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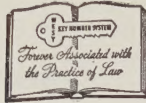






# CALIFORNIA REPORTER

*Covering Cases Reported in*  
PACIFIC REPORTER



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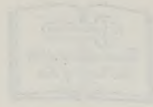
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PACIFIC REPORTER

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53 P. 24

ST. PAUL, MINN.  
WEST PUBLISHING CO.  
1956

# CALIFORNIA REPORTER

Carrying Cases Reported in  
PACIFIC REPORTER



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1, 2, 4-12.

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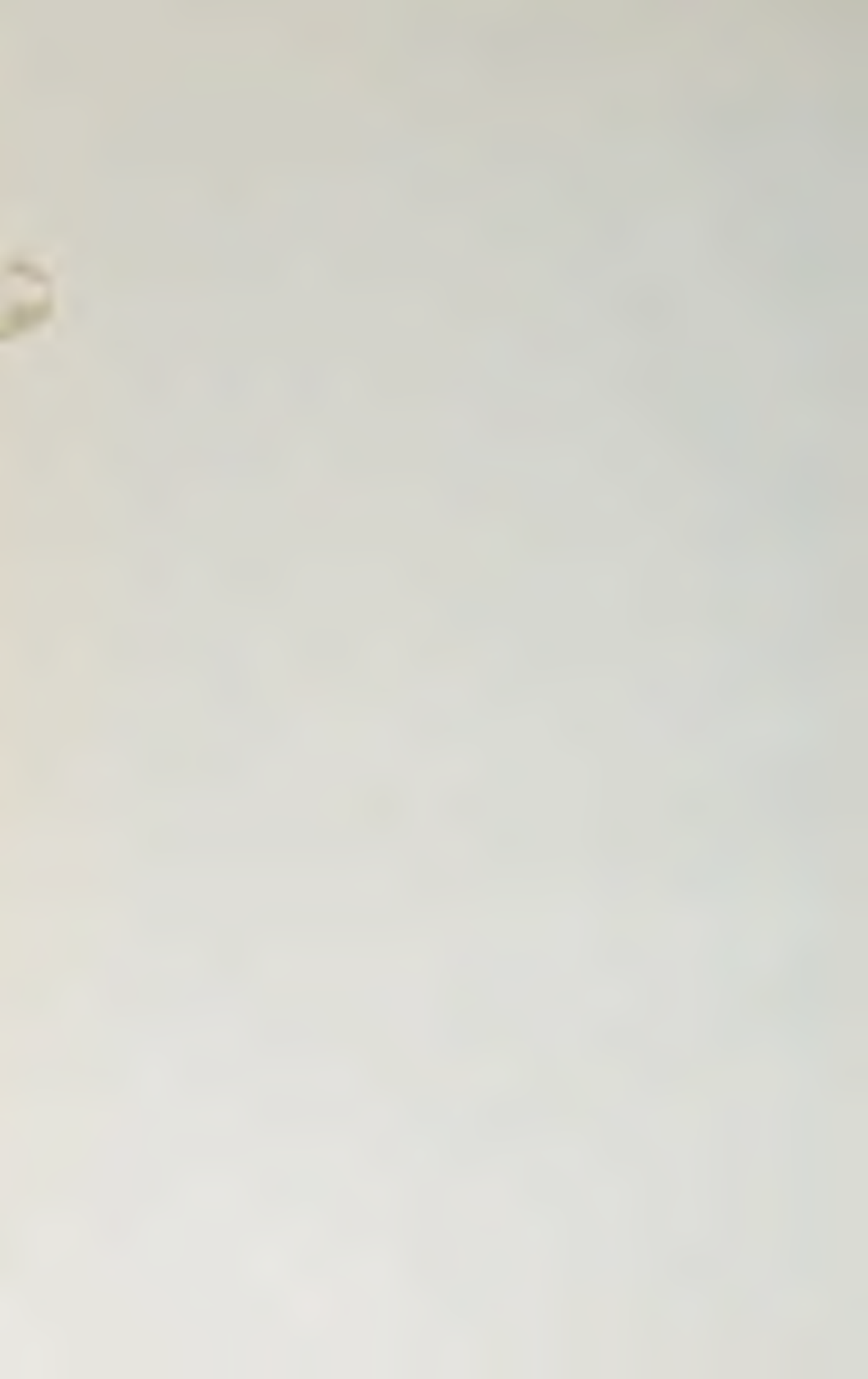
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# CALIFORNIA REPORTER

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(120 Cal. 643)

KAHN v. WILSON. (Sac. 308.)

(Supreme Court of California. April 28, 1898.)

APPEAL—JUDGMENT ROLL—NEW TRIAL—QUESTIONS IN REPLY BRIEF.

1. Notice of an intention to move for a new trial is not part of the judgment roll, and, in order to predicate error on the absence thereof, the record must affirmatively show that no notice was given.

2. New questions cannot be raised by an appellant in his reply brief, unless, upon leave of the court, for good cause shown.

Department 2. Appeal from superior court, Stanislaus county.

Action by Charles Kahn against R. M. Wilson, executor, to foreclose mortgages. There was a decree of foreclosure as to one, and the action was abated as to the other. Defendant appealed from an order granting a new trial thereon. Affirmed.

J. L. Maddux, for appellant. Reinstein & Eisner and W. H. Hatton, for respondent.

McFARLAND, J. This action was brought to foreclose two certain mortgages. The court below rendered judgment in favor of plaintiff, foreclosing one of the mortgages, and directed that the action abate as to the other mortgage. Upon motion of the plaintiff the court granted a new trial, and from the order granting a new trial the defendant appealed.

There appears in the transcript a "bill of exceptions on motion for a new trial." To this there is attached an acknowledgment of service by the counsel for defendant, in these words: "Service of above-proposed bill of exceptions and motion for a new trial herein, in due time, is hereby acknowledged;" and there is also attached a certificate of the judge of the lower court "that the above and foregoing bill of exceptions is true and correct, and the same is hereby settled and allowed as true and correct." There is no copy of the notice of the motion for a new trial in the record, and the sole point made by appellant in his opening brief is that the record does not show that any notice of intention to move for a new trial was ever given, nor the grounds for any motion for a new trial, and that, therefore, the court had no jurisdiction over the motion for a new trial. This contention cannot be maintained. The Code does not make a notice of motion for a new trial a part of the judgment roll, nor does it require that said notice shall appear anywhere in the record; and it has been definitely settled by this court that "the notice of intention to move for a new trial is not a part of the record on appeal, and need not appear therein." *Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706; *Gage v. Downey*, 79 Cal. 140, 21 Pac. 527, 855; *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871; and *Southern Pac. R. Co. v. Superior Court, City and County of San Francisco*, 105 Cal. 84, 38 Pac. 627. If, as a matter of fact, there was no notice as a basis of the motion in the court below, that fact must be affirmatively shown by the appellant, and he must cause it to be included in a statement or proper bill of exceptions. This proposition was thoroughly discussed and settled in *Pico v. Cohn*, and has been frequently approved by this court in other cases. In what is called "Appellant's Brief in Reply," the point above stated is substantially conceded, and appellant proceeds to argue other questions. Respondent objects to the consideration of these new points thus made; and we think that his objection is good, and that the said reply brief

cannot be considered. We do not mean to say that an appellant might not be allowed, in exceptional cases, to discuss new questions in his final brief. He might be allowed to do so upon an application showing meritorious reasons why the points were not made in the opening brief. Such application might be based upon sickness, inadvertence, or other excusable neglect. But in the case at bar no reason whatever is given for this departure from the ordinary method of presenting a case in this court. If the practice were allowed without any substantial reason, it would lead to great irregularity and delay. In such event the respondent, of course, could justly demand the right to file an additional brief, and the course of the argument by brief would be radically changed. The order appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(120 Cal. 640)

BRIND v. GREGORY et al. (Sac. 418)<sup>1</sup>

(Supreme Court of California. April 28, 1898.)

APPEAL — RECORD — ADVERSE POSSESSION — COLOR OF TITLE.

1. Under Code Civ. Proc. § 950, providing that any statement used on motion for a new trial may be considered on an appeal from a final judgment, what purports to be an engrossed statement on motion for new trial cannot be considered, it not appearing that any motion for a new trial was made.

2. Where defendant in an action to recover real estate held the property by adverse possession for more than five years before suit, claiming under decrees of distribution and partition, it is immaterial that the decrees were erroneous.

Department 2. Appeal from superior court, Placer county.

Action by Mary A. Brind, administratrix of James Gregory, deceased, against John H. Gregory and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

James Gartlan, for appellant. F. P. Tuttle, for respondents.

McFARLAND, J. This is an action brought by the plaintiff as administratrix of the estate of James Gregory, deceased, to recover possession of certain described lands alleged to belong to the estate of said Gregory. There are several defendants. In their answer they deny all right of possession of plaintiff, and each one of them sets up ownership to a part of the land in contest. Each defendant avers that he has been in the exclusive and adverse possession of the part of the land claimed by him for more than five years before the commencement of the suit, and pleads the statute of limitations. Judgment went for the defendants, and the plaintiff appeals from the judgment.

There appears in the printed transcript what purports to be an "engrossed statement on motion for a new trial," and appellant

<sup>1</sup> Rehearing denied.

contends that he has a right to have this statement considered on this appeal from the judgment under the provisions of section 950 of the Code of Civil Procedure. But that section merely provides that any statement "used on motion for a new trial" may be considered on an appeal from a final judgment. In the case at bar it does not appear that any motion for a new trial was ever made or passed upon by the court; and therefore it does not appear that the statement printed in the transcript was ever used on motion for a new trial. It does not come within the provision of said section 950, and on this appeal we can look only to the judgment roll. The judgment roll makes a very meager presentation of the case, and it is somewhat difficult to discover what the points upon appeal are. But the court found that each of the defendants had been in the actual and adverse possession of the portion of the land claimed by him, asserting the title thereto, and holding it against all the world for more than five years before the commencement of the suit; and there is nothing in the record which shows this finding to be erroneous. It seems that the respondents originally claimed under certain decrees of distribution and partition, and appellant now contends that these decrees were invalid. But, whether or not these decrees were erroneous at the time they were entered, they certainly afforded the foundation for the acquisition under them by respondents of title by adverse possession, and we see nothing in the record to warrant us in overruling the finding of the court to that effect. The court also finds that in 1891 the present plaintiff, and others joined with her as plaintiffs, brought a suit against the defendants in this case to have it adjudged that they, the plaintiffs therein, were the owners and entitled to the possession of certain undivided interests in the land described in the complaint in the present action; that said action was determined against the plaintiffs therein; that on an appeal to this court the judgment therein was affirmed, and that the plaintiff herein was thereby estopped from maintaining this present action. That case, entitled "*Gregory v. Gregory*," is reported in 102 Cal., commencing at page 50, 36 Pac. 364, and from the record in the present case it is difficult to say what effect that decision had upon the case at bar. As an authority, however, it seems to have determined that the land in contest here does not belong to the estate of James Gregory, deceased, and that the present respondents have a good title to the land by adverse possession. But it is not necessary for the purposes of the present case to determine whether or not the decision in *Gregory v. Gregory* strictly estops the plaintiff from maintaining this action. We see nothing upon the face of the judgment roll in the case at bar—in view of the principle that all presumptions are in favor of the judgment—that would

warrant us in disturbing the judgment herein. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

120 Cal. 581

TRUETT v. ONDERDONK. (S. F. 587.)

(Supreme Court of California. April 9, 1898.)

SETTING CASE FOR TRIAL—UNREASONABLE DELAY—FRAUD.

1. Where consent to the dismissal of an action is filed, but no judgment of dismissal has been entered, the action is still pending; and on a subsequent motion for plaintiff to set the case for trial, supported by an affidavit in which plaintiff asks to be relieved from the obligation of his consent to a dismissal, the case may be set for trial.

2. Where, after an action begun to wind up a partnership and obtain a settlement, the parties agree, before trial, to abide by the decision of an arbitrator, and the plaintiff files his consent to a dismissal, a motion made by the plaintiff, 14 years afterwards, to set the case for trial on the ground of fraudulent representations made by his co-partner to the arbitrator, should be denied, if the evidence in support of the motion does not prima facie entitle the plaintiff to relief, or if the discovery of the alleged fraud could have been made sooner by the use of due diligence.

In bank. Appeal from superior court, city and county of San Francisco. J. M. Seawell, Judge.

Action by Miers F. Truett against Andrew Onderdonk. The action was dismissed, and plaintiff appeals. Affirmed.

T. M. Osmont, for appellant. Fox, Kellogg & Gray, for respondent.

VAN FLEET J. This action was commenced on March 18, 1890, in the superior court of the city and county of San Francisco, to secure an accounting and winding up of the affairs of a partnership alleged to exist between the parties as contractors for the construction of sea walls, grading of railroads, filling in, extension, and widening of streets, and works of a similar character; the complaint specifying in detail a large number of contracts for work of the character indicated as being in a state of completion or partial completion by said partnership, and alleging that a large sum of money was due plaintiff from defendant on account of such work. It was alleged that defendant had assumed and taken control of the work of said partnership, and all of the affairs thereof, to the exclusion of plaintiff; refused him access to, or an examination of, the books of the concern, or to further recognize him as a partner in the business; and, generally, as "wrongfully carrying on the said business without any regard to the rights of this plaintiff." Summons was issued and served on the day the complaint was filed. Within a few days thereafter the parties came together, and entered into a written agreement for the settlement and adjustment of their difficulties, whereby it was mutually stipulated that, to avoid litigation and publicity in regard to their differences, the same should be submit-



ted to one Thomas W. Scott, as arbitrator, with full power to arbitrate and finally adjust all claims, demands, and matters of controversy, of every nature, existing between them; that each would "fully and faithfully keep, observe, and perform the award to be made by said Scott"; that said Scott should make his award within two days thereafter, and that the defendant, Onderdonk, should pay the amount of the award within 24 hours after notice thereof; and that thereupon this action should be dismissed. Scott accordingly proceeded and made his award as such arbitrator, finding that there was due the plaintiff the sum of \$32,000. This amount was at once paid by Onderdonk, and Truett thereupon executed to him a full and complete release of all matters of difference between them, and thereafter, on March 26, 1880, caused to be filed in the action, by his attorney, this direction: "Let the above-entitled action be dismissed, and the clerk of the court is hereby authorized and directed to enter dismissal thereof without further notice. Hosmer P. McKoon, Attorney for Plaintiff." No judgment of dismissal, however, was entered upon said direction; and there the case slumbered until November, 1894,—a period of more than 14 years. In the latter month the plaintiff appeared in said court, through other counsel, and gave notice of a motion to have the cause set for trial, and to have a day fixed for the trial thereof. In support of this motion, he filed the affidavits of himself, said Scott, and one Martin. In the first, after stating the general nature and purpose of the action as alleged in the complaint, and that since said settlement Onderdonk had been continuously, with the exception of a few days, absent from, and a nonresident of, this state, these facts are set forth: That plaintiff was induced to enter into said settlement, and to authorize the dismissal of said action, by "a material suppression and misrepresentation of facts by the defendant," "by means of which plaintiff was greatly prejudiced by his consent to said dismissal, if the same shall be effective to dismiss the action." "That, among other suppressions and misrepresentations, the defendant caused to be represented to plaintiff that a contract regarding the construction of a section of the Canadian Pacific Railway, in which plaintiff and defendant were mutually interested, and which had been obtained by defendant for the benefit of said firm, had been sold a short time prior to that, and for which nothing whatever had been realized for the benefit of said firm; the only consideration being that defendant was to receive a monthly salary as superintendent. That affiant, believing said representation to be true, made said settlement, and his attorney filed said paper authorizing dismissal accordingly. That within a few weeks last past the plaintiff has learned that said representation regarding said Canadian Pacific Railway contract was totally false; that the defendant had not dis-

posed of the same for the consideration above named, as represented to plaintiff, but still retained an interest in said contract, out of which he subsequently realized a very large sum of money, amounting to several hundred thousands of dollars. That if plaintiff had known the facts regarding said contract, and that the same had not been disposed of as stated by defendant, plaintiff would never have consented to any settlement or dismissal of said action. That no part of said profits of said Canadian contract have ever been paid over to plaintiff, and, upon a just and fair accounting, defendant would be indebted to plaintiff, as plaintiff is informed and believes, in a very large sum of money."

Touching the manner and circumstances of his discovery of the defendant's alleged fraud, the affidavit states: "In the spring of 1894 there was published in the daily papers of San Francisco an account of the notorious actions of one Shirley Onderdonk, a son of the millionaire contractor, Andrew Onderdonk, of Chicago, the defendant herein, which article fell under my eye, and was read by me. The perusal of this article set me to cogitating, and to conjecturing how said Andrew Onderdonk had become a millionaire. Shortly after this I met a man whom I had casually known, and who had previously applied to me for a clerical position on the railroad which I was then engaged in building from Manzanilla to Colima, in Mexico. This man knew that Onderdonk and myself had been engaged together in building the sea wall in San Francisco, and spoke to me of the article or articles published about Onderdonk's son. We discussed this matter, and conversed about Onderdonk, and he then informed me that he had been engaged in some clerical capacity—bookkeeper, as I now remember—on the Canadian Pacific Railroad, at a place called 'Lyttons,' as I now remember. I do not remember whether his employment was with Onderdonk himself, or with some of the subcontractors on the work. At any rate, he was engaged upon the work. In this conversation this gentleman informed me that Onderdonk was very wealthy, and had made hundreds of thousands of dollars on the Canadian Pacific Railroad contract; that is, the contract obtained by said Onderdonk for the benefit of the firm of which I was a partner with said Onderdonk, referred to in my said affidavit. I have not seen my said informant since the aforesaid conversation, and I cannot at this moment recall his name. He knew me better than I knew him, and, although I well remembered him at the time of our conversation, I was unable then, and am now, to recall his name. Reflecting upon what I had learned from this man, and believing that he was in a position to know something as to what Onderdonk had realized out of said contract, I began to make inquiries of different parties, but gained little information. Finally, it occurred to me to call on O. B.



Martin, of San Francisco, who, as I recollected, had also been employed on the Canadian Pacific Railway; and from him I learned that the said Andrew Onderdonk had an interest in the profits of the contract, namely, the contract for the benefit of said firm as aforesaid, besides a salary of \$1,000 a month. Pushing my inquiries further, Mr. Martin, at my solicitation, went to see a Mr. McLaren, who was likewise employed on the work, and Mr. J. McMullen, a subcontractor on said work, both of whom informed Mr. Martin, as he stated to me, that Andrew Onderdonk had an interest in the profits over and above the salary paid him. This information was obtained by me from Mr. Martin, and through him from Mr. McLaren and Mr. McMullen, the latter part of October, 1894. \* \* \* The amount of the profits realized by said Onderdonk out of said contract, according to my information obtained as aforesaid, was several hundred thousands of dollars; exceeding, I believe, half a million of dollars. The information so obtained as aforesaid was definite and positive, and I verily believe the same to be true." The affidavit further stated the fact that no judgment of dismissal had ever been entered in the action, and that, upon discovery of the said fraud, plaintiff had retracted and withdrawn his consent to the dismissal of said action; and the affidavit closes with the prayer that an order be entered authorizing the withdrawal and retraction of said dismissal.

The affidavit of Scott states that, after the commencement of the action, he undertook the settlement and adjustment of the controversy between the plaintiff and Onderdonk; that, in the performance of said undertaking, affiant had a number of interviews "with said defendant or his agent, and negotiated with him, on behalf of said plaintiff, for an adjustment of their accounts and a settlement of their differences involved in said action; that in said negotiation said defendant gave affiant the items constituting the assets and liabilities of said partnership between plaintiff and defendant, for the purpose of forming the basis of settlement between them; that in discussing the terms of such settlement, and arriving at a conclusion, and in making of such settlement, the defendant, Andrew Onderdonk, stated and declared to affiant that he and plaintiff had obtained a contract to build a section of the Canadian Pacific Railway, but that it became necessary to relinquish the same to other parties, inasmuch as defendant could not otherwise procure the necessary financial assistance to carry out said contract"; that Onderdonk further represented to affiant that he had retained no interest in said contract, and that the only benefit he would receive therefrom was a salary which he was to get as engineer in the construction of said section of railway, and that, beyond such salary, he had no interest growing out of said contract.

And it is also stated that in making the settlement said Canadian Pacific Railway contract was not taken into consideration as an asset of said partnership, by reason of the facts represented by defendant as aforesaid. The affidavit of Martin is simply to the effect that affiant had heard read the affidavit of plaintiff, Truett, and "that in so far as the same refers to him [affiant], and to things and matters learned through this affiant, the same is true."

With these affidavits, plaintiff also filed this paper, signed by him in person: "Now comes the plaintiff, Miers F. Truett, in the above-entitled action, and withdraws and retracts the order or authorization for a dismissal of said action filed herein by his attorney, Hosmer P. McKoon, on the 26th day of March, 1880. Dated November 1, 1894."

At the hearing of plaintiff's motion in February, 1895, counsel specially appeared for the defendant for the purpose of opposing the same, and to urge a counter motion on behalf of defendant, that a judgment of dismissal be entered as directed by plaintiff in his authorization filed March 26, 1880. The motions were heard together, and the facts shown on the hearing were as above stated. Thereafter, on February 27, 1895, the court made an order denying plaintiff's motion, and granting that of defendant, and judgment was thereupon entered dismissing the action. Plaintiff appeals from said order, and from the judgment.

Certain objections are urged by respondent which would preclude an inquiry into the merits of the real question presented by the appeal, but we deem them untenable. The motion, although technically to set the case for trial, fairly involved the further relief asked by plaintiff's affidavit, that he be relieved from the obligation of his consent to a dismissal. Nor had the court lost jurisdiction to entertain the motion. The action was still pending. It had not been dismissed, for the reason that no judgment of dismissal had been entered as required by the statute. *Acoc v. Halsey*, 90 Cal. 215, 27 Pac. 193; *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209. Nor can there be any question of the power of the court, if the circumstances justified it, to relieve plaintiff from the obligation of his order of dismissal. It was, in its nature, but a stipulation; and it is always competent for the court to control such conventions, in the interest of justice, where for any reason they have been improvidently entered into. *Robinson v. Exempt Fire Co.*, 103 Cal. 1, 36 Pac. 955. The material question presented, however, is whether, upon the showing made, assuming all the material statements of fact to be true, it was the duty of the court to grant plaintiff's motion, and its refusal to do so was an abuse of discretion. The purpose to be subserved by the motion may be regarded as analogous, in a sense, to that of an action to reopen an account upon the ground of fraud, or to re-

scind a contract upon that ground; and assuming, for the purpose of coming to the merits, that such a question may be presented by mere motion, and upon affidavits, the facts relied on should obviously be at least such as, if proved in such a case, would *prima facie* entitle a plaintiff to relief. We are satisfied that the facts here relied on do not meet that requirement.

In the first place, it may be seriously questioned if the facts tend sufficiently to establish any fraudulent act on the part of the defendant. There are some general statements in the affidavits of plaintiff, which, standing alone, would have that tendency, but it appears that those statements are not made from any positive knowledge, but from information derived from others; and, when the source of such information is given, it is seen to rest solely upon some vague, general, second-hand statements of third parties, one of whom plaintiff cannot name, and two of whom he did not himself see, and with no attempt made to state the source or character of knowledge upon which his informants based their alleged statements of facts. For all that appears, the entire fabric of plaintiff's information may consist of the idlest and most unfounded rumors. The affidavit of Martin does not state that he knows anything of the facts. All his affidavit may be taken to substantiate is that he told plaintiff certain things himself, and interviewed McLaren and McMullen on the subject, who made certain statements to the affiant; but as to the truth or authenticity of his own statements, or those of McLaren and McMullen, he does not pretend to state. The affidavit of Scott states the only tangible fact in the whole showing,—that defendant did represent that the Canadian Railroad contract had been disposed of without profit to the partnership. But there is nothing which competently negatives the truth of this statement, or which necessarily shows that, if defendant did thereafter in fact make money out of that contract, it was not under some subsequent arrangement, and in a manner entirely in consonance with the truth of his representations. We do not think that the court was bound to base a finding of fraud for any purpose, or to any extent, upon such evidence. The presumption is always against fraud,—a presumption approximating in strength to that of innocence of crime; and it should not be deemed overcome, even *prima facie*, upon a showing so intangible and shadowy. *Heller v. Manufacturing Co.*, 116 Cal. 127, 47 Pac. 1016; *Ex parte Fukumoto* (Cal.) 52 Pac. 726.

But in the next place, assuming that the evidence was sufficient to make a *prima facie* case of fraud, there is an absolute want of any showing of diligence in the plaintiff in moving for relief in the premises. Plaintiff was aware, at the time of the settlement, of the existence of the railroad contract, and that it had been taken in behalf of the firm.

He so states in his affidavit. The parties in that settlement were dealing at arm's length,—in the face of litigation,—and yet the plaintiff took no measures whatsoever to verify the statements of defendant as to the actual facts with reference to this contract. He rested supinely and in blind confidence, so far as appears, upon those representations, notwithstanding the conduct of the defendant had been such, as alleged in the complaint, to arouse his just suspicions, and put him upon inquiry as to the defendant's good faith. There is nothing shown to indicate that defendant in any way prevented an independent inquiry by plaintiff into the facts as to the status of that contract. It is to be presumed plaintiff knew, because he does not negative such presumption, the source or channel through which the contract had been secured, and there is nothing to show that the slightest inquiry at that source would not have disclosed whether defendant's representations were true or false. It does not even appear that plaintiff examined the books of the partnership to ascertain what there appeared as to this contract. They might themselves have shown the truth or falsity of defendant's claim. It is not alleged that he was denied access to the books in the making of the settlement, and yet there is nothing to show what appeared therefrom. There is no claim that they had been in any way falsified or tampered with for the purpose of covering up the true status as to this contract. Notwithstanding these facts, neither then, nor for more than 14 years thereafter, did plaintiff make the slightest effort to probe the truth of defendant's representations, and there is not the faintest effort to show why he did not. It was certainly not by reason of the confidence reposed, or which he had a right to repose, in the defendant. That, as we have suggested, is negated by the averments in his sworn complaint. This lack of diligence is as fatal to the relief here sought as it would be in a direct action to recover for the fraud. Equity abhors a stale claim, and it was incumbent upon plaintiff to show facts excusing his long delay in asserting the fraud. It is not enough to assert merely that the discovery was not sooner made. It must appear that it could not have been made by the exercise of reasonable diligence. And all that reasonable diligence would have disclosed, plaintiff is presumed to have known; means of knowledge in such a case being the equivalent of the knowledge which it would have produced. *Wood v. Carpenter*, 101 U. S. 135; *Teall v. Slaven*, 40 Fed. 774. Under the circumstances, we think the court below was fully justified in denying plaintiff the relief sought, and that plaintiff got all he could reasonably ask, in having the judgment entered without prejudice to another action. The order and judgment are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.; McFARLAND, J.; HENSHAW, J.



120 Cal. 634

In re WEED'S ESTATE. (Sac. 379.)

(Supreme Court of California. April 26, 1898.)

## RESIDENCE—LOSS BY LEAVING STATE.

1. Whether a person is a resident of the state is a mixed question of law and fact, to be determined by the court.

2. Pol. Code, §§ 52, 1239, provide that a person's residence is the place where he remains when not called elsewhere for labor or other temporary purpose, and to which he returns in seasons of repose, and in which his habitation is fixed, and to which he intends to return when absent; but, if he removes to another state with the intention of remaining an indefinite time, he loses his residence, notwithstanding his intention of returning at some future time. *Held*, where a husband and wife remove from the state for a temporary purpose, intending to return within a year and a half or two years, and take all their property with them, and remain away nearly five years, although the work which called them away is completed several months previous to their return, that they lose their residence upon leaving the state.

3. Where a husband and wife have lost their residence in this state, the wife cannot regain her residence immediately by returning to the state on the death of her husband.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

H. C. Duncan and Mary L. Goldy each filed a petition asking to be appointed administrator of the estate of Theodore E. Weed, deceased. From an order appointing H. C. Duncan administrator, and an order denying a motion for a new trial, Mary L. Goldy appeals. Affirmed.

White & Seymour, for appellant. Byron Ball and J. C. Ball, for respondent.

BELCHER, C. Theodore E. Weed died, intestate, in the county of Yolo, in this state, on the 26th day of March, 1896, being at that time a resident of said county, and leaving an estate therein, consisting of real and personal property, of the value of about \$20,000. He left no wife or children and no next of kin residing in this state, unless the appellant, Mary L. Goldy, was so residing. On April 2, 1896, H. C. Duncan, the public administrator of the county, duly filed a petition praying that letters of administration upon the said estate be issued to him; and thereafter, on the 13th day of the same month, Mary L. Goldy filed her petition, stating that she was a niece of said decedent, and praying that letters of administration upon the estate be issued to her. The two petitions were heard together, and thereafter, on June 5, 1896, the court made and filed its findings of fact and conclusions of law, and ordered and adjudged that letters of administration on the estate be issued to the petitioner H. C. Duncan. The court found "that the petitioner Mary L. Goldy was not a bona fide resident of this state at the time her petition was filed herein; nor was she a bona fide resident of this state at the time of the trial"; and, as a conclusion of

law, that she was not competent or entitled to serve as administratrix. There are two appeals in the case. The first was taken August 3, 1896, and is from the order granting the petition of the public administrator for letters of administration upon the estate of said deceased, and refusing appellant's application for such letters; and the second was taken February 7, 1897, and is from an order denying appellant's motion for a new trial.

Appellant contends that the findings were not justified by the evidence, and whether they were justified or not is the only question which need be considered. At the hearing, J. W. Hughes was called as a witness for appellant, and testified that he had been the legal adviser of the said deceased for many years, and at the time of his death had in his possession many of his papers. He then stated: "Upon the death of Mr. Weed, I telegraphed the fact to his relatives at Stamford, Conn., and for some of them to come out and take charge of the estate. In response to my telegram, a brother of Mrs. Goldy came out immediately. He had never been in California before. I learned from him that his sister, Mrs. Goldy, had some years before lived in California; and, in response to telegrams, she came out, and, on arriving at my office in Sacramento, signed her petition for letters of administration herein. Several telegrams passed between us. I can produce them." On objection of counsel for appellant, the telegrams were excluded by the court. S. N. Goldy, the husband of appellant, was called as a witness, and testified, in substance, that his business was that of a civil engineer, and that he and his wife came to San Francisco in 1889, and rented a furnished flat at No. 180, Clinton Park, in said city, where they lived until the summer of 1891, when they went East; that, when he came to San Francisco, he established an office on California street, in that city; and, when he went East, he did so for the purpose of perfecting an invention on which he was then at work, and obtaining patents thereon; that he then expected it would require eighteen months or two years to perfect his invention and obtain patents thereon, and intended, as soon as that should be accomplished, to return to San Francisco, and establish a business there in connection with his invention; that his invention was a machine for cutting and polishing hard woods, making chair rounds, wagon and buggy spokes, fancy house furnishings, moldings, and picture frames, and working up all character of hard wood requiring a high polish, and that the Pacific Coast, and particularly San Francisco, was peculiarly adapted to the establishment of such a business; that in 1890 he registered and voted in San Francisco, and ever since he moved there, in 1889, he had always considered, and still considered, that city his home, and had no other plans than to reside there, and

carry on the business above described; that, while in the East, he registered at hotels as from San Francisco, and spent most of his time at Bridgeport, Conn., where he had a friend engaged in the foundry and machine business, whom he employed to construct the greater portion of the castings and other parts of his invention which were made of iron and steel, and could be constructed more cheaply there than in California. On cross-examination, the witness testified that he arrived in Sacramento the day before the trial, and that he had not been in San Francisco since he left there, in the summer of 1891; that he completed the construction of his machine five or six months before he heard of the death of Mr. Weed, and had not made any preparation to return to California. He was then asked by counsel for respondent: "Q. If your machine can be more economically constructed in the East, and the hard woods procured there in large quantities, what reason can you give for saying that you intended to return to California? A. Well, I expected to go into the business of fruit raising with Mr. —, who was to furnish the capital. Q. Where did you expect to locate your fruit farm? A. At Redding, California. Q. Where is Mr. —? A. He is dead. He died about two years ago." Mrs. Goldy was also called as a witness in her own behalf, and testified substantially as her husband did in regard to their coming to San Francisco in 1889, residing there until 1891, and then returning East. She said: "During all the time of our absence, I considered California as our home, and intended to return to this state. I might not have returned so soon if it had not been for the death of my uncle." And on cross-examination she said: "When we went East, in 1891, we gave up our rooms, and took everything we owned with us." "While in Bridgeport, we rented rooms already furnished, \* \* \* where we lived for over two years. We were living there when we heard of uncle's death. My husband always returned to Bridgeport when away on business." "I would not have returned to California when I did had not uncle died. I came out to administer on his estate, and signed the petition for administration the day I arrived in Sacramento, before I went to San Francisco. When we heard of uncle's death, my brother started for California, expecting to administer on the estate. \* \* \* After my brother arrived in California, we found out that he could not administer on the estate; and, as I had at one time lived in California, they had me come out to administer on the estate. I am living in the same rooms in San Francisco that we occupied at No. 180, Clinton Park, in 1890. I found them vacant, and rented them by the month, already furnished."

The above was, in substance, all the evidence given at the hearing, and the question is: Does it appear therefrom that appel-

lant was a bona fide resident of this state at the time she made her application for letters, or at the time of the trial? If not, she was, under our statute (Code Civ. Proc. § 1369), incompetent to serve as administratrix, and her application was properly denied. Whether appellant was a bona fide resident of the state or not was a mixed question of law and fact to be determined by the court. We have no statute declaring what acts are necessary to constitute a bona fide residence in this state, but there are several provisions in the Codes in relation to residence and nonresidence. Among others are the following: Section 52 of the Political Code, under the heading: "Person Composing the People of the State," provides: "Every person has, in law, a residence. In determining the place of residence the following rules are to be observed: (1) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose. (2) There can only be one residence. (3) A residence cannot be lost until another is gained. \* \* \* (5) The residence of the husband is the residence of the wife. \* \* \* (7) The residence can be changed only by the union of act and intent." Section 1239 of the same Code, in regard to the residence of persons claiming a right to vote in this state, provides: "(1) That place must be considered and held to be the residence of a person in which his habitation is fixed, and to which whenever he is absent he has the intention of returning. \* \* \* (6) If a person remove to another state with the intention of making it his residence he loses his residence in this state. (7) If a person remove to another state with the intention of remaining there for an indefinite time, and as a place of residence, he loses his residence in this state, notwithstanding he entertains an intention of returning at some future time." We see no conflict in the above provisions, and they are therefore to be construed together as parts of the same statute. Pol. Code, § 4480. And, in accordance with the law as thus declared, Mr. Freeman, in his note to *Berry v. Wilcox* (Neb.) 48 Am. St. Rep., at page 714 (s. c. 62 N. W. 249), states the rule to be as follows: "If a person actually removes to another place with an intention of remaining there for an indefinite time, and as a place of present domicile, it becomes his place of residence or domicile, notwithstanding he may have a floating intention to return to his old residence at some future time,"—citing several cases.

The question, then, is: Did Goldy and his wife lose their residence in California when they moved East, taking with them all of their property, and established a residence there which they maintained for nearly five years? That their return to the East was for an indefinite time was shown by the fact that it was to perfect an invention and con-



struct a machine, which he expected would require eighteen months or two years, but which was not in fact completed until five or six months before he heard of the death of Mr. Weed; and, after it was completed, he made no preparations to return to California. At the commencement of his testimony, Mr. Goldy stated: "I reside at 180 Clinton Park, San Francisco, California, and have resided there since the year 1889." But this was evidently a mere fiction of the imagination. Further on, he stated that, as soon as his invention should be perfected and patents obtained therefor, he intended to return to San Francisco, and "to introduce and establish a business in connection with said invention." But this was inconsistent with other portions of his testimony, and particularly with his statement that, as a reason for returning to California, he expected to go into the business of fruit raising at Redding with a man who had been dead for two years at the time of the trial. Mrs. Goldy came back to California to administer on the estate, and, on the day of her arrival in the state, she signed her application for appointment as administratrix. She left her husband at their home in the East, and would not have come at that time if her uncle had not died. But her husband's residence was her residence, and, if he then had no bona fide residence in this state, we fail to see how she could have had. To be a bona fide resident of the state, one must really and in good faith have established a home or place of residence therein, where he lives, and to which, when away on business or pleasure, he returns. We conclude, therefore, in view of all the evidence, that both Mr. and Mrs. Goldy lost their residence in this state when they left the state, in 1891, and went East to live.

But it is urged that, conceding appellant lost her residence in California when she went East with her husband, she regained it immediately upon her return to the state, and became therefore entitled, by her new residence, to letters in preference to the public administrator. Counsel say: "From the moment she set her foot on California soil, in April, 1896, and declared her intention to be a resident of the state, and to remain permanently within its borders, she became a bona fide resident of California, just the same as though she had been born here, and never passed beyond its limits." This theory cannot, in our opinion, be sustained; and in effect a similar theory was, in the case of *In re Donovan's Estate*, 104 Cal. 623, 38 Pac. 456, held untenable. It results that both of the orders appealed from should be affirmed.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, both the orders appealed from are affirmed.

(5 Cal. Unrep. 980)

FOX v. HALE & NORCROSS SILVER-MIN.  
CO. et al. (S. F. 683).<sup>1</sup>

(Supreme Court of California. April 9, 1898.)

FRAUD—COMPLAINT—RETRIAL AFTER APPEAL—ISSUES—EVIDENCE—AMENDMENT—ANSWER—LIMITATION OF ACTIONS—REVIEW.

1. In charging fraud, a complaint must state the facts constituting the fraud,—at least, in a general way; and such facts must be alleged with sufficient distinctness to enable the adverse party to come prepared with evidence on the general questions of fraud which will be raised.

2. When, on appeal, the judgment of the lower court is affirmed as to one cause of action, and reversed and remanded for a new trial as to another cause of action, all the issues involved in the cause of action remanded must be retried, though the appellate court deems the evidence sufficient to sustain the judgment of the trial court on one of the issues.

3. When defendants are charged with a fraudulent conspiracy for two purposes, and it is proved for one purpose, the presumptions are still in favor of the innocence of defendants of conspiring for the other purpose.

4. Fraud cannot be conjectured from the fact that defendants have been guilty of other independent frauds. The evidence must be satisfactory, within the rule stated in Code Civ. Proc. § 1833, defining "prima facie evidence" as that which suffices for the proof of a particular fact until contradicted and overcome by other evidence.

5. The admissions of questions and answers of witnesses in evidence, which assumed that certain samples of ore were fair samples, and that assays thereof were fair assays, without proof that such was the case, when the question at issue was whether they were fair samples, and whether they were properly assayed, is error.

6. When the complaint is amended in any material respect, so as to present new questions, on which issue may be taken, defendant may answer, as of course; and in such case the court cannot limit the defenses which may be interposed.

7. Some of defendants were sued by fictitious names, but the summons was personally served on them. The complaint was afterwards amended so as to properly name defendants. *Held*, that defendants were made parties, within the statute of limitations, when the summons was served.

8. On the first trial, evidence was taken of plaintiff's right to bring the action as a stockholder of a corporation, and the court found facts authorizing plaintiff to sue in behalf of the company. Defendants did not except to the sufficiency of such evidence, or present the question thereof on appeal. The case was affirmed on appeal as to a certain issue, and remanded for retrial as to another issue. *Held*, the findings being sufficient to show the right of plaintiff in that regard, that the issue as to the right of plaintiff to bring the action as stockholder was not open for investigation in the second trial, either as to the issue on which a new trial was denied, or as to that on which a new trial was awarded.

9. Where a judgment is affirmed as to certain issues and reversed and remanded for a new trial as to other issues, it is a modification of such judgment, and such action is within the province of the supreme court.

McFarland and Garoutte, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by M. W. Fox against the Hale & Norcross Silver-Mining Company and others.

For opinion on rehearing, see 53 Pac. 169.

Judgment for plaintiff. Defendants appeal. Reversed.

W. F. Herrin, Lloyd & Wood, Garber, Boat & Bishop, Bishop & Wheeler, W. E. F. Deal, and Ed. R. Taylor, for appellants. W. T. Baggett, L. D. McKisick, E. S. Pillsbury, and W. H. H. Hart, for respondent.

TEMPLE, J. This action was brought by plaintiff, as a stockholder in the corporate defendant named, against the corporation, the directors thereof, and various other persons; charging a fraudulent conspiracy between the directors and others to cheat and defraud the corporation. Among other preliminary allegations, the plaintiff charges that Hayward and Hobart were largely the owners of the stock in the Nevada Mill & Mining Company, and controlled and managed the Mexican Mill, and that they conspired with other persons to defraud the Hale & Norcross Silver-Mining Company. For that purpose they procured the control of the last-named corporation, and, by certain practices set forth, caused certain persons named as defendants to be elected directors of said corporation. It is charged that said directors were at all times controlled by said Hayward and Hobart in all official acts; that they all conspired to cheat and defraud the corporation by various cunning and fraudulent acts, practices, arts, and devices, intending by them to have the effect of increasing their own gains at the expense of the corporation and its stockholders. Certain devices and practices are then stated, from which it is alleged damage resulted to the corporation. Without attempting to set them out, they may be indicated thus: (1) Refusing to report to stockholders assays of the ores taken from the mine, that the conspiracy and combination to defraud might be carried out more easily and successfully. (2) Mixing low-grade ores with the high-grade ores, to increase the amount of ore to be milled, and the profit of the mill, and for the purpose of hiding and concealing the true value of the high-grade ore. It is charged that the corporation suffered damage from this source to the amount of \$500,000. (3) They caused false and fraudulent assays to be made of the pulp at the mill. (4) The fourth is as follows: "As another of the acts, practices, arts, and devices concocted in aid and furtherance of said fraudulent conspiracy and combination, the said persons and corporations as aforesaid, so controlling and directing the affairs and management of the said mills, and the agents and employés thereof, caused and directed all of said ores to be handled or managed by a fraudulent system of imperfect milling or reduction, intending thereby to leave in the tailings, slimes, and residues a large portion of the gold and silver contained in said ores, which tailings, slimes, and residues plaintiff is informed and believes were afterwards worked over for the joint benefit of the aforesaid conspirators, and to the

great damage and loss of the said mining company and its stockholders, to wit, about one million one hundred thousand (\$1,100,000) dollars. (5) Alleges excessive charge for milling. (6) The sixth alleges that 6,000 tons of ore, worth \$280,000, were sent by the conspirators to the Choller and Nevada Mills, which were wholly lost to the corporation. It is then charged that the directors, knowing all the acts, practices, and devices of said conspirators to cheat and defraud the corporation, combined with said persons to cheat and defraud said corporation, and did cheat and defraud said mining company, "through said conspiracy, combination, acts, practices, arts, and devices, of large quantities of bullion and money, the property of said mining corporation, to wit, about two million one hundred thousand dollars (\$2,100,000)."

All the material allegations were specifically denied by the appellants, but the court upon the first trial found in substance for the plaintiff upon all the issues. The only damage found, however, was for the overcharge for milling, and that resulting from the alleged fraudulent and imperfect milling of the ores. Upon the last-mentioned issue, as to fraudulent and imperfect milling, the findings were as follows: "That the defendants Alvinza Hayward, W. S. Hobart, the Nevada Mill & Mining Company, and H. M. Levy, by and with the knowledge, consent, and approval of the defendant trustees, and for the purpose of consummating the fraudulent conspiracy and combination to cheat and defraud the Hale & Norcross Silver-Mining Company and its stockholders, did cause and direct all of said ores to be handled and managed by a fraudulent system of imperfect milling, whereby there was left in the tailings, slimes, and residues of said ores a large portion of the gold and silver contained in said ores, which tailings, slimes, and residues were the property of the Hale & Norcross Silver-Mining Company, and a portion of which tailings, slimes, and residues were afterwards worked over by said conspirators, who took, carried away, and appropriated the gold and silver extracted therefrom for the benefit of themselves, to the damage and loss of the said Hale & Norcross Silver-Mining Company and its stockholders." "That during all of the times from about March 1, 1887, until July 1, 1890, an unlawful and fraudulent combination and conspiracy existed by and between the defendants Alvinza Hayward, W. S. Hobart, the Nevada Mill & Mining Company, and H. M. Levy, and the defendant directors, and others, which unlawful and fraudulent combination and conspiracy was organized and conducted with the intent and for the purpose of wrongfully and unlawfully diverting valuable property, consisting of ores, residue of ores, and bullion, belonging to the Hale & Norcross Silver-Mining Company and its stockholders, from said corporation and its stock-



holders, to the use and benefit of the members of said unlawful combination and conspiracy, and said unlawful and fraudulent combination and conspiracy, organized and conducted with the knowledge, consent, and approval of the said defendant directors, for and during all the time that each was a director or trustee of said Hale & Norcross Silver-Mining Company; and there was wrongfully and fraudulently diverted, taken, carried away, and converted by said defendants, by and through said fraudulent and unlawful combination and conspiracy, valuable property, consisting of ores, residues of ores, and bullion, belonging to the Hale & Norcross Silver-Mining Company and its stockholders, to the damage and loss of said corporation and its stockholders, in the sum of \$789,618, and the further sum of \$222,217, caused by the fraudulent, excessive, and exorbitant charge for crushing and milling said ores, making an aggregate loss to the said Hale & Norcross Silver-Mining Company of \$1,011,835. That all the defendants herein except the Hale & Norcross Silver-Mining Company are, and were at various times between the 1st day of March, 1887, and the 1st day of July, 1890, members of the said unlawful combination and conspiracy."

An appeal from that judgment, and from an order refusing a new trial, was taken to this court by the present appellants and others; and a full statement of the facts of the case, and of the issues involved, may be found in the opinion then rendered. 108 Cal. 369, 41 Pac. 308. The effect and meaning of that decision and opinion are of prime importance in the determination of this appeal. The following is a summary of the conclusions reached, and of the judgment rendered: "(1) That the defendants Hayward, Hobart, and Levy formed a fraudulent combination and agreement for mining and milling the ores of the Hale & Norcross Silver-Mining Company, but that the other directors of the mining company were not parties to this agreement, but were merely negligent in the performance of their duties, and are therefore chargeable only with such negligence, and are not chargeable with any actual fraud. (2) That the Mexican and Nevada Mills were under the control of Hayward, Hobart, and the Nevada Mill & Mining Company, but that it is not shown that the Vivian Mill was under their control. (3) That Hayward, Hobart, and Levy, with the acquiescence and consent of the officers of the Hale & Norcross Company, controlled the affairs of that company. (4) That Hayward, Hobart, and Levy, in pursuance of their agreement aforesaid, caused a quantity of inferior and worthless ores to be extracted from the mine, and to be milled, after being mixed with ores of a higher grade. (5) That the Hale & Norcross Company paid \$7 per ton for milling said ores; that the actual cost of milling the same was about \$4.50 per

ton; that, by reason of their fraud as aforesaid, the said defendants were entitled to receive only the actual cost of milling said ores; that, by reason of having been required to pay \$7 per ton for milling said ores, the Hale & Norcross Company had sustained damage in the amount of \$210,197.50. (6) That the evidence is insufficient to sustain the finding of the court that the Hale & Norcross Company had sustained damage, by reason of the improper milling of the ores, in the amount of \$789,618, and that the actual amount of damage sustained thereby cannot be determined from the findings of the court. (7) That the Nevada Mill & Mining Company, not having been served with process, was not before the court as a defendant. The cause is therefore remanded to the superior court, with the following directions, viz.: The judgment appealed from is set aside, and the superior court is directed to enter a judgment, as of the date of its former judgment, against Alvinza Hayward and H. M. Levy, for the sum of \$210,197.50, with interest from that date, upon the issue presented by the claim for having paid an excessive price for milling the ore in the Mexican and Nevada Mills, and upon that issue the order denying a new trial as to these appellants is affirmed. As to the other appellants, except the Nevada Mill & Mining Company, the order denying a new trial as to this issue is reversed, and a new trial thereon ordered. Upon the issue presented by the claim for damages sustained by reason of the imperfect and fraudulent milling, the order denying a new trial is set aside as to all the appellants; and the court is directed, upon the evidence already taken in the case, and such other evidence as may be presented by either party, to make findings in accordance with the views hereinbefore expressed. Upon the amount, if any, of such damage sustained by the Hale & Norcross Company, in addition to finding the value of the ore delivered to the mills, the court is directed to find the amount and value of the bullion that should have been returned therefor. The court should also find what amount of this value of the ore delivered to the mills was necessarily lost in working, or would not, under fair milling, be separated from the baser matter, and also the amount of the money, if any, received by the mills from the working or sale of the tailings or residue of the ores."

From this it appears that the former judgment gave damages to the plaintiff only upon two claims made in the complaint: (1) For the difference between the charge for milling the ores and the actual cost; and (2) for damages sustained by reason of imperfect and fraudulent milling of the ores. As to the first of these, the order denying a new trial was affirmed. As to the second, the order was reversed, and a new trial granted, and upon that new trial the court was directed to find upon certain specific questions. The oth-

er issues, in regard to alleged frauds, from which no damage was shown or claimed to have resulted, were regarded as immaterial. The ground upon which this court sustained the finding as to the alleged excessive charge for milling the ores is plainly stated. It was, to restate it plainly and briefly, because it appeared that Hayward and Hobart, or their agents, had bribed Levy, the real manager of the mining corporation, to give the mills controlled by them the milling of the ores. They did control the mining corporation, as to that contract, and therefore their relation to the company was that of trustees, and they could not be allowed to make a profit out of a contract so procured. The corrupt arrangement entered into between Hayward and Hobart, on one part, and Levy, on the other, is called a "conspiracy," in the complaint, and also in the former opinion of this court, and a great deal seems to be made out of the epithet. It seems to be understood that it tends to prove a continued concert of action to cheat and defraud the mining corporation. The facts shown do not really establish a conspiracy. The whole arrangement,—so far as the proof goes,—at the worst, shows that the president, who was in fact sole manager of the corporation, was bribed to give them the milling of the ores. There is no proof that the arrangement between the defendants, bad as it was, went beyond this. If metal was by design sent into the tailings, to enrich them for the advantage of the mill owners, or if bullion was to be feloniously abstracted, Levy, so far as the proof shows, would not profit thereby; and this limitation upon the so-called conspiracy is clearly shown in the opinion rendered on the first appeal. After calling attention to the fact that the contract was simply that Levy should share in the profits of the milling done by the mills controlled by Hayward and Hobart, the opinion proceeds to state how far the corrupting influences of this illegal contract would naturally go. It is said: "It is next contended that the finding to the effect that Hayward, Hobart, and the Nevada Mill & Mining Company, in conjunction with the other defendants, controlled all the business affairs of the Hale & Norcross Company, is against the evidence. This finding is material only so far as it relates to the mining and milling of the Hale & Norcross ores, and as to those matters the evidence fully warrants the conclusion that a majority of the directors were, as above stated, simply acquiescent or passive, and that Levy did as he pleased. Whatever inference, therefore, as to participation by the mill owners in the control of the mining company may be legitimately drawn from the existence of the unlawful contract for a division of the profits of the milling, or from the manner in which the ore was milled, or from an inadequacy of returns of bullion, or neglect of proper precautions in behalf of the mining company, is to be considered as a fact proved. Undoubtedly, the existence of the con-

tract supplied a motive to both parties to increase the amount of milling by the extraction of low-grade ores; and it may fairly be argued that it also afforded an inducement to Levy to connive at a careless and inefficient system of milling, by which a larger number of tons would be milled at the same cost, and consequently at a larger profit. But proof of a motive to commit a wrong is scarcely sufficient, by itself, to prove that the wrong has actually been committed; and it remains to be considered whether there was any other substantial evidence of the mining of the low-grade ores, or of imperfect milling." According to the evidence, the understanding between Hayward, Hobart, and Levy was that, if Levy would retire from the contest in the election of directors, he should have one-eighth of the profits of the milling of all ores from the mine which was done at their mills. Afterwards it was conceded that he might be a director, and still retain his interest in the contract; and finally he became president and the sole manager of the mine and of the corporation. It is quite conclusively shown that all he did receive was a share in the profits of milling the ore at seven dollars per ton. There is nothing which even tends to show that there was a conspiracy to purloin the bullion, and divide profits so made. Nor is there any allegation in the complaint of any fraud of that character, or of damages so resulting. Yet the last judgment is necessarily and admittedly based upon that very proposition. It is conceded, as is also shown by the opinion of the learned judge of the trial court, that the amount of the judgment was reached in this way. The true value of the ore sent to the mill was estimated as nearly as practicable. The defendants were then given credit for the estimated value of the slimes and tailings (that is, of the residue after milling), also for an estimated amount of moisture in the ore. This was deducted from the estimated value of the ore, and the difference is the amount of bullion which should have been returned. Of course, if that value in bullion was obtained from the ore, and false returns were made, the portion not returned to the mine was stolen by some one. The judgment, in effect, charges Hayward, Hobart, and Levy with the larceny.

It is strenuously contended by the appellants that no such fraud is charged in the complaint, and no damage from any such source claimed. The finding, it is said, is not responsive to any issue made in the case. It is quite obvious that, so far as the pleadings are concerned, this position is sound. The charge of damage resulting from an alleged system of fraudulent and imperfect milling is specific. It was done with the intent of unduly enriching the slimes, tailings, and residues, which it is charged were afterwards worked over for the joint benefit of the conspirators, to the damage of the mining corporation in the sum of about \$1,100,000. This means, and was understood to mean, that the ores were intentionally so



milled as to leave a large portion of the gold and silver in the residues, which by fair milling would have been extracted and returned to the mining company. Eliminate this charge, that the so-called conspirators purposely left a portion of the valuable metals in the residues, and there is no allegation in the complaint of any fraud with reference to the milling or of any resulting damage. Fraud is a conclusion of law, and, when made a ground of action, the facts constituting it must be stated. The law upon the matter is stated by Bliss, in his work on Code Pleading (section 211), as follows: "In alleging fraud, it will not suffice to say that the party fraudulently procured or fraudulently induced or fraudulently did this or that, or that he committed, or was guilty of, fraud. The facts which constitute the fraud must be stated. Fraud is a conclusion of law. A statement that defendants, in 'concert, did, by connivance, conspiracy, and combination, beat and defraud the plaintiff out of,' etc., does not state the facts that constitute the cause of action. It does not appear what they did. The legal conclusion—an epithet only—is applied to their acts, without knowing what they were. Fraud is not a fact. It is a name given by law to certain facts, to certain conduct of the accused party. The fact may be misrepresentation, deceit, specifically stated, and the term 'fraud' is the legal epithet applied to such facts. It is not the fact, not the thing done, but only a conclusion from the thing done. The term 'fraud' or 'misrepresentation' may not be used at all, if the facts appear." Unless the facts are stated,—at least, in a general way,—no cause of action is stated; and this court has ruled that the facts must be alleged with sufficient distinctness to enable the adverse party to come prepared with evidence upon the general questions of fraud which will be raised. *Capuro v. Insurance Co.*, 39 Cal. 123. See, also, *Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. 491; *Herron v. Hughes*, 25 Cal. 556; *Gray v. Galpin*, 98 Cal. 635, 33 Pac. 725; *People v. McKenna*, 81 Cal. 158, 22 Pac. 488; *Meeker v. Harris*, 19 Cal. 279; *Triscony v. Orr*, 49 Cal. 612. The answer to this proposition contained in respondent's brief is that this court at the former hearing declared "that there was an issue fairly and properly made by the complaint, which this court declared to be 'an issue presented by the claim for damages sustained by reason of the imperfect and fraudulent milling of the ores of the Hale & Norcross Mining Company by the defendants,'" and that the trial court was directed to take additional evidence and make findings upon that issue. This certainly is no answer to the argument. No one disputes that there is an issue made by the pleadings upon the claim for damages resulting from the alleged fraudulent and imperfect milling of ores. The question is, simply, what is that issue? No fraud or imperfection in the milling is charged, except that

a portion of the valuable metals was purposely left in the ore, and sent into the tailings, to be, and which was, thereafter appropriated by the alleged conspirators. That the writer of the former opinion understood that such was the issue presented by the pleadings, and which had been tried, and upon which a new trial was asked, clearly appears from the opinion. The issue is plainly so stated: "That said mill owners, in furtherance of the objects of the conspiracy, caused all of said ores to be handled by a fraudulent system of imperfect milling, intended to leave in the tailings, slimes, and residues a large portion of the gold and silver contained therein, which tailings, slimes, and residues were afterwards worked over for the joint benefit of the conspirators, to the damage of said mining company and its stockholders in the sum of about \$1,000,000." 108 Cal. 381, 41 Pac. 310. Again, on page 400, 108 Cal., and page 317, 41 Pac.: "The next, and by far the most important, exception to the decision of the superior court, relates to the various findings to the effect that Hayward, Hobart, Levy, and other defendants worked the ores of the Hale & Norcross Company by a fraudulent system of imperfect milling, by which a large portion of their value was left in the slimes, tailings, and residues of the mills." The court then proceeds to consider at some length the evidence upon which the court had found that the ores had been fraudulently milled, and the damage ascertained, and finally says that the value of the silver bullion was incorrectly determined, and that for this reason alone a new trial must be had. Then occurs the passage, much relied upon by the respondents, as to the proper method of determining the damage. This amounts really to nothing more than the statement that, when the court shall determine the amount of bullion which should have been returned, the value of that wrongfully retained in the slimes and tailings should be estimated as stated. And the court proceeds to say that, since a new trial must be had upon the question of damages, it is unnecessary to discuss the evidence offered to corroborate the general charge of fraud in the milling, by showing how it was possible to debase the battery samples, or to run the value into the tailings by improper amalgamation, or to abstract the amalgam or the bullion; and the opinion proceeds: "All these things have their place as tending more or less to corroborate other evidence of improper milling, and are entitled to such weight as the trial judge may think belongs to them when considered with the more direct evidence of the assay value of the ores, the bullion returns made, percentage that ought to be returned with correct milling." It is then stated that the trial court concluded that, inasmuch as the proper return of bullion was not made, a large part of the ore was improperly run in to the tailings, and consequently the tailings

did not belong to the mill company. All this clearly indicates that the court understood that a new trial was granted upon the entire issue as to damages claimed for fraudulent and imperfect milling, including the issue whether the milling was fraudulent and imperfect, as well as to the amount of damages. It must be remembered that "whether the evidence is sufficient to establish the fact is a question of fact, which must be determined by the tribunal to which it is submitted. A declaration by the appellate court that it does establish the fact would be outside of its functions, and would not be binding upon the trial court." *Wallace v. Sisson*, 114 Cal. 42, 45 Pac. 1000. Had the supreme court said that it was proven that there had been a fraudulent and imperfect milling of the ore, but that the amount of damage could not be ascertained, and therefore, as to the issue in which such damage was claimed, a new trial was ordered, the trial court would not be bound by the statement as to the facts, but would be required to try the whole issue.

The order refusing a new trial upon the issue raised upon the claim for damages alleged to have resulted from a fraudulent system of imperfect milling was reversed. This, of itself, granted a new trial upon that entire issue, and not as to the amount of damages only. The language of the judgment is sufficient to identify the issue upon which a new trial was granted, and that is all that was necessary. Upon a part of that issue (that is, as to the amount of damage, "if any"), the court was directed to find upon certain special matters. This itself was equivalent to saying that, if there had been a fraudulent milling of the ores as charged, and damage had resulted therefrom, then the court should find as directed. It was not intended to limit the inquiry to these matters, however. The required findings are probative, and all have a bearing, not only upon the amount of the damage, but upon the question as to whether the ores were fraudulently milled in order to run the gold and silver into the tailings for the advantage of the mill company. The court was directed to find, upon these points: (1) The value of the ore; (2) the amount which would have been returned by fair milling; (3) what could not have been separated from the ore by fair milling; and (4) how much the defendants had realized by working over or selling the residues. All these inquiries have a direct bearing upon the question as to whether the ore had been fraudulently and imperfectly milled, with intent to enrich the tailings, slimes, and residues; but it is difficult to discover any reason for requiring a finding upon all these matters, if the new trial was only to ascertain the amount of damage, and this was a direction as to how that was to be determined. Counsel for the respondent say that they do not know why the court was directed to find

how much the defendants realized from working the tailings, unless that amount was to be added to the damages ascertained by the other process, by which the court found what ought to have been returned. Of course, that would have been absurd; for when the court determined the amount of metal in the ore, and how much was in the tailings, slimes, and residues, and concluded that the difference showed what had been extracted, evidently there could be no further damage, if, as now found, the milling was perfectly done. It was not intended that the court should determine the damage by either any or all the processes indicated, to the exclusion of other methods; nor was it supposed or indicated that necessarily any question as to the amount of damage would be tried at all. Not only is the presumption very strong that the new trial granted was that which was asked for and had been denied upon an issue then in the case, but it is not to be believed, unless indicated by language to which no other construction can possibly be given, that the supreme court sent the case down with directions to try a question which was not before in the case, and which would award to the plaintiff damages for which he had not asked. Perhaps the statute of limitations had then run against the claim, and the defendants were thereby prevented from pleading it. The issue was twofold: Was there a fraudulent conspiracy to imperfectly mill the ores, as charged, and were the ores so milled to the injury of the mining corporation? If this be answered in the affirmative, the question then is, how much has the plaintiff been injured? Upon the first part of this inquiry the presumptions are with the defendants all through the case, both as to the existence of fraud, and the extent of it. The presumption of innocence is one of the strongest disputable presumptions known to the law. *Code Civ. Proc.* § 1963, subs. 1, 19; *Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756. The fraud being proven, upon the question of damage only are the presumptions against the wrongdoers. It is evident that the court entered upon the retrial upon the theory that the question of fraud had already been determined against the defendants, and that such finding had been affirmed by this court. It is entirely evident that there was no attempt to try the issue made by the pleadings, which was a claim for damages for milling the ores under a system of fraudulent and imperfect milling, which was intended to, and which did, run into the tailings, slimes, and residues a large portion of the gold and silver contained in the ore, and which, by fair and honest milling, would have been extracted and saved for the benefit of the mining corporation. Practically, though not formally, the court found that the ores had been properly milled, when in its computations it gave defendants credit for the ascertained value of the tailings,



slimes, and residues, and charged them with the ascertained value of metal contained in the ore. Necessarily this would be, when formally stated, a finding in favor of the defendants upon the issue as to fraudulent and imperfect milling which is made by the pleadings.

But suppose the respondent's position can be maintained, that under the general allegations of fraud, notwithstanding the averments of particular acts, and of damages resulting from such acts, the plaintiff could maintain a claim for false returns made by the mill, and the purloining of bullion, still it is evident that the case was tried upon a wrong theory, because, as already stated, it was assumed that the alleged conspiracy was not only proven, but that the new and unpleaded charge of stealing the bullion was within the conspiracy. Respondent, in his brief, claims that such was the fact, and that the action of the court is to be judged from that standpoint. If it were so found in the first trial, and had this court decided that the finding was fully sustained by the evidence, yet the order granting a new trial would have set the whole matter at large. This court would then only have said that there was evidence sustaining the finding, not that it was sustained by the preponderance or the weight of the evidence. But this court did not say anything of the kind. Denying a new trial upon the issue as to the alleged overcharge for milling did not imply anything of the kind. That was based upon the proposition that Hayward, Hobart, and Levy controlled the mining corporation, and contracted with themselves for milling its ores. How they got control of the corporation was utterly immaterial upon that issue. Had it been gained in the most honest and honorable manner imaginable, the result would have been the same. Nor did the judgment imply, nor did the evidence show, that the defendants had wronged the corporation out of a dollar. The corporation paid them what it would have been compelled to pay any other mill for the service. It could not have had the work done cheaper. That large judgment is sustained, not because the corporation was cheated out of the money, but under a rule of public policy which declares illegal contracts made by a trustee with himself, whereby he makes a profit, and compels him to pay over all the profit to his beneficiary, even though the beneficiary was not injured, and the profit would have been a fair profit but for the disability. But, if that finding were based upon a fraudulent conspiracy, it would have no bearing upon the question as to whether there was a further illegal agreement to defraud the corporation by making false returns of the bullion obtained from the ore, and by feloniously abstracting the bullion. The presumptions upon such further issue would still be in favor of the alleged conspirators. The burden of proof as to the

whole issue is still with the plaintiff. In *Conard v. Nicoll*, 4 Pet. 291, the supreme court of the United States laid down certain rules as to proof of fraud, which have been often followed since: (1) Actual fraud is not to be presumed. (2) If the act may be attributed to an honest motive, equally as to a corrupt practice, the former is preferred. (3) "If the person against whom fraud is alleged should be proved to have been guilty of it in any number of instances, still, if the particular act sought to be avoided be not shown to be tainted with fraud, it cannot be affected by those other frauds, unless in some way it be connected with, or form a part of, them." See, also, *Estate of Kidder*, 66 Cal. 487, 6 Pac. 326; *Paxton v. Boyce*, 1 Tex. 319.

It is presumed, even in favor of a trustee, that he has done his duty; and when he has rendered an account of his stewardship, which appears to be sufficient and fair, the account is presumed to be correct. In order to charge him with fraud or unfaithfulness, the beneficiary must falsify the account by evidence which does more than raise a suspicion. The evidence must be satisfactory, within the rule stated in section 1833 of the Code of Civil Procedure. It cannot be conjectured from the fact that the defendants are bad men, and have been guilty of other, independent frauds. I do not think guilt can be properly found from a comparison of a number of conjectures, or the addition of various approximate estimates, by which the court ascertained the value of the ore only "as nearly as practicable," when in the same finding the estimates upon which reliance is placed are shown to be 28 per cent. above the real value. By deducting from this estimate the amount of gold and silver which was estimated to have passed into the slimes, tailings, and residues, and making another deduction for moisture, which certainly was simply guessed at even by the witnesses, the court found the amount of bullion which ought to have been returned, and determined that the difference between that sum and what was actually returned was purloined by the defendants in pursuance of a conspiracy to cheat and defraud the mining corporation. And it must be remembered that there does not appear to have been any suppression of evidence. This point is discussed on the first appeal, and it was so held there. But upon the last trial the employés of the mill were subjected to cross-examination, and answered fully, and with apparent candor. The books were produced, with clerks and bookkeepers, and the fullest scope for the investigation allowed. Hayward's private books were produced, and Hayward, Hobart, and Levy have been upon the stand. All the employés who worked in the mill testified fully, and to the effect that every ounce of bullion which was extracted from the ore (except, perhaps, that recovered from the concentrates, which the mill company claimed) was

honestly accounted for, and returned to the mining company. Nothing of an inculpatory character was found in the books. Under such circumstances, nothing is to be presumed against the defendants as to this charge. And in weighing the evidence upon this charge the court should, at every step, have adopted the view which was consistent with innocence, unless the evidence to the contrary clearly preponderated. But what is the evidence which implicates Hayward, Hobart, or Levy in the supposed theft? There is certainly no evidence proving an express agreement or conspiracy to so defraud the mining company. In the absence of such proof, it must be shown that Hayward, Hobart, and Levy personally participated in purloining the bullion; that they in some way aided, abetted, or at least that some of the fruits of the fraud were received by them. This could be shown by circumstantial evidence. I have not been able to find in the record, including that upon the first appeal, a scintilla of evidence which tends to prove anything of the kind. The only evidence that bullion has been purloined is the discrepancy between the value of the ore as found, and the return made by the mill. Conceding that the discrepancy proves that some of the metal extracted was not returned, who took that which was not returned? It is conceivable that the employés could have taken and applied it to their own use. Indeed, if they did take it under circumstances that would subject them to a prosecution for felony, it would be strange that they would do it for the profit of others. Hayward and Hobart were not there. It is not shown that the defendants knew of or countenanced such theft, but, so far as their testimony and that of their employés could prove it, the contrary is shown. Not a pound of the bullion which is supposed to have been stolen has been traced to them, or to anyone else. One of the difficulties in the plaintiff's case is the number of confederates the conspirators would have been compelled to employ to enable them to carry out such a scheme. It is hard to believe that so many people, many of them well-to-do in the world, would have conspired to commit such a felony, or, if they did, that they would have trusted so many people with a secret which, if known, would consign them to the penitentiary. Another difficulty is in believing that about \$500,000 worth of bullion, consisting of 60 per cent. of silver and 40 per cent. of gold, was feloniously abstracted under such circumstances, and by the most thorough and searching investigation not one pound of it can be traced to any one. The mill corporation would perhaps be responsible if the bullion was shown to have been extracted from the ore. But the defendants are not even sued as stockholders in the corporation. Proof that they controlled the corporation would not make them liable as conspirators. Stockholders have a right to control the corporation of which they are con-

stituents. This would not make them personally liable for thefts committed by their employés. To make them so responsible, guilty knowledge and participation must be shown, and much more so when they are simply charged as conspirators.

Probably, when the action was commenced plaintiff hoped to be able to prove the fraudulent milling of the ores as alleged. Had he been able to do so, it would have been easy to believe that the fraud was perpetrated in pursuance of the same understanding or conspiracy under which the defendants obtained control of the mining corporation. It would also have proved a fraudulent appropriation of the property of another; that is, a taking under color and pretense of right, rather than an unblushing larceny, of which the defendants were in fact found guilty. It would also have been such a taking as would imply guilty participation on the part of the managers of the milling corporation. Their corrupt gains would be acquired only as stockholders. The control of the mining corporation, that there might be no complaints of ineffectual milling, and the participation of Levy in the profits derived from the slimes and tailings, if it could have been shown, would have favored the idea of a conspiracy. But when the plaintiff found that the milling had been thorough and efficient, and he was compelled to wage his battle from a new base, there were no facts so strongly favoring the idea of a conspiracy. In fact, the charge of a conspiracy was entirely irrelevant to the claim that bullion had been converted. If proven, conspiracy would have had no other effect than to connect the individual defendants with the trespass. The cause of action was the conversion. The conspiracy, if proven, was evidentiary merely. And then, if the bullion was converted by a larcenous taking, there is no presumption that it was done for the corporation or its stockholders, or even for the benefit or with the knowledge of those who, as owners of large amounts of stock, controlled the corporation. The great discrepancy between the mining-car assays and the return of bullion made is the only evidence upon which is based the finding that bullion has been converted. Does that fact tend to show that the conversion was in pursuance of a preconceived design on the part of Hayward, Hobart, and Levy? The learned trial judge says it is beyond question that the battery assays are false, and remarks that for no single month from January, 1887, to July, 1890, during which time more than 80,000 tons of ore were milled, did the percentage equal the car-sample assay, and adds: "Considering that all assays are somewhat speculative, and never absolutely exact, the fact that in all this mass of ore there was scarcely a single battery assay that even by chance went higher than the car assays is startling, in its evidence of deliberate, habitual design." Since the court found that the aver-



age of 84,000 car-sample assays showed a value 28 per cent. above the true value ascertained by him as nearly as practicable, and since he speaks in this very sentence of the assays as speculative, I doubt if there is any such implication in the fact. If the battery assays had frequently exceeded such car-sample assays, that fact would have condemned the battery assays. But, admitting that the difference is startling, how does that tend to prove that the conversion of the bullion, if there was any such conversion, was in pursuance of the alleged conspiracy? According to the theory of plaintiff, the defendants controlled both sets of assays. Why, then, did they allow this discrepancy to exist, if they were purloining the bullion, and were debasing the battery assays to hide the theft? The effort to show that the car assays were concealed was certainly a failure. There is at least a hint in the evidence that they were published daily. But, whether concealed or not, I do not see why such discrepant assays should have been allowed, if there was this design to purloin the bullion on the part of the personal defendants. In that case they were not wanted as a check on the mill. There might have been a motive for having the car assays too high, and that suspicion, if we are to indulge in suspicion, is as probable as the other. Perhaps some influential mine owners were then unloading. Certainly the discrepancy, however startling, cannot be accounted for upon the supposition that bullion was purloined by any one, in the absence of other inculpatory circumstances; and, if such conversion were proven, the burden would still be upon the plaintiff to connect the appellants with it. That has not been done, and can only be made out by boldly claiming that this court went outside of its functions as an appellate tribunal, and found as a fact that there was a fraudulent conspiracy to defraud the mining corporation, and to purloin its bullion. I do not find any language in the opinion justifying such claim, and, had there been, I doubt if we should feel bound by it. Certainly not unless it had been expressly and unmistakably so adjudged, and perhaps not then. Such a finding would not have bound the lower court, and therefore could not conclude this. Entertaining these views, it is not necessary to consider the numerous points raised as to the introduction of evidence at length.

1. I think the court erred in overruling the objections of defendants to the introduction as evidence of the books and statements of officers and bookkeepers of the Overman Silver-Mining Company. The question is not simply whether the result of the reduction of the ore of that mine could be shown, and compared with the working of ore in the Nevada Mill. The objection is to the mode of proving the results of working ore in the Overman Mills. The case of *Insurance Co. v. Weide*, 9 Wall. 677, 11 Wall. 433, and 14

Wall. 381, does not seem to me to have any bearing upon this question. There the evidence offered was not, as here, the unverified statement of third parties, but was direct. Had the working of similar ores in other mills been shown by competent proof, for the purpose of comparison, I think it would have been proper, and that is all that was decided in the case cited which is pertinent here. The same remark applies to another class of testimony to which objection was made. I think it was incumbent upon the plaintiff both to show that by sampling and assaying the value of the ore could be ascertained, and also to show that it was done by the method pursued in this case. In fact, the first proposition is involved in the last. On no other theory could the plaintiff be sustained in putting questions to experts on the assumption that samples were fair samples, or were fairly taken, or that there were no disturbing elements. Of course, if the samples were fair samples, and were properly assayed, that would end the controversy. But the question at issue was whether they were fair samples,—did truly represent the ore in the car,—and whether they were properly assayed. The questions assumed the point at issue, unless that was whether by sampling and assay the value could be determined. The questions and answers did not tend to show whether the samples involved here were fair, or that the assays were correct. It seems to me that all the questions put by plaintiff upon this subject assumed that the assays had been properly made.

2. The rule is that whenever a complaint is amended in any material respect, so as to present new questions upon which issue may be taken, the defendant may answer as of course; and in such case I do not see how the court can limit the defenses which may be interposed, any more than it could the defenses which might have been made in the first instance. The case is different where the court is asked to permit an amended answer to be filed. In this case I think the defendants had the right to answer, but I fail to perceive in what respect they have been damaged by the refusal. The amended complaint was allowed upon the first trial, to make it conform to the proofs. As to that trial, it served no other purpose. It should not be allowed in such case to present issues which have not been fully tried, and no advantage can be taken from the fact that some of the new allegations have not been controverted. The new trial was had after the amended complaint was filed. It is not contended that it is materially different from the former complaint, and the only injury claimed to have resulted is that the defendants could have pleaded the statute of limitations. It is not contended that the demand was barred when the action was commenced, or when summons was served on these defendants, but some of the defendants were sued by fictitious names. The

summons was, however, personally served upon them. The complaint was amended so as to substitute the names of the defendants who had been served, for the fictitious names. Before this was done, it is thought, the limitation of the statute had accrued. I think the amendment was merely formal, and that the defendants were made parties in reality when the summons was served. True, they should still be made parties to the record as they were, but after that was done they are to be treated as having been parties from the time of service of process upon them. The answer already in was as appropriate to the complaint as amended as before the amendment, for it was in all material respects the same identical pleading.

The last point which it is necessary to consider is whether upon the new trial the question was still open as to the right of the plaintiff to bring this action as a stockholder of the Hale & Norcross Silver-Mining Company. Evidence upon this subject was taken upon the first trial, and the court found fully upon the subject. The facts which authorize the plaintiff to sue in behalf of the company were found. Upon the first appeal the defendants could have presented the question both upon the law and the evidence. By failing to except to the sufficiency of the evidence to sustain the findings, they waived that claim, and, there being no doubt as to the sufficiency of the findings to show the right of the plaintiff in that regard, this court necessarily concluded upon that record that the suit was properly brought. There was really no demand for a new trial,—none that this court could entertain upon that ground,—and no new trial upon that issue was awarded. The judgment here was an unusual one, no doubt. Appellants claim that, if the whole judgment was not vacated, it was one which this court had no power to make. They say this court can only affirm, modify, or reverse the judgment appealed from; and, as they contend, the judgment was not affirmed or modified, and must have been reversed, as they also say it was in terms. The judgment, as pronounced here, reads: "The cause is therefore remanded to the superior court with the following directions, viz.: The judgment appealed from is set aside, and the superior court is directed to enter a judgment as of the date of its former judgment against Alvinza Hayward and H. M. Levy for the sum of \$210,197.50, with interest from that date, upon the issue presented by the claim for having paid an excessive price for milling the ore in the Mexican and Nevada Mills; and upon that issue the order denying a new trial is affirmed." As to another issue, specially mentioned, the order denying a new trial was reversed, and the court was directed to retry that issue, and certain directions were given as to the mode of trial. This judgment is not adequately described by quoting the first sentence, "The

judgment appealed from is set aside." That sentence is limited and explained by what follows. The case was not sent back to be tried from the beginning. Evidently a part of what had been done was to stand,—all, I think, except as to the issue upon which a new trial was awarded. No findings were set aside, except upon the one issue. Upon the new trial the case would be taken as partly tried, and the trial court was told to proceed to finish the trial as directed. That which was reviewed was the order denying a new trial. The judgment was no further interfered with than was inevitable after the ruling upon the order denying a new trial. The judgment was set aside only to effectuate that ruling. So far as the judgment was supported by the findings not vacated, it was held in abeyance until the trial (which by the ruling was left incomplete) was finished, when one judgment would be entered, covering all the issues in the case. As to the order under review, it was affirmed in part and reversed in part, and this resulted in a modification of the judgment. So that in this case the court exercised its power in all the modes to which appellants claim it was confined. Although unusual, this action does not seem to me to be irregular, or at all suggestive of an excess of jurisdiction. It was all within the province of an appellate tribunal, and not beyond the power of this court as defined in the constitution. It must follow that the issue as to the right of plaintiff to prosecute the action as a stockholder was not open for investigation upon the last trial, either as to the issue upon which a new trial was denied, or upon that in regard to which a new trial was awarded. In fact, the direction to the trial court to proceed with the unfinished and incomplete trial was a ruling upon that matter. The court held that there was a case pending, and directed the superior court to proceed with the trial, and determine the one issue left open, in order that a final judgment could be made which would cover all the issues in the case. Of course, the order awarding a partial new trial may affect some general findings, so far as they determine matters brought in question in the special issue upon which a new trial was awarded. The right of plaintiff to sue was, however, the subject of a distinct issue, which was of the nature of a preliminary inquiry. Had that been found for the defendants, the court would not have proceeded to determine the other issues. When this court directed the trial court to proceed with the trial, it necessarily assumed that inquiry upon that subject was at an end. Nor do I think this conclusion a hardship upon the appellants. They had their day in court. The proper time for them to have presented the question was upon the first appeal. They did not avail themselves of the opportunity then offered. I do not see why they should have another. The judg-



ment will therefore be, as upon the first appeal, that the judgment below is set aside, and the superior court is directed to enter a judgment, as of the date of the first judgment, against Alvinza Hayward, H. M. Levy, and the estate of W. S. Hobart, deceased, for the sum of \$210,197.50, with interest from that date, upon the issue for having paid an excessive price for milling the ore in the Mexican and Nevada Mills. As to the issue presented by a claim for damages sustained by reason of imperfect and fraudulent milling, a new trial is awarded, and the court is directed to proceed and try that issue, and make findings in accordance with the views hereinbefore expressed.

We concur: BEATTY, C. J.; HENSHAW, J.; HARRISON, J.

VAN FLEET, J. I concur in the judgment, and generally in the views expressed by Mr. Justice TEMPLE upon which it is based. Were the question of the correctness of the court's finding as to plaintiff's capacity to maintain the action open to inquiry upon this appeal, I should strongly incline to the view that it was not supported by the evidence. But I am unable to perceive wherein either the reasoning or conclusion of the main opinion upon that question can be successfully upset. As conclusively shown by Judge TEMPLE, and as is indeed obvious, that finding was and is primarily essential to the validity of the judgment of the court below to any extent. Its correctness was in no manner attacked or questioned upon the former appeal. Upon that appeal the cause was remanded for a new trial solely as to the single issue of the alleged imperfect and fraudulent milling of the ore; and thereby, in all other respects, the findings and conclusions of the court below were manifestly as effectually sustained and affirmed as if so ordered in terms, since the lower court was left no power or discretion to reopen or disturb its findings or judgment in any other respect. In other words, our former judgment was equivalent to an express and final adjudication of the correctness of the proceedings of the court below in all respects other than the one particular as to which its action was reversed. Since this court has no power, under the constitution, to review its own final judgments (*Fox v. Mining Co.*, 112 Cal. 568, 571, 44 Pac. 1022), upon the going down of the remittitur upon that appeal the question as to the plaintiff's right to maintain the action was definitely and finally concluded.

McFARLAND, J. I dissent from that part of the judgment which directs the court below to enter judgment against certain appellants for \$210,197.50, and from so much of the principal opinion as leads to that result. I concur in all other respects in the opinion of Mr. Justice TEMPLE. I am of the opinion, however, that the language of this court

on the former appeal did not preclude the appellants, on the second trial, from making the point, as to the whole case, that the respondent was not a bona fide stockholder during the time when the alleged causes of action accrued, and therefore not entitled to maintain the action,—a point which did not appear in the record on the former appeal, and was not on its merits then passed upon.

GAROUTTE, J. I dissent. When this case was before the court upon the former appeal, I felt compelled to dissent from the conclusion then declared. By that conclusion it was held that the evidence was insufficient to justify the finding of fact made by the trial court to the effect that 74 per cent. in bullion of the car-sample assay should have been returned to the Hale & Norcross Mining Company by the milling company. Upon the second trial of the case by the superior court, all the evidence introduced at the first trial was admitted, and in addition thereto other important evidence was introduced, bearing upon the issue as to the amount of bullion which should have been returned to the mining company. Upon the second trial the court found as a fact that 67 per cent. of the bullion as indicated by the car-sample assay would be a fair return to the mining company. It thus appears that at the second trial the percentage of bullion was reduced by the court, and at the same time the evidence upon the point strengthened. I am fully convinced that the evidence, as disclosed by the record, is amply sufficient to support this finding of fact made by the trial court. And I am therefore again compelled to dissent from that portion of the principal opinion wherein this particular issue is considered. Other questions of grave importance are involved in the appeal, and carefully considered in the opinion of the court. Owing to the press of other duties, I have not considered them, for the reason that my conclusion would not change the result of the litigation, even if by possibility such conclusion should happen to look in an opposite direction to the views therein declared.

6 Cal. Unrep. 1

HOLLIDAY v. HOLLIDAY et al. (L. A. 338.)<sup>1</sup>  
(Supreme Court of California. April 26, 1898.)

MALICIOUS PROSECUTION—TERMINATION OF ACTION  
—PROBABLE CAUSE—INSTRUCTION—  
ADVICE OF COUNSEL.

1. An allegation, in an action for malicious prosecution, that the prosecution on which the action is based had been finally determined in plaintiff's favor, is sufficient, without alleging, in addition, the means, as by writ of habeas corpus, by which that end was accomplished.

2. When a prosecution, under Pen. Code, §§ 701-714, authorizing the arrest of a person charged with having threatened to commit an offense, results, after a hearing, in an order requiring the accused to give an undertaking to keep the peace, the order, unless it is shown to have been procured by fraud, is conclusive evidence of probable cause.

<sup>1</sup> Reversed in banc. See 55 Pac. 703, 123 Cal. 26.

3. In an action for malicious prosecution, it appears that, in one of the prosecutions on which the action was based, the plaintiff was discharged on a writ of habeas corpus, on the ground of the insufficiency of the commitment, and a possible defect in the warrant; and, in the other, upon the statement that she could not give a bond and assurances that she would not harm defendants, who were seeking to compel her to give an undertaking to keep the peace, she was discharged on motion of the district attorney, on her own recognizance. *Held*, that an instruction that plaintiff's release upon the habeas corpus proceedings and the dismissal on the motion of the district attorney were each a sufficient termination of the prosecution, for the purposes of this action, going to show a want of probable cause, is error.

4. A defendant in an action for malicious prosecution, who relies on the defense of probable cause by showing that he in good faith acted on the advice of counsel, after having disclosed to him all the material facts within his knowledge relating to the offense and the accusation, need not show that he also disclosed all the material facts bearing on the case which he could have ascertained by reasonable diligence, the other disclosures being sufficient.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by Fannie L. Holliday against Edward F. and Mrs. M. P. T. Holliday. Judgment for plaintiff, and defendants appeal. Reversed.

Wm. J. Hunsaker, for appellants. James & Newby, for respondent.

BELCHER, C. This is an action to recover damages for malicious prosecution and false imprisonment, based on a proceeding instituted by defendants against plaintiff before a justice of the peace, under the provisions of sections 701 to 714 of the Penal Code. The complaint contains four counts. The first count alleges that on the 19th day of August, 1895, in the city of Los Angeles, the defendants falsely and maliciously, and without reasonable or probable cause, charged plaintiff before William Young, a justice of the peace within and for the township of Los Angeles, with having threatened to burn the personal property of defendants, and to shoot, stab, and kill defendants, and that said defendants had just cause to fear the said threats would be carried into execution by said plaintiff if she was not restrained by the court, and procured said justice to issue a warrant for the arrest of plaintiff on said charge; and thereupon plaintiff was arrested under said warrant, and imprisoned in the county jail of Los Angeles county for the space of eight days. It is then alleged "that on the 27th day of August, 1895, upon petition of plaintiff for discharge upon a writ of habeas corpus, which was duly issued and returned, the said plaintiff was discharged from custody, and the said prosecution is wholly ended and determined." The second count alleges that on the 27th day of August, and immediately after plaintiff's discharge, as alleged in the first count, the defendants again pro-

cured the said justice to issue a warrant for the arrest of plaintiff upon the same charge set out in the first cause of action; and thereupon she was arrested under said warrant, and imprisoned for three hours, until released upon her own recognizance to thereafter appear and answer said charge; and "that on the 31st day of August, at the request of counsel for defendants, and on motion of the district attorney, the plaintiff was discharged from custody without examination, and said prosecution is wholly ended and determined." The third and fourth counts, by the instruction of the court, were withdrawn from the consideration of the jury, and they need not therefore be considered. Defendants demurred to each of the counts contained in the complaint, and their demurrer was overruled. They then answered, denying the allegations of the first and second counts relating to malice, want of probable cause, and damage, and, as a further defense to the first count, alleged that, after an examination of the charge before the justice of the peace, the proceeding was finally determined on August 20th and, as showing such final determination set up the following order made by the justice: "It appears to me that there is just reason to fear the commission of the offense within mentioned. I order that you, the said defendant, enter into an undertaking in the sum of \$1,000, with two sufficient sureties, to keep the peace towards the people of the state of California, and particularly towards the affiants. Done in open court, this 20th day of August, 1895. Wm. Young, Justice of the Peace." And, in addition to the denials of the allegations of the second count, defendants alleged that they consented to the dismissal of the second proceeding solely for the reason that they and their counsel were assured by the counsel for the plaintiff in this action (the defendant in said proceeding) that she would not carry the threats, for the making of which she was charged, into execution, or otherwise harm or molest the persons or property of defendants. The case was tried before a jury, and a verdict was rendered in favor of the plaintiff for the sum of \$500, on which judgment was entered. From that judgment, and an order denying their motion for a new trial, defendants have appealed.

The law is well settled that, to maintain an action of this kind, the plaintiff must allege and prove affirmatively malice and want of probable cause on the part of the defendant in instituting the proceeding which is made the basis of the action, and that the same has been finally determined in favor of the plaintiff. Appellants contend that the allegation in the first count of the complaint that upon a writ of habeas corpus, which was duly issued and returned, plaintiff was discharged from custody, and the prosecution was wholly ended and determined, was not sufficient to show that the



proceeding had been finally determined in favor of the plaintiff, and therefore their demurrer to that count should have been sustained. The argument is that it does not appear that the petition for the writ was presented to any court or judge having jurisdiction to issue the writ, or that an order was made by any court or judge directing the discharge of plaintiff. But it was only necessary to allege that the prosecution had been finally determined, and not the means by which that end was accomplished. The statement that plaintiff was discharged upon a writ of habeas corpus, which was duly issued and returned, and the prosecution was wholly ended, should therefore, we think, be held sufficient.

It is further contended that the order of the justice of the peace made August 20th, requiring the plaintiff to enter into an undertaking to keep the peace, was a conclusive determination that there was probable cause for the institution of the proceeding which resulted in the making of such order, and was not subject to collateral attack. And, in accordance with this contention, defendants requested the court to instruct the jury that the order referred to, made by the justice upon the information before him, was "conclusive evidence that there was probable cause for lodging said information and prosecuting said proceeding." The court refused to give the instruction asked, and, at the request of the plaintiff, instructed the jury that "the fact that Justice Young rendered judgment requiring the plaintiff in this action to give bail in the sum of \$1,000 to keep the peace is no bar to this action by the plaintiff," and that "the defendants cannot shield themselves on the first and second causes of action behind the action of Justice Young in issuing the warrants of arrest and committing plaintiff, if the facts stated in the information were false, and not believed by the defendants to be true." It is claimed by appellants that the court erred in refusing to give the instruction requested by them, and in giving the instructions requested by respondent, and many cases are cited on both sides as to the effect, as conclusive evidence, of judgments and orders of courts. Without reviewing the cases cited, we deem it enough to say that, while there is some apparent conflict in the decisions, the prevailing rule seems to be that when a person is charged before a competent court having jurisdiction of the matter, and is tried and found guilty, the judgment rendered, unless it is shown to have been obtained by means of fraud, is conclusive evidence of probable cause for making the charge, even though it is afterwards held to be unauthorized and reversed on appeal. It has, however, been held by this court that, in actions for malicious prosecution, the fact that the plaintiff, after examination, has been held to answer by the examining magistrate, is *prima facie*, but not conclu-

sive, evidence of the existence of probable cause for the prosecution complained of. *Ganea v. Railroad Co.*, 51 Cal. 140; *Diemer v. Herber*, 75 Cal. 287, 17 Pac. 205. Under the provisions of the Penal Code before referred to, authorizing the arrest of a person charged with having threatened to commit an offense against the person or property of another, the order of the magistrate, made after a hearing, and requiring the accused person to enter into an undertaking to keep the peace, would seem to have the force and effect of a final judgment and determination that there was just reason to fear the commission of the offense, and that the penalty provided should be imposed. If this be so, then such an order goes further and has a wider effect than an order made by an examining magistrate holding a party to appear and answer for some alleged offense before a trial court. We conclude, therefore, that appellants' contention on this point must be sustained, there having been no evidence that the said order of the justice was procured by fraud.

In actions of this character, what constitutes probable cause is always a question of law for the court. As said in *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937: "Malice is always a question of fact for the jury, but whether the defendant had or had not probable cause for instituting the prosecution is always a matter of law, to be determined by the court. If the facts upon which the defendant acted are undisputed, the court, according as it shall be of the opinion that they constituted probable cause or not, either will order a nonsuit (or direct a verdict for the defendant), or it will submit the other issues to the jury; but, whether admitted or disputed, the question is still one of law to be determined by the court from the facts established in the case. If the facts are controverted, they must be passed upon by the jury before the court can determine the issue of probable cause; but the question of probable cause can never be left to the determination of the jury. \* \* \* The court cannot divest itself of its duty to determine this question, however complicated or numerous may be the facts. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that, if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly."

In accordance with the law as above declared, the court, at the request of plaintiff, very briefly and meagerly grouped the facts which would constitute a want of probable cause, and instructed the jury that, if they

found those facts to be true, the verdict should be in favor of the plaintiff. And, at the request of defendants, the court very fully grouped the facts which the evidence tended to prove, and instructed the jury that, if they found those facts to be true, then they constituted probable cause for lodging the information against plaintiff, and her arrest and prosecution, and the verdict should be for defendants on both causes of action. It is objected that the facts, as grouped at the request of plaintiff, were insufficient to show a want of probable cause, and that this was a fatal error, which calls for a reversal. But all of the instructions must be read together, and, when so read, we fail to see that the jury could have been misled. The jury must be presumed to have understood that if the facts, as grouped at the request of defendants, were not found to be true, then there necessarily must have been a want of probable cause.

At the request of the plaintiff, the court instructed the jury "that the release of plaintiff upon habeas corpus proceedings was and is a sufficient termination of the first prosecution; and the dismissal by the court on the motion of the district attorney on August 31, 1895, was a sufficient termination of the second prosecution, for the purposes of this action." In view of the evidence, this instruction, we think, was erroneous. Mr. Jones, who was the attorney for plaintiff in the habeas corpus proceeding before Judge Shaw, testified: "The ground upon which Judge Shaw discharged Mrs. Holliday was, as I remember, that the commitment was improper. It wasn't necessary to discuss the question of the sufficiency of the evidence, as she was discharged on account of the insufficiency of the commitment, and possibly a defect in the warrant. I think the main point that we pressed the most heavily was that the warrant of commitment did not conform to the order of commitment, and therefore she was unlawfully committed to jail, and she was therefore discharged." And as to the second discharge, it was proved that, immediately after plaintiff's second arrest, she and her attorney went to the justice's office, and there found Mr. Williams, the deputy district attorney; and that after consultation between the attorneys, and a statement by her attorney that she could not give a bond in any sum, and an assurance by her and her attorney that she would not do any harm to defendants, she was, on motion of the district attorney, released by the justice on her own recognizance. This being so, it certainly did not appear that either one of the proceedings against the plaintiff had been finally determined in her favor.

The court also, at the request of plaintiff, instructed the jury as follows: "The defendants rely upon the advice of counsel as one of their defenses to the causes of action for malicious prosecution, and upon this point the court instructs the jury that whether or not

the defendants did, before instituting the proceedings, make a full, fair, and honest statement to their attorneys of all the material facts bearing upon the facts stated in the informations laid before Justice Young of which they had knowledge, or which they could have ascertained by reasonable diligence, and whether, in commencing such proceedings, the defendants were acting in good faith upon the advice of their counsel, are questions of fact to be determined by the jury from all the evidence and circumstances proven in the case; and, if the jury believe from the evidence that the defendants did not make a full, fair, and honest statement of such facts to their counsel, then such advice cannot avail them anything in this suit." By this instruction, the court, in effect, charged the jury that when, in an action for malicious prosecution, the defendant relies upon the advice of counsel as a defense for instituting the proceeding complained of, he must, in order to avail himself of that defense, prove to the satisfaction of the jury that, before instituting the proceeding, he made a full, fair, and honest statement to his counsel of all the material facts bearing upon the charge of which he had knowledge, or which he could have ascertained by reasonable diligence, and that he acted in good faith upon the advice of the counsel. In *Dunlap v. Insurance Co.*, 109 Cal. 365, 42 Pac. 29, instructions of similar import were given by the court, and held to be erroneous, and, for the error in giving them, the judgment was reversed. The court, after a review of the authorities, said: "Assuming that in seeking the advice of counsel, and in acting thereon, he has acted in good faith, and has disclosed all the facts within his knowledge relating to the offense and the accusation, his defense of probable cause will be established, even though the defendant should show at the trial other facts sufficient to secure his acquittal, and which might have been ascertained by the prosecuting witness if he had made diligent inquiry therefor. It is not necessary that he shall institute an investigation of the crime itself, or seek to ascertain whether there are other facts relating to the offense, or try to find out whether the accused has any defense to the charge. He is not required to exhaust all sources of information bearing upon the facts which have come to his knowledge, for that would be to require him to perform the office of the committing magistrate, and thus thwart the very purpose of the law in inducing him to seek its immediate vindication for crimes committed against it. There are expressions in some opinions to the effect that, in addition to the facts within his knowledge, he must also have exercised reasonable diligence to ascertain whether there are any other facts bearing upon the charge; but, in an extended examination of the authorities, we have not been able to find any case in which it has been decided that such diligence must be exercised, or where



the prosecuting witness has been held liable for failure to ascertain whether there were any other facts bearing upon the case." The case of *Sandell v. Sherman*, 107 Cal. 391, 40 Pac. 493, cited by counsel for respondent, does not sustain their claim that the instruction under review was not erroneous. In that case an instruction was given which stated that if the defendants "made a full and fair statement of all the facts of that case to their counsel," and he advised, etc., and they acted on his advice, "it is a good defense in this case." It was urged that the instruction was erroneous, for the reason, among others, "that it does not charge that they should have stated to the attorney all the facts within their knowledge, or which they reasonably could have obtained." But, tested by the general rule in such cases, the court failed to see any serious objection to the instruction, and held it to be sufficient. Following the law as declared in the *Dunlap Case*, it must be held here that the instruction under review was erroneous in so far as it charged, in effect, that the defendants could not avail themselves of the advice of counsel unless the jury should find from all the evidence and circumstances proven in the case that, before instituting the proceedings, they made a full, fair, and honest statement to their attorneys of all the material facts bearing upon the case "which they could have ascertained by reasonable diligence."

For the errors above noted, the judgment and order appealed from should be reversed, and the cause remanded for a new trial.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

120 Cal. 559

HALL v. SUSSKIND. (L. A. 286.)

(Supreme Court of California. April 9, 1898.)  
TROVER AND CONVERSION—INSOLVENCY—FRAUD—  
SUFFICIENCY OF EVIDENCE—APPEAL  
—RECORD—REVIEW.

1. A stock of jewelry, several months prior to the filing of a petition in insolvency by the owner, was worth from \$50,000 to \$70,000. At the latter time the stock was reduced to \$10,000, and was sold by the assignee for \$7,100 to defendant, who took possession, and continued the business at the same place, assisted by insolvent's husband and former manager. Eight or nine months later his stock was attached by the assignee, and was found to be worth from \$25,000 to \$30,000. Sales in the meantime had been \$34,000, and augmentation of the stock as accounted for by defendant only \$4,600. Some of the stock in defendant's possession was identified as goods sold to the insolvent, but not turned over to the assignee, and a large portion was shown not to have been part of that sold by the assignee, nor to have been purchased by defendant elsewhere. There was testimony that insolvent's husband had admitted having secreted \$25,000 or more of stock. The ordinary retailer's profit was about

50 per cent. *Held*, that the facts, taken with defendant's failure to account for such augmentation, show a fraudulent conversion, and a motion to nonsuit was properly denied.

2. In an action for fraudulent conversion of a stock of merchandise by sales at retail, it is not necessary to identify the specific articles converted.

3. Defects in a complaint cannot be reviewed on appeal from an order denying a new trial.

4. Under Code Civ. Proc. § 659, subd. 3, requiring specifications of error to point out the particulars in which error is averred, specifications of errors "pointed out and designated in the transcript by exceptions Nos. 1 to 25" cannot be considered.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by A. I. Hall against Henry Susskind. From a judgment for plaintiff, and an order denying a new trial, defendant appealed. The appeal from the judgment was dismissed. Order affirmed.

Wells & Lee and C. Edgerton, for appellant. Graff & Latham, for respondent.

BRITT, C. This case, in a different phase, was before the court on a former appeal. *Hall v. Susskind*, 109 Cal. 203, 41 Pac. 1012. Plaintiff sues as assignee in insolvency of one L. M. Wagner, who, prior to her insolvency, was engaged in business as dealer in jewelry, diamonds, watches, silverware, etc., at the city of Los Angeles. In his complaint plaintiff charged that defendant conspired with said insolvent and her husband (one J. B. Wagner, who was her managing agent) to secrete and conceal a portion of her estate, described as "consisting of diamonds, watches, and jewelry," to prevent the same from coming into the possession of the assignee; that the insolvent did conceal property not exempt by law; that the defendant took possession of said concealed property knowing it to be part of the insolvent's estate, converted the same to his own use, and sold a portion thereof of the value of \$30,000. The court found, among other things, that after said J. B. Wagner, acting on behalf of said insolvent, had concealed and secreted part of her estate,—described as in the complaint,—the defendant with knowledge of such concealment, and that the property concealed was part of the insolvent's estate, took possession of the same, and sold a portion thereof for cash, between November 16, 1892, and July 26, 1893, and that the value of the goods thus sold was \$15,000, for which sum plaintiff had judgment.

Defendant's appeal from the judgment was dismissed. On the appeal from the order denying a new trial the main question made is whether the evidence sustained the finding of fraudulent conversion by defendant. The evidence was mostly circumstantial. It tended to show that Mrs. Wagner's stock in trade in the month of March, 1892, was worth from \$60,000 to \$70,000. In July, 1892, it was valued at \$50,000. On September 22, 1892, the same was seized under a writ of

attachment, and a few days later—on September 28th—she filed her petition in insolvency. The goods she then had in stock were worth, perhaps, \$10,000, though there were estimates of witnesses thereon at considerably less than that sum; and on November 16, 1892, plaintiff, as assignee of said insolvent, sold the same at public auction to the defendant for the sum of \$7,100. Defendant received possession of the goods thus purchased, and embarked in the same business as that previously conducted by the insolvent, and at the same stand. He was assisted therein by said J. B. Wagner, though in what capacity is not clear. Between November 16, 1892, and July 26, 1893, defendant made sales by auction and otherwise out of his stock to the amount, the evidence tended to show, of about \$34,000. On the date last mentioned all the goods then in his possession were attached as the property of L. M. Wagner at the suit of one Wunsch and others, creditors of said L. M. Wagner. Some particulars of that action are related in *Susskind v. Hall*, 44 Pac. 328. At the time of this attachment defendant had on hand goods of the estimated value of \$25,000 to \$30,000. In the stock then attached in defendant's possession were found a considerable number of valuable gold watches; also several elaborate pieces of diamond jewelry, which were clearly identified as having been purchased by said insolvent, and it seems carried in stock by her, prior to her insolvency, but which were not included in the assets surrendered to the assignee, and sold by him to defendant. In March, 1892, the diamonds held in the Wagner stock were worth \$20,000 or more. At the time of the insolvency the value of the diamonds on hand (and thereafter sold with the general stock by the assignee to defendant) was found to be from \$1,300 to \$1,500; but at the time of the second attachment, in July, 1893, the diamond stock in the hands of defendant was worth some \$14,000. The only additions shown to have been made to defendant's stock by purchase between the time of the sale to him by the assignee (November 16, 1892) and the time of the second attachment (July 26, 1893) consisted of diamonds, watches, etc., to the amount of about \$4,600. There was also evidence that said J. B. Wagner stated in conversation shortly after the filing of his wife's petition in insolvency that he was afraid of certain creditors, and had secreted goods. Being asked, "Did you put away \$20,000?" he said, "Yes; I put away more than that." "Did you put away \$25,000?" and he replied, "Yes; plenty." Some declarations of defendant were given in evidence which tended to show an understanding between him and J. B. Wagner that when defendant was repaid the money he had invested, with certain interest, the stock should belong to Wagner; also that he had been so repaid prior to the second attachment. He continued, how-

ever, in possession of the property, and claimed to own the same. When that attachment was levied, defendant was asked to open the strong box inside the safe belonging to the establishment. He refused, saying that it contained nothing but his private papers. It was opened a few days later, and found to contain diamonds and jewelry worth \$2,500 or more. It seems that all, or a large portion, of these goods were not part of the stock sold by the assignee to defendant on November 16, 1892, and were not shown to have been purchased by defendant elsewhere. When the case for plaintiff was closed, defendant moved for a nonsuit, which being denied, he declined to introduce any evidence.

We think the nonsuit was properly denied, and that the evidence before the court—stated above in outline merely—justified the material findings. It is true, as said in a recent case here, that the presumption of law is always in favor of the fair dealing of the parties to a transaction, and that mere suspicion of fraud is not sufficient to overcome the presumption. *Levy v. Scott*, 115 Cal. 39, 46 Pac. 892. But it is also true, as conceded in the same case, that fraud is commonly established by facts and circumstances which logically denote its existence, rather than by direct proof of covinous contrivance; by circumstances which, taken together, lead to the inference of fraud, rather than to that of honesty. "Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and the other to contradict." Code Civ. Proc. § 2061. Here it appeared that defendant purchased goods at a cost of less than \$12,000, and which there was evidence to show were worth not greatly more than that sum. He made sales amounting to \$34,000, and still had stock in his store worth above \$25,000. Admitting that he sold at a profit of 50 per cent.,—which was said in the testimony to be a fair profit for the retailer over the wholesale price,—it is still apparent that his stock was enormously augmented from some undisclosed source. If, now, the estimates and values given in evidence for plaintiff were false, it must have been easy for defendant, by production of his books or otherwise, to contradict them. If he received accessions to his stock by purchase, gift, or consignment, in addition to those proved by plaintiff, or if the goods found in his stock which had been formerly owned by Mrs. Wagner, and not surrendered by her to the assignee in insolvency, were introduced into his store without his knowledge, or had been in some way legitimately obtained, it was easy for defendant to prove these facts, and very difficult for plaintiff to prove the contrary. He offered no proof, and cannot justly complain if the court viewed his neglect with suspicion, and gave to plaintiff the advantage of the unfavorable inferences which the evidence



justified. *Bode v. Lee*, 102 Cal. 583, 36 Pac. 936; *Newman v. Cordell*, 43 Barb. 448, 461; *Bump, Fraud. Conv.* (4th Ed.) § 65. These considerations suffice to answer the specific objections urged that the evidence showed no ownership of goods alleged to have been converted either in the insolvent or in the plaintiff as her assignee, and that it failed to show that defendant converted any such goods. That the evidence pointed to the fraudulent concealment of a very large part in value of the insolvent's stock in trade prior to the filing of her petition is clear, and is not disputed by counsel. Of course any goods thus concealed belonged rightfully to the assignee. We may allow that defendant was not shown to have been either party or privy to such concealment in the first instance, but it was not essential to the making out of plaintiff's case to prove that he was. The important inquiry was whether defendant had knowingly converted to his own use property of the insolvent estate. Many articles which, it was reasonable to infer, had been concealed by Wagner, were found in defendant's possession, and he offered no explanation of this fact. The amount of his sales, and the goods remaining in his stock unsold, were out of all proportion to the investment he had made, and as to this incongruity he also remained silent. From these and the other facts developed it was a fair inference that the sales he had made included goods which had been surreptitiously withheld from the assignee.

It is claimed that there was no proof to sustain the court's finding of value of the goods converted,—\$15,000. But given the fact found, upon sufficient evidence, as we hold, that defendant sold property belonging to the assignee, and it is apparent that the amount of such sales was peculiarly within the knowledge of defendant, and extremely difficult to ascertain by plaintiff. Defendant offering no proof, the court was forced to deduce the conclusion of value from the estimates before it, and of this defendant ought not to complain, provided the deduction was fairly made. We think it was. Defendant's sales had amounted approximately to \$34,000. Assuming—what is improbable—that all the goods shown to have been purchased by him were again sold, and at a liberal margin of profit, the proceeds thereof would still be short of the total amount of sales by the sum of \$15,000 or more. It is unnecessary to specify other elements which may have entered into the estimate made by the court.

It is further urged that the evidence was fatally deficient, in that it did not identify the goods in question; that is, as we understand the argument, describe with certainty sufficient for identification the "diamonds, watches, and jewelry" mentioned in the findings, and show, first, the concealment, and, secondly, the conversion, of goods so identified. We do not think this degree of certainty can be required in an action like the

present, where, from the dispersion of the goods in the usual course of retail traffic, and other difficulties apparent in the evidence, identification was virtually impossible to the plaintiff. In modern times the rule of the action of trover invoked by defendant has not been considered hard and fast, but, on the contrary, as one amenable to circumstances. Thus, at a period when more strictness was required than now, trover was allowed for a "library of books," without expressing what they were, "because to set down the particular books would make the record too prolix." *Emery's Case*, cited in *Elpicke v. Acton*, 1 Vent. 114. Also for a "parcel of diamonds." *White v. Graham*, 2 Strange, 827. And see *Bode v. Lee*, 102 Cal. 590, pl. 4, 36 Pac. 936; *Seligman v. Armando*, 94 Cal. 314, 29 Pac. 710; 26 Am. & Eng. Enc. Law, 804, note 4; *Bank v. Montgomery*, 70 Miss. 550, 13 South. 242; *Taylor v. Wells*, 2 Saund. 74, note. Possibly, the complaint was defective, as contended by defendant, in failing to show why the property was not more specifically described therein; but defects in the complaint are not reviewable on appeal from an order denying a new trial. *Brisson v. Brisson*, 90 Cal. 323, 27 Pac. 186. The finding followed the description in the complaint, and is sustained by the evidence, which discloses also sufficient reason for the generality of the finding.

It is argued that the court erred in several rulings regarding the admission of evidence. The only specification of such errors contained in the statement on motion for new trial is that they are "pointed out and designated in the foregoing transcript by exceptions Nos. 1, 2, 3, etc., to 25, and the court erred in each of its said rulings." This was no more than to say that the court erred in the various rulings excepted to by defendant as shown in the transcript, and can scarcely be regarded as such a specification of particular errors as the statute requires. Code Civ. Proc. § 659, subd. 3. Moreover, we have been unable to find an exception in the transcript numbered in any manner. The order appealed from should be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

120 Cal. 517

SMITH et al. v. KANSAS ST. IMP. CO. et al.  
(L. A. 272.)

(Supreme Court of California. May 9, 1898.)

In bank. On application for rehearing, denied.

For former opinion, see 52 Pac. 811.

PER CURIAM. Rehearing denied, May 7, 1898.

BEATTY, C. J. I dissent from the order denying a rehearing in this case, not because I disapprove of the judgment of affirmance, but because the ground upon which it is placed is not sustained by the record. The findings of the superior court make it clear that considerable losses accrued upon those contracts, as to which the department opinion concedes that the respondent may have been liable for contribution; but I think the superior court correctly decided, upon the facts found, that by his withdrawal from the partnership upon September 19, 1887, Green was released and discharged from all liability to the co-partnership.

120 Cal. 623

MARTIN et al. v. WAGNER et al. (Sac. 294.)  
(Supreme Court of California. April 19, 1898.)

MUNICIPAL CORPORATIONS — ASSESSMENTS FOR  
STREET IMPROVEMENT—WHAT LAND SUBJECT.

1. Defendant owned half of an irregular block in the shape of a right-angled triangle, and his property touched the street corner in question, on which the assessments for paving were levied, at the point of an acute angle. The property fronted on the street which intersected the corner at right angles. *Held*, that the land was subject to assessment for improvements on the street crossing touching the acute angle, under St. 1891, p. 196, § 7, subd. 3, providing that the expense of the work done on main street crossings shall be assessed on the quarter blocks and irregular blocks adjoining and cornering on the crossings, and separately on the whole of each lot or portion of a lot having any frontage in the said blocks fronting on said main streets halfway to the next main street crossing, and all the way on said blocks to a boundary line of the city where no such crossing intervenes, but only according to its frontage in said quarter blocks and irregular blocks.

2. A main street ran diagonally through what would have constituted a block had not half of it been cut off by a lake, and terminated at the corner of said block where two other streets intersected. *Held*, that the quarter block facing on such street, and adjoining such crossing, could be assessed for paving such crossing, under St. 1891, p. 196, § 7, subd. 4, providing that, where a main street terminates in another main street, the expenses of the work done on one-half of the width of the street opposite the termination shall be assessed on the lots in each of the two quarter blocks adjoining and cornering on the same, and the expense of the other half of the width of said street on the lots fronting on the other half of the street at such termination.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by M. M. Martin and others against

J. C. Wagner and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Jas. A. Louttit, for appellants. Elliott & Elliott, for respondents.

**BELCHER, C.** This is an action on a street assessment for work done and materials furnished in paving and improving El Dorado street, in the city of Stockton. The complaint sets out very fully all the facts necessary to constitute a cause of action, and the only denials in the answer are (1) that the total cost of the street improvement was assessed and apportioned upon all the lots and lands assessable and liable therefor; (2) that defendants, or either of them, own any property fronting on said work or improvement; and (3) that the land described in the complaint has any frontage upon said improvement. The court below found in favor of defendants upon all the issues raised, and gave judgment accordingly, from which, within 60 days after its rendition, the plaintiffs appealed.

The defendant J. C. Wagner was the owner of the east half of block 94, east of Center street, as known and designated on the official map of said city, and the following diagram of the block with its surrounding streets will serve to illustrate the situation:



It was admitted that the said block has a frontage on Oak street, between El Dorado and Center streets, of 300 feet, city measure. There was an assessment upon the 150 feet of the said block fronting on Oak street, and owned by defendant, to pay a proportionate share of the expense of the improvement on the crossing of El Dorado and Oak streets; and there was another assessment called "Opposite Termination" assessment, upon 167½ feet of defendant's said land fronting on Fremont street, the two assessments aggregating the sum sued for. It will be observed that said block 94 is in the form of a right-angled triangle, and that it touches El Dorado street only at the point of an acute angle. Under these circumstances, the question, and the only one mooted, is, was his land subject to assessment for any improvements made on the said street?

The street improvement act of 1885, as

amended in 1891 (St. 1891, p. 196), contains the following provisions: Section 7, subd. 3: "The expense of the work done on main street crossings shall be assessed at a uniform rate per front foot of the quarter blocks and irregular blocks adjoining and cornering upon the crossings, and separately upon the whole of each lot or portion of a lot having any frontage in the said blocks fronting on said main streets, half way to the next main street crossing, and all the way on said blocks to a boundary line of the city where no such crossing intervenes, but only according to its frontage in said quarter blocks and irregular blocks." Section 7, subd. 4: "Where a main street terminates in another main street, the expenses of the work done on one-half of the width of the street opposite the termination shall be assessed upon the lots in each of the two quarter blocks adjoining and cornering on the same,—according to the frontage of such lots on said main streets,—and the expense of the other half of the width of said street upon the lot or lots fronting on the latter half of the street at such termination." Section 34, subd. 7: "The word 'street,' as used in this act, shall be deemed to, and is hereby declared to, include \* \* \* crossings or intersections, \* \* \* and the term 'main street' means such actually opened street or streets as bound a block; the word 'blocks,' whether regular or irregular, shall mean such blocks as are bounded by main streets, or partially by a boundary line of the city." Section 34, subd. 12: "The term 'quarter block,' as used in this act as to irregular blocks, shall be deemed to include all lots or portions of lots having any frontage on either intersecting street half way from such intersection to the next main street, or, when no main street intervenes, all the way to a boundary line of the city."

Under these provisions of the statute, we think it clear that defendant's land was properly assessed for a part of the expenses of the work done on the crossing. It was the east half of an irregular block adjoining and cornering upon the crossing, and having a frontage on Oak street halfway to the next main street crossing. To say that, as a point has no length or breadth, there is no frontage of the property on the work, does not meet the case. The property cornered on the work, and had an admitted frontage of 150 feet on the intersecting street; and this was all the statute required.

We also think defendant's land was properly assessed for a portion of the expenses of the work done opposite the termination of Fremont street. It appears that that street passes diagonally through what would constitute block 94 if a portion of it had not been cut off by the lake. It is a main street, and terminates at El Dorado street. In such cases "the expenses of the work done on one-half of the width of the street opposite the termination shall be assessed upon the lots in each of the two quarter blocks adjoining and corner-



ing on the same, according to the frontage of such lots on said main streets." Suppose Fremont street had terminated on El Dorado street, 10 or 20 feet further south, in that case there could be no question that defendant's quarter block would be subject to the termination assessment, according to its frontage on each of the main streets. Here, as the land only cornered on El Dorado street, there could be, and was, no assessment for frontage on that street, but the assessment for the frontage on Fremont street was clearly authorized. No objection is made that either of the assessments was for too large a sum, or to the validity of the assessments, if the said quarter block was in any way subject to assessment for the work done. The judgment should be reversed, and the cause remanded.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded.

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5 Cal. Unrep. 980

FOX v. HALE & NORCROSS SILVER-MIN.  
CO. (S. F. 683.)

(Supreme Court of California. May 9, 1898.)

REHEARING—REVERSAL.

A reversal of a judgment on appeal will be set aside, on the ex parte application of the respondent for leave to remit a portion thereof, and for an affirmance of the remainder, to enable the court to consider such application on a rehearing, which will be limited to that proposition.

McFarland and Van Fleet, JJ., dissent.

In bank. On application for rehearing. Granted.

For former opinion, see 53 Pac. 32.

PER CURIAM. The respondent having made an ex parte motion for a modification of the judgment of reversal heretofore given, it is ordered that the said judgment be vacated and set aside in order that the court may consider the application of the respondent for leave to remit a portion thereof, and for an affirmance of the remainder. The rehearing will be limited to this proposition, and the respondent will serve notice of his motion upon the appellants.

McFARLAND, J. I dissent from the whole of the foregoing order.

VAN FLEET, J. I dissent. If the judgment of this court is to be set aside for any purpose, I think the order should be general.

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6 Cal. Unrep. 10

OHLANDT et al. v. JOOST et al. (S. F. 1442.)  
(Supreme Court of California. May 3, 1898.)

APPEAL—DISMISSAL.

Where a motion to dismiss an appeal involves an examination into its merits, the motion will be denied, with leave to renew it on submission of the cause.

In bank. Appeal from superior court, city and county of San Francisco.

Action by one Ohlandt and others against one Joost and others. On motion to dismiss an appeal. Denied.

Mullany, Grant & Cushing, for appellants. A. F. Morrison, for respondents.

PER CURIAM. It appearing that a determination of the motion to dismiss the appeal in this case involves the necessity of an examination into the merits of the appeal, it is ordered that said motion be, and it is hereby, denied, with leave to the respondents to renew such motion in submitting said cause upon the merits.

120 Cal. 648

SOLANO COUNTY v. McCUDDEN. (Sac.  
307.)

(Supreme Court of California. May 3, 1898.)

STATUTES—OPERATION—UNIFORMITY—COUNTIES.

St. 1893, p. 365, § 51, requiring all claims of members of the board of supervisors against a county for services to be presented to the district attorney for approval before allowance, does not conflict with section 25, subd. 12, authorizing the board to allow all accounts chargeable against the county, and hence does not violate Const. art. 1, § 11, requiring all laws of a general nature to be uniform in operation.

Commissioners' decision. Department 1. Appeal from superior court, Solano county.

Action by Solano county against James H. McCudden. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Geo. A. Lamont, for appellant. Frank R. Devlin, for respondent.

BRITT, C. Defendant was a member of the board of supervisors of Solano county, and ex officio commissioner of a certain road district. At various times from December 5, 1893, to September 2, 1895, inclusive, he presented to said board, of which he was a member as stated, claims against the county for services performed by him as road commissioner. Such claims were allowed by the board, and were paid out of the county treasury. None of them was presented to the district attorney of the county, and none

of them bore his indorsement of approval or rejection. This is an action by the county to recover the amount of the several payments made as aforesaid. The services for which defendant was paid were actually rendered, and there is no charge of bad faith against him. The county recovered judgment.

It is provided in section 51 of the county government act of 1893 (Statutes of that year, p. 365) that all claims against the county presented by members of the board of supervisors for any service rendered by them must, before allowance, be presented to the district attorney, "who must indorse thereon in writing his opinion as to the legality thereof; if he declare the claim illegal, he must state specifically wherein it is illegal, and the claim must then be rejected by said board." It is undisputed in the case that if such requirement was valid the judgment is right. See section 8 of the act. Subdivision 12 of section 25 of the same act confers power on the board of supervisors "to examine, settle and allow all accounts legally chargeable against the county," with a specified exception not material here; and it is contended for defendant that said section 51 of the act conflicts with the general provision of subdivision 12 of section 25 by giving to the district attorney supervisory power over claims presented by members of the board, and on that account is violative of the command of the constitution that all laws of a general nature shall have a uniform operation. Article 1, § 11. We are unable to concur in the view of defendant's learned counsel. Section 51 does not purport to clothe the district attorney with authority essentially different from the power exercisable by him as to any claim whatever presented to the board for allowance. It is his duty to attend meetings of the board, and "oppose all claims and accounts against the county when he deems them illegal and unjust." Section 137 of said act. True, under the section last cited, the opposition of the district attorney does not control the discretion of the board to allow the claim opposed, while under section 51 the board is bound to reject the claim of one of its members if the district attorney in writing declares it illegal and states specifically wherein it is illegal, but this is not because of any enlarged power of the district attorney to supervise or usurp the proper functions of the board. It is the mandate of the law which thus discriminates between classes of claims, viz. those presented by the members of the auditing board, and those presented by other persons, and requires the rejection of the former on the unfavorable opinion of the district attorney. We think it quite apparent that claims of its own members are on a footing before the board so different from claims in general that special conditions for their allowance may justly be imposed by the legislature;



and, as the requirement for submission to the district attorney applies alike to all claims within the category thus peculiarly circumstanced, the provision of the statute has uniformity of operation, within the meaning of the constitution. *People v. Judge of Twelfth Dist.*, 17 Cal. 547; *People v. Henshaw*, 76 Cal. 436, 442, 18 Pac. 413; *People v. Railroad Co.*, 105 Cal. 576, 584, 38 Pac. 905. A judge of the superior court must pass upon and allow or reject claims against the estates of decedents in process of administration before him, but if he has a demand of his own against an estate he must obtain its allowance by some other judge. Code Civ. Proc. § 1495. It would probably not be contended that this provision affects the uniform operation of the statutes concerning claims against estates in probate. The principle of *Dwyer v. Parker*, 115 Cal. 544, 47 Pac. 372, cited by appellant, seems to us inapplicable here. There the statute drawn in question purported to confer on the district attorney discretionary power to determine in what cases justices of the peace and constables should be paid for certain official services; and this, whether such services had been performed in cases required by law or not, and whether for such services the law provided for their compensation or not. Here no such authority is given him. His duty as to the claim of a supervisor is merely to advise on its legality as presented, not to decide whether it shall be allowed as a matter of policy, even if found to be legal. Moreover, his conclusion is not final. The supervisor whose claim is rejected has still the right to sue the county thereon in the proper court. Section 44 of said act. The judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

120 Cal. 645

PEOPLE v. SOUTHERN. (Cr. 208.)

(Supreme Court of California. April 30, 1898.)  
HOMICIDE—DYING DECLARATIONS—VIEW BY JURY.

1. Dying declarations are admissible on behalf of the accused to show that the killing was by another person.

2. It is discretionary to allow a view of a scene of a homicide by the jury, and error assigned thereon must be affirmatively shown to warrant a reversal.

Department 1. Appeal from superior court, Orange county.

Gray G. Southern was convicted of murder in the second degree, and appealed. Reversed.

C. S. McKelvey and Brousseau & Montgomery, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. The defendant has been convicted of murder of the second degree, and now prosecutes this appeal. The deceased was an Indian, and his death was caused by a shot from a pistol. The shooting occurred upon a public street of the city of Santa Ana, at about the hour of 10 p. m. The defendant denied that he fired the shot, or was present at the scene of the shooting.

During the progress of the trial, when the time arrived for the defendant to present his case, he proposed to prove a dying declaration of the deceased. This declaration was made by deceased in answer to a question put to him by a bystander a few moments after the shooting, and was to the effect that he (deceased) was shot by a Mexicano (Mexican). In view of the fact that the defendant is an American, the importance of this evidence to him is readily perceptible. There was evidence introduced tending to show that the defendant a few moments before the shooting addressed the deceased in the Mexican dialect, and also other evidence indicating that the locality where the shooting occurred was but dimly lighted. From these circumstances, it could well be argued to the jury that the deceased was mistaken as to the identity of the party who was his assailant; but those circumstances shed no light whatever upon the question as to the admissibility in evidence of this declaration of the deceased. In view of the fact that objections were sustained to nearly all questions addressed to the witnesses by counsel for defendant looking towards the establishment of a sufficient foundation upon which to rest the admission of evidence of this declaration of the deceased to the effect that he was shot by a Mexican, it would seem that the court took the broad ground that a dying declaration made by the deceased, which is favorable to a defendant on trial, cannot be introduced before the jury for his benefit. Evidence tending to show that the statement of the deceased was one made in extremis, and therefore admissible as a dying declaration, was rejected. For that reason we are not called upon here to examine the sufficiency of the foundation laid to form the basis for the admission of the dying declaration. Let us concede this declaration admissible, unless for the single reason that it was favorable to defendant. Is that reason good in law? There is a dearth of authority upon the question. In *Rex v. Scaife*, 1 Moody & R. 551, Justice Coleridge asked counsel for the prisoner if they could refer him to a case where the declaration of a dying man in favor of a prisoner had been received in evidence; and counsel replied that they had searched for such a case, but had not found it. In *People v. McLaughlin*, 44 Cal. 436, this court volunteered to cast some doubt upon the admissibility of such declarations, but expressly stated that it did not give an opinion upon the point. The court,

in *Moore v. State*, 12 Ala. 767, said: "We conceive the rule to be that the dying declarations of the deceased may be given in evidence as well to acquit as to convict the accused, and they are not limited as evidence in favor of the state alone." The same principle is also declared in *People v. Knapp*, 26 Mich. 112, the court there holding that the prisoner had the same right with the people to show dying declarations, and stated that the rule would be very unjust unless so applied. 1 Greenl. Ev. § 159, and 3 Russ. Crimes, p. 270, seem to be in line with the two cases cited.

Upon principle there is no reason why a defendant is not entitled to invoke as evidence the dying declarations of the deceased. If such declarations are competent evidence to prove facts, what matters it that such proof tends to acquit the defendant rather than convict him? The state is as much interested in acquitting an innocent man charged with crime as it is in convicting a guilty man so charged. And surely the probability of the truth of a statement made by the dying deceased, tending to justify the assault upon him by the defendant, is entirely equal to the probability of the truth of a statement made by him bearing against the defendant. Indeed, there is no sound reason to be urged why the statement in one case should be received as evidence, and in the other case rejected. It may be said that this reasoning does not apply with full force in the present case, for here it is denied that defendant even assaulted the deceased; but the principle we have invoked applies nevertheless, and, when it is shown that the statement is a dying declaration in the sense of the law, a defendant is entitled to have it placed before the jury for its consideration.

A multitude of exceptions are disclosed by the record taken to the rulings of the court upon questions addressed to various witnesses. Many of these exceptions present close questions of law. It would seem that the prosecuting officer was zealous in objecting to all questions asked by counsel for defendant where a doubt existed in his mind as to their legal soundness. It is always a dangerous practice to thus attempt to hew to the very line of the law, for the slightest encroachment upon the other side may result in a mistrial. A much better practice is for both the prosecutor and the court to be liberal in these matters, and under all ordinary conditions to resolve doubtful questions in favor of the defendant. It is a safer and better course, for it will prevent mistrials, which often follow as a result of an effort to rigidly adhere to the letter of the law.

There are many other alleged errors occurring during the progress of the trial upon which appellant relies for a reversal of the judgment. Some of these assignments of error present important questions of law,

but, as a new trial must be ordered upon other grounds, they will not be considered; for upon a second trial it is evident that they will not again arise.

The court allowed a view to be taken by the jury of the scene of the homicide. Error is now predicated upon this proceeding. It rests upon appellant to show error in this regard, and in the absence of an affirmative showing to that effect the proceeding will be sustained. It may be suggested that the trial court has an absolute discretion in granting or refusing an application for a view, and under any ordinary circumstances the safer course would be a denial of the application. There is always great danger that something may be said or done, or omitted to be done, in taking a view, which will operate in creating a mistrial of the cause. We find no sound objection to the law given by the court to the jury. For the foregoing reasons the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

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120 Cal. 688

LOUSTALOT v. CALKINS et al. (L. A. 388.)  
(Supreme Court of California. May 24, 1898.)

ACTION ON NOTE—PARTIES DEFENDANT—  
FINDINGS.

1. Under Code Civ. Proc. § 383, providing that persons severally liable on the same note may all be included in the same action, an indorser on a negotiable note may be joined as a party defendant in a suit on the note.

2. A complaint on a note alleged that defendant, before delivery, indorsed it, waiving protest and notice. The court made a general finding that the allegations of the complaint were true, and found that defendant signed the note as a guarantor. *Held*, that the findings were not contradictory, and supported the judgment.

Department 1. Appeal from superior court, Santa Barbara county.

Action by Peter Loustalot against A. C. Calkins and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Parsons & Sherer and W. S. Day, for appellants. Thos. McNulta, for respondent.

GAROUTTE, J. This appeal is prosecuted from the judgment, without a bill of exceptions. The action is brought upon a negotiable promissory note against A. C. Calkins, J. B. Libeu, and J. W. Calkins; and a joint and several judgment was rendered against them. They now appeal, and rely upon two grounds for a reversal of the judgment: (1) The demurrer of J. W. Calkins to the complaint should have been sustained; (2) the findings of the court are not sufficient to support the judgment.

The demurrer of J. W. Calkins declares there is a "misjoinder of parties defendant, in that J. W. Calkins, an alleged and supposed guarantor, is joined with the principal promisors." The complaint alleges that "the defendants A.

C. Calkins and J. B. Libeu made their certain promissory note, in words and figures following: \* \* \* " It is further alleged that defendant J. W. Calkins then and there indorsed said note in the following words, to wit: "Waiving notice and protest. J. W. Calkins,"—"and that after the signing and indorsing of said note as aforesaid, the said defendants did then and there deliver said promissory note to the plaintiff." Section 3117 of the Civil Code provides: "One who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon as an indorser." Tested by this section of the Code, the facts here alleged plainly place the defendant J. W. Calkins in the position of an indorser of the note. In many jurisdictions he would be termed an anomalous or irregular indorser. In speaking as to parties who may be joined as defendants, the Code of Civil Procedure (section 383) declares, "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff." By a liberal construction of this provision, it may be fairly said that an indorser, such as this defendant, Calkins, is a party to the promissory note. It is said in *Riggs v. Waldo*, 2 Cal. 487, "Each one who writes his name upon it is a party to it, and, from its original character, each party to it is an original undertaker." The object of this section of the law is directed solely to the avoidance of a multiplicity of actions, and we see no substantial objection to the application of the rule to a case like the one at bar. Upon an examination of the authorities from other states having statutory provisions substantially similar to the one found in our Code, we find those authorities preponderating to the effect that a guarantor and the maker of a promissory note may not be joined as parties defendant; but that question is not directly before us, and we pass it by for that reason. In this state, from its earliest judicial history, the makers and indorsers of negotiable promissory notes have been joined as parties defendant, and no question as to the correctness of the practice has ever been suggested. For this reason alone we feel constrained to give the statute a construction which it has tacitly borne for so many years. See *Riggs v. Waldo*, supra; *Pierce v. Kennedy*, 5 Cal. 138; *Ford v. Hendricks*, 34 Cal. 673; *Jones v. Goodwin*, 39 Cal. 493; *Fessenden v. Summers*, 62 Cal. 484; *Young v. Miller*, 63 Cal. 302. The demurrer was properly overruled.

Are the findings of fact sufficient to support the judgment? The court made a general finding to the effect that all the allegations of the complaint were true. The allegations of the complaint which we have heretofore quoted, taken in connection with the additional fact that the note sued upon was negotiable in character, make J. W. Calkins an indorser, under section 3117 of the Civil Code. He



is also an indorser who has waived notice and protest. Being a proper party defendant, it necessarily follows from these facts that the judgment against him is fully supported. The court, in addition to these findings, also found as a fact that Calkins signed the note as a "guarantor." And it is now insisted that such finding is contradictory to those findings showing him to be an indorser. If a guarantor may be joined in this state with the maker of the note, as a party defendant, then this finding gives a second ground for supporting the judgment, and that would be its only effect. But, conceding for present purposes alone that the law as to proper pleading would forbid such joinder of defendants, still the two findings of fact are not at all contradictory. A person may be an indorser upon a promissory note under the aforesaid section 3117, and also a guarantor upon the same note. Here the court found the defendant to be an indorser, and that fact itself was sufficient to support the judgment. For the foregoing reasons the judgment is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

120 Cal. 660

PEOPLE v. PRATHER. (Cr. 360.)

(Supreme Court of California. May 18, 1898.)

LARCENY—INFORMATION—DESIGNATION OF OWNERSHIP OF STOLEN PROPERTY—SUFFICIENCY—WITNESSES—EXAMINATION—EVIDENCE—DECLARATIONS OF ACCUSED—IMPEACHMENT—INSTRUCTIONS.

1. Under Pen. Code, § 956, providing that, where an offense for a private injury is described with sufficient certainty to identify the act, an erroneous allegation as to the person injured is not material, an information charging a larceny of cattle as belonging to the estate of a deceased person is not fatally defective.

2. In a prosecution for grand larceny it is unnecessary to allege in the information that the property was taken to another county, where the offense was completed in the county wherein the information was filed.

3. It is proper to allow a witness to be withdrawn in order to lay a foundation for the admissibility of his testimony.

4. Declarations of a person accused of crime in his own favor are not admissible.

5. It is competent to ask a witness in a prosecution for larceny, who had been arrested for the same offense, but discharged without examination, for the purpose of impeaching his testimony, if he had not previously made statements different from his testimony given on the trial.

6. Where accused testifies in his own behalf, to discredit him testimony as to his general reputation in the community for truth, honesty, and integrity is admissible.

7. Instructions covered by others given are properly refused.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county.

Frank Prather was convicted of grand larceny, and appealed therefrom, and from order denying a motion for a new trial. Affirmed.

J. C. Ball and W. R. Jacobs, for appellant. Atty. Gen. Fitzgerald, for the People.

SEARLS, C. This is an appeal by the defendant from a judgment of conviction of grand larceny, and from an order denying his motion for a new trial. The defendant was prosecuted by information filed by the district attorney in the county of Yolo, on the 14th of April, 1897. The following excerpt from the information will serve to illustrate the objections urged against its sufficiency: "The said Frank Prather did, on or about the 8th day of March, 1897, in the county of Yolo, state of California, then and there being, willfully, unlawfully, and feloniously steal, take, and drive away certain cattle, being cows and steers, the personal property of the estate of James G. Fair, deceased, said property being then and there of the aggregate value of \$780," etc. A motion was made to set aside the information, but, as the grounds upon which it is based are not made to appear of record or otherwise, the ruling of the court does not call for comment.

A demurrer was interposed to the information upon the statutory grounds prescribed by section 1004 of the Penal Code. The demurrer was disallowed by the court, and the ruling is assigned as error. The contention of appellant is that the information is too indefinite, in that the property alleged to have been feloniously taken could not have belonged to the estate of James G. Fair, deceased. It is true that, technically speaking, the personal property of James G. Fair, at his death, descended to his heirs or legatees, subject to the possession and a special property in his executors or administrators for the purposes of administration. At common law the ownership in such cases might be averred to be in the heir at law, if in possession, or in the ordinary before proof of the will, or in the executor or administrator after their appointment. But to aver ownership in a deceased person or in an estate was fatal. A like rule prevailed in this state prior to the adoption of our Penal Code. *People v. Hall*, 19 Cal. 425.

The question, then, is: Has the Code wrought such a change as to the allegation of ownership as to render this error now unimportant? Section 956 of the Penal Code provides that "when an offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." In *People v. Leong Quong*, 60 Cal. 107, which was a case of grand larceny, the court said: "The name of the owner of property stolen is not a material part of the offense charged. It is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offense." In *People v. Smith*, 112 Cal. 333, 44 Pac. 663, which was a case of larceny, the complaint charged the defend-

ant with stealing property belonging to the estate of W. C. Elledge, deceased. The information alleged ownership in Joseph Elledge and Mrs. M. J. Elledge, as executor and administratrix of the estate of W. C. Elledge, deceased; and it was held by this court that "there was no substantial variance in the offense, as charged in the complaint and in the information"; that "in each the offense was described with sufficient certainty to identify the act, and the alleged ownership was in effect the same, namely, in the estate of W. C. Elledge, deceased." In common parlance, we speak of property as belonging to the estates of deceased persons. We assess them as such for the purposes of taxation, and in various ways recognize property as belonging to such estates; and under section 957, Pen. Code, "the words used in an indictment or information are construed in their usual acceptance in common language, except such words and phrases as are defined by law." The act of the defendant constituting the offense is clearly and distinctly set forth in ordinary and concise language, and it is not within the bounds of reasonable probability that he was or could have been misled or in any wise jeopardized by the designation of the property as belonging to the estate of Fair, rather than to his executors or administrators. "No indictment or information is insufficient \* \* \* which does not tend to the prejudice of a substantial right of the defendant upon its merits." Pen. Code, § 960. See, also, section 1404.

It is also objected that the offense charged, if committed at all, was begun in the county of Yolo, and consummated in the county of Colusa, and that these facts should have been stated in the information. As nothing of this sort appeared on the face of the information, it was no cause for demurrer or motion to set aside the information. It may be remarked that the larceny is charged, and the evidence tended to show, that the offense was completed in the county of Yolo, and it was sufficient to so charge. It is true that the evidence showed that the stock was driven to the county of Colusa. Had the information been filed in the latter county, the question sought to be raised by appellant would have been involved, but it has no application here. The demurrer was properly overruled.

It is next urged that the court erred in refusing to strike out the testimony of Asa Morris, a witness for respondent. This witness had testified that about the 1st of March, the date not being remembered, but as he thought one week, more or less, before he heard of defendant's arrest, he met the latter in McGriff's or Griffin's Lane, a narrow and muddy lane in the vicinity of Knight's Landing, and asked him "what he was doing down there in the mud," to which defendant answered that "he was looking after some cattle for Doug. Mc-

Griff." The prosecution then withdrew the witness, with a view, as appears, of offering other testimony as to dates, etc. The court, in refusing to strike out the testimony, stated that it desired to give the district attorney an opportunity to connect the transaction. The testimony of J. J. Ely and others subsequently taken indicated that it must have been about the 8th or 9th of March that defendant met Asa Morris, and thereupon the court held the testimony of Morris admissible. In this there was no error. The testimony was of little importance, but was admissible for what it was worth. Nothing is more common than to permit a witness to be withdrawn in order to lay the proper foundation for the admissibility of his testimony, and it is as proper as common. The evidence showed without contradiction that defendant drove the cattle alleged to have been stolen from near the Fair ranch, in Yolo county, to a ranch owned or claimed by his (defendant's) father, some six or eight miles west of Arbuckle, in Colusa county.

A brother of defendant had been up to this ranch with provisions, and when on his return, and on the 11th day of March, met the defendant, just west of Arbuckle, driving about 30 head of cattle, and had a conversation with him. Defendant's counsel then sought to prove by their witness what the conversation was. The testimony was objected to, and the objection sustained. The evident object was to prove the declarations of the defendant in his own favor. We think the court was correct when, in ruling on the question, it spoke of it as "a self-serving statement, and not admissible."

Edward Prather, a brother of the defendant, was called as a witness on behalf of the latter, and testified in substance that in February and March he was on his father's ranch, west of Arbuckle, taking care of the latter's cattle; that some of their cattle had wandered away, and that he wrote a letter to his family apprising them of the fact, and that some of Fowler's cattle, whose ranch adjoined, had also disappeared, and asked them to look out for them at Knight's Landing, from whence the Prather cattle had been driven in January, 1897; that on the 11th of March, 1897, the defendant arrived at the ranch with some 25 or 30 head of cattle, 4 of which belonged to them (his father), and supposing the others were the Fowler cattle, or stock being ranched by the latter, they turned them over on the Fowler premises. On cross-examination the district attorney, for the purpose of impeaching the witness, was permitted, against the objection of defendant, to ask the witness various questions, among which were: "(1) Did you not tell me that you did not know the stock was on that place for several days after it was brought there? (2) Didn't you say: 'I am innocent. I didn't know that stock was upon that place for several days. I did not see Frank [the defendant] at all'? (3) Did



you tell me that you told a falsehood to Linton about these cattle upon this place? (4) Did you explain to me that you told this falsehood because no man could expect me to convict my brother?" It appeared that the witness had been arrested, charged with the same larceny, and that this conversation was had in a room in the court house near the jail, and that the witness had been discharged without an examination. These questions and some others of like tenor were proper as tests of the credibility of the witness. The cases of *People v. Greening*, 102 Cal. 384, 36 Pac. 665, *People v. Dilwood*, 94 Cal. 89, 29 Pac. 420, and others cited by appellant on the question, are not in point. Code Civ. Proc. § 2052.

There are some other objections made to the rulings of the court upon the admission of evidence, but they are not, with a single exception, of sufficient importance to call for comment. The exception to which we allude is this: The defendant was a witness in his own behalf, and gave testimony vital to his defense. In rebuttal, the prosecution introduced as a witness one B. S. J. Hiatt, to whom the following question was put: "Q. Do you know the general reputation of Frank Prather [the defendant] for truth, honesty, and integrity, in the community where he lives?" Counsel for defendant objected to the question as irrelevant, immaterial, and incompetent. It seemed to be conceded by defendant's counsel that the truth and veracity of defendant were proper subjects of inquiry, but that other traits were not properly in issue. The objection was overruled, and in conclusion the witness said: "Well, it is bad." Counsel for appellant urge with earnestness and zeal that testimony as to the honesty of defendant was inadmissible, and that for that error the judgment should be reversed. In support of their contention, they cite the case of *State v. Marks*, decided by the supreme court of Utah, February 4, 1898, and reported in 51 Pac. 1089. That case is not in all respects precisely in point with the case at bar, for the reason that there the question put to the witness was, "Do you know the reputation of the defendant in that community for truth, honesty, and integrity?" while here the question was, "Do you know the general reputation," etc. The court, however, after disposing of the first question in favor of the appellant, proceeded to say that the character of the defendant for honesty was not in issue, and that the question should have been confined to the general reputation of the defendant for truth and veracity, and hence that the court below erred, for which error a reversal was had. This case certainly sustains the contention of the appellant here. Section 2052 of our Code of Civil Procedure is in part as follows: "A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, and integrity is bad." This, being a statutory provision, may well be held to enlarge the scope of impeaching testimony.

"The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this Code." Pen. Code, § 1102. We shall not discuss the question at large, for the reason that this court has foreclosed it in this state. In *People v. Hickman*, 113 Cal. 80, 45 Pac. 175, which is directly in point, it was held that just such a question as that propounded here, and put under like circumstances, was proper; citing *People v. Beck*, 58 Cal. 212, and *People v. Bentley*, 77 Cal. 7, 18 Pac. 799.

Appellant contends that the court, by the second instruction given on behalf of the prosecution, instructed the jury to find the defendant guilty of grand larceny. To reach this result, counsel for appellant eliminates from the second instruction all that portion qualifying the language to which he objects. In the first instruction the court had fully explained to the jury the distinction between grand and petit larceny, and had explained to them that the felonious stealing, etc., of "a cow, steer, bull, calf," etc., is grand larceny. Pen. Code, § 487. The second instruction, in its entirety, is as follows: "(2) It will be noticed from this definition of grand larceny that every felonious stealing, taking, and driving away of cows, steers, bulls, and calves is grand larceny, regardless of the value of the property taken; and in this case, as there is no evidence of anything other than calves, cows, steers, and bulls having been taken, you would not be at liberty to find the defendant guilty of petit larceny, but your verdict must be guilty of grand larceny, if you should believe from the evidence beyond a reasonable doubt, and to a moral certainty, that the defendant, as charged in the information, did steal, feloniously, a cow, steer, bull, or calf; or if you should, upon this proposition, have a reasonable doubt of the guilt of the defendant, your verdict should be not guilty." The language of the instruction, taken as a whole, refutes the position of appellant. The thirtieth instruction asked by defendant was refused, "because given elsewhere by the court." It was in all essential particulars covered by the instructions given at the request of defendant in numbers 31, 32, 33, and 34. These instructions are too lengthy to be copied. They are to be found at pages 134 and 135 of the transcript.

There are some minor points made by appellant, but the foregoing are all that it is deemed necessary to notice. The instructions were very lengthy, and those given placed the law of the case fairly and plainly before the jury. Upon a patient review of the record, we are of opinion the judgment and order appealed from should be affirmed; and we so recommend.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.



(120 Cal. 652)

**LAUER v. ESTES. (Sac. 413.)**

(Supreme Court of California. May 18, 1898.)

**ELECTIONS—ILLEGAL BALLOTS—DECLARATION OF VOTER—EVIDENCE—PARTIES.**

1. Under Pol. Code, § 1215, providing that no voter shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him, a mark upon a ballot, having no lawful right there, and that might serve as an identifying mark, vitiates the ballot.

2. In an election contest, the declaration of a voter as to how he voted is inadmissible.

3. In an election contest a voter is not a party unless such of record.

Department 2. Appeal from superior court, Modoc county; G. G. Clough, Judge.

Action by E. Lauer against W. F. Estes. Judgment for plaintiff, and defendant appeals. Reversed.

G. F. Harris, for appellant. Goodwin & Stewart, H. L. Sprague, and D. W. Jenks, for respondent.

**McFARLAND, J.** This is an election contest, and involves the office of supervisor for the Fourth supervisor district of Modoc county. The board of supervisors, after canvassing the returns, declared Estes elected, and he received the certificate of election. Afterwards Lauer commenced this present contest, and the superior court rendered a judgment annulling the said certificate of election, and declaring Lauer to have been duly elected to said office. From this judgment Estes appeals.

The court found that the appellant, Estes, received 131 legal votes for said office of supervisor. By finding 3 the court found that the respondent, Lauer, received 132 legal votes for said office; and in finding 7 it is found that the said respondent, Lauer, received 133 legal votes for the office. Appellant contends that these two findings as to the number of votes received by the respondent are fatal to the validity of the judgment, because they are inconsistent and uncertain. These findings might be embarrassing under certain circumstances, but we do not think that matter material in the case at bar, because, in our opinion, there were errors committed by the court prejudicial to the appellant to the extent of at least three votes. In this case—and the same thing occurs in most election contests—each counsel contends that, with respect to certain points, the evident intention of the voter expressed by the ballot should prevail as against what is called the “technicalities” of the election law, while with respect to other points the same counsel contends that other votes should be rejected because not in compliance with the mandatory provisions of the Code, no matter how clearly the ballots may express the intention of the voters. For instance, respondent's counsel contends that the court was right in excluding a certain vote for appellant, because the stamp on the ballot was outside of the perforated line, which ruling appellant's counsel

considers highly technical, erroneous, and unjust, because the intent to vote for appellant was quite clear. But appellant contends that certain other votes counted for respondent should have been excluded, notwithstanding the apparent intentions of the voters, upon grounds which respondent's counsel considers highly technical. The truth is that under our present election laws courts cannot confine themselves to a mere inquiry as to what the voter intended to express by his ballot. The law has many other purposes, and to accomplish them it provides in great detail what the ballots shall be,—what the voter may do and what he may not do; and it declares that “any ballot which is not made as provided in this act shall be void, and shall not be counted.” Pol. Code, § 1211. For instance, the law evidently contemplates that the intent which a ballot expresses may be the result of coercion or undue influence, and endeavors to prevent one having power over another from knowing how the latter voted; and so it is provided that “no voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him.” Section 1215. And this provision is mandatory. *Tebbe v. Smith*, 108 Cal. 108, 41 Pac. 454, and cases there cited. Under the sections of the Code last above quoted the court erroneously counted for the respondent the “challenged ballot No. 15,” attached to the transcript between pages 42 and 43. In that ballot the voter regularly stamped the number of presidential electors for whom he was entitled to vote, and at a point a couple of inches further down on the ballot, and opposite certain other candidates for presidential electors, there is a mark apparently made with ink, which is clearly a distinguishing or identifying mark within the meaning of the Code. It is not slight, nor is it connected with any other mark properly made by the stamp, nor is there any evidence that it was a mark made by the folding of the ballot. It stands by itself, is in a place where it has no authority to be, is about half an inch in diameter, is very distinct and pronounced, and there is no apparent reason why it was not put there as a distinguishing mark. The vote on this ballot was for the respondent, Lauer, and should not have been counted for him. For similar reasons the challenged vote No. 25, which appears on the ballot attached between pages 64 and 65 of the transcript, should not have been counted for the respondent. On that ballot there is a stamp regularly made after the name of Lauer for supervisor; but lower down on the ballot, and opposite the blank line, there is also another distinct cross, and this cross was clearly a distinguishing and identifying mark. Under the views expressed in *Tebbe v. Smith*, *supra*, there is no ground for holding that the marks upon said two ballots above referred to are not distinguishing or identifying marks. If we disregard them, we are “left without a fixed rule by which the officers of election

are to be guided in counting the ballots." The marks in question were not legal marks placed upon the ballot in a legal place, and were, therefore, unauthorized. In the *Tebbe* Case the letter "J" was written in the blank space left for the insertion of a name for justice of the peace; and the court say: "Doubtless it may have been the intention of the voter to write a name, and he may have abandoned his intent after setting down the initial letter; but doubtless also the mark would serve as a distinguishing mark, and, being one having no lawful right upon the ballot, it renders it void." Of course, it might clearly appear on the face of a ballot that a mark was the result of accident; but there is no such showing in the case at bar. Either of the marks may have been intended as a distinguishing mark, and, being in their nature distinguishing marks, they vitiate the ballots. No doubt the provisions of the law in this respect sometimes work injustice, but, if so, the remedy is with the legislature.

One Samuel Cole voted at the election in question. The respondent introduced evidence tending to show that he was not a qualified voter, because he had not a legal residence at the place where he voted. The evidence was somewhat conflicting on this point, but the court found that he was not a qualified voter, and, under our view of the case, it is not necessary to inquire whether or not that finding was supported by the evidence. But, for the purpose of showing that Cole voted for the appellant, the respondent was allowed, over the objections of the appellant, to introduce a certain written declaration of Cole that he had voted for the appellant. This declaration was in the form of an affidavit made before a notary public. It was made after the election, and within two days of the filing of the complaint in this action. Of course, the fact that the declaration is in the form of an affidavit is of no significance. There is no provision for such an affidavit, and, if false, it would not subject the party making it to the penalties of perjury. It was a mere parol declaration of a voter as to how he voted, made some time after the election, and in no sense part of the *res gestæ*,—even if such a declaration might be admitted at all as part of the *res gestæ*. This declaration was the only evidence offered to prove how the said Cole voted, and "the court thereupon held that Samuel Cole was not entitled to vote at Alturas precinct at said election, and deducted his vote from the votes cast for defendant and contestee, *W. E. Estes*." The evidence was improperly admitted, and the court erred in deducting Cole's vote from the votes cast for appellant. Declarations of voters as to their disqualifications were admitted by the English parliament in contests over seats in that body. Their votes were given *viva voce*. The election records showed how an elector voted. The right to vote was a special

franchise exercised by a limited class, and was dependent generally upon a freehold interest in land; and the admission of a declaration of a voter that he was disqualified seems to have been founded mainly upon the fact that such declaration was strongly against his interest as the holder of a special franchise, and really endangered his freehold interest, which was not always a matter of record. This rule has been followed to some extent by congress and other American legislative bodies, but even there it has been often seriously questioned. In a few judicial decisions this rule has been followed, although the weight of judicial authority is the other way. In *People v. Pease*, 27 N. Y. 45, there is a dictum that a declaration of a voter as to his qualifications is admissible, but the question was not there involved; and in *State v. Olin*, 23 Wis. 309, it is held that a declaration of a voter as to how he voted is admissible, but the rule is stated there upon the authority of *People v. Pease*, *supra*, which does not sustain the rule to that extent, even if the dictum in *People v. Pease* be taken as an authority. But in *Kansas (Gilleland v. Schuyler)*, 9 Kan. 569, in *Illinois (City of Beardstown v. City of Virginia)*, 76 Ill. 34, and in *Colorado (People v. Commissioners of Grand Co.)*, 7 Colo. 190, 2 Pac. 912 the rule is repudiated. There is also an interesting discussion of the question by a congressional committee in the case of *Cessna v. Meyers* (43d Congress, Smith, 60), in which the incorrectness and danger of the rule is very clearly and strongly stated. The subject is quite thoroughly reviewed in *Paine on Elections*, commencing at paragraph 773, and most of the authorities bearing upon the question are there cited, and under paragraph 776 will be found a large part of the opinion of the congressional committee in the case above referred to of *Cessna v. Meyers*. The author says: "But it is held, both in the United States and in England, that declarations of voters, made after the election, are not admissible." In this state the point was noticed in *Norwood v. Kenfield*, 30 Cal. 394, but was not determined in the opinion of the court rendered by *Sanderson, J.* However, in a concurring opinion, *Sawyer, J.*, very pointedly says that such evidence is inadmissible. The question has not arisen in any other case in this state to which our attention has been called. In our judgment, the declaration of a voter as to how he voted is clearly incompetent, and hearsay of the most dangerous kind. If admissible, it would afford a most easy method of manufacturing sufficient evidence in a closely contested election case to change the result. Under such a rule an unqualified voter could give one illegal vote to one candidate, and then, by a simple declaration, which would not subject him to any loss or danger, could have deducted a legal vote from another candidate. In a close contest



between A. and B. a friend of A., who had illegally voted for him, would be under a strong temptation to declare that he had voted for B.; and it is difficult to imagine another case where the admission of hearsay evidence might be so mischievous. It has been said that in an election contest a voter should be considered as a party, and that, therefore, his declarations should be admissible. If that be so, then his declarations as to every question involved in the case would be admissible. But in fact he is not a party. He, of course, is not a party of record, and he is not a party in any other sense. This view is very thoroughly established in the report in the case of *Cessna v. Meyers*, above cited. It does not appear that any illegal votes were counted for appellant. The above views are therefore determinative of this case in favor of the appellant, and make it unnecessary to discuss other questions raised in the case. It may be proper to say, however, that in our opinion the complaint in the case is sufficient, and that no error was committed by the court in the matter of granting a continuance of the trial. There is no question here as to defeating the real will of the majority of the voters. It does not appear that a majority was in favor of the respondent. It appears that the appellant actually received more votes than the respondent, and the determination of the board of canvassers makes for him a prima facie case. The judgment is reversed, and the cause remanded.

We concur: TEMPLE, J.; HENSHAW, J.

120 Cal. 657

ANDERSON v. JOHNSTON. (Sac. 330.)  
(Supreme Court of California. May 18, 1898.)  
APPEAL—FINDINGS—REVIEW.

Findings of the trial court, when supported by evidence, will not be disturbed on appeal.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county.

Action by A. Anderson against W. E. Johnston. From a judgment for plaintiff, defendant appeals. Affirmed.

Martin Devine and A. A. De Ligne, for appellant. C. W. Baker, for respondent.

SEARLS, C. Action to foreclose a mechanic's lien. Plaintiff demands judgment for \$85 and costs and an attorney's fee of \$50. The cause was tried by the court, and a decree entered in favor of plaintiff for \$67.50 and for an attorney's fee of \$25 and costs. Defendant appeals from the decree and from an order denying his motion for a new trial.

It appears that on the 1st day of September, 1895, the plaintiff and defendant entered into a written agreement by the terms of which the plaintiff agreed with the de-

fendant to construct for the latter a house in Sacramento, 12x18 feet, two stories in height, with one room on the back 10x18 feet, 8 feet high, with shed roof. The building, among other equipments, was to have eight windows, etc. An old building on the premises was to be taken down, and the lumber used in the construction of the new, with some exceptions not necessary to any question here. Plaintiff was to be paid \$175,—\$100 when the work was done, and \$75 thirty days thereafter. The building was completed and occupied by defendant October 10, 1895, but not in accord with the contract, in that (1) there were but six windows instead of eight; (2) the rear room was 7½ feet high instead of 8 feet, as called for by the contract.

Defendant in his answer sets out these variations from the contract, and avers that he completed the structure as provided for therein at a cost of \$20, which he avers should be deducted from the \$75 due. He further avers that he tendered plaintiff \$65 (\$10 being, as we suppose, on account of extra work, averred in the complaint to have been performed and agreed upon). Defendant deposited \$55 in court, which he claims was all that was due.

The court found, in substance, that all the allegations of the complaint were true, except, as before stated, that the ceiling of the back room was only 7½ feet high instead of 8 feet, as it should have been, and that defendant was entitled to a credit of \$12.50, the sum necessary to make it 8 feet, and that defendant was entitled to a credit of \$5, the amount agreed upon for leaving out two windows. It also found that \$25 was a reasonable fee for plaintiff on foreclosure.

The principal contention of appellant is that the building was never completed as required by the terms of the contract, and hence that respondent was not entitled to a mechanic's lien thereon. It is true that, as said by Phillips on *Mechanics' Liens* (page 189, § 134), "a substantial performance, according to the terms and conditions agreed upon, is a condition precedent to the builder's right to maintain an action under the mechanic's lien law." The finding of the court is that the building was completed according to the contract except as to the back room, which was but 7½ feet high, and that it was accepted by the appellant. The court also finds that subsequently to the making of the contract some of the work thereon was ordered changed by the defendant. There was evidence tending to show that two windows were omitted from the building by order of the defendant, and that the posts of the old building furnished by defendant, and from which the new one was constructed, were not of sufficient length to make the back room 8 feet high, and that upon being so informed by plaintiff defendant told him to use them and do the best he could with them. The effect of this was



to change the terms of the contract. "A contract in writing may be altered by a contract in writing or by an executed oral agreement." Civ. Code, § 1698. There is no express finding as to the exact alteration made in the written agreement, but only that alterations were made therein; but, as no specifications of error are predicated thereon, we think the findings must be deemed sufficient. The findings have evidence in their support, and we advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

120 Cal. 685

PEOPLE v. FONG HONG. (Cr. 357.)

(Supreme Court of California. May 20, 1898.)

ARSON—WHAT CONSTITUTES—OWNERSHIP—INTENT.

1. Under Pen. Code, § 452 (providing that, to constitute arson, it is unnecessary that a person other than the accused should have owned the building, but, if any part thereof was actually occupied by another, it is sufficient), where it is alleged and proved that the building burned was owned by one, and occupied by others, a conviction will be sustained, though there was no evidence that accused was not licensed by the owner to burn it.

2. To constitute arson where the acts are sufficient in all other respects, it is immaterial whether the motive be gain, revenge, or any other kind of malicious mischief.

Department 2. Appeal from superior court, city and county of San Francisco.

Fong Hong was convicted of arson, and appeals from the judgment, an order denying his motion in arrest, and an order denying his motion for a new trial. Affirmed.

Joseph Naphtaly and William Hoff Cook, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The appellant was convicted of arson in the first degree, and appeals from the judgment, from an order denying his motion in arrest of judgment, and from an order denying his motion for a new trial. A reversal is contended for on two grounds:

1. Appellant's counsel contends that as "it is not arson to burn one's own property [citing *People v. De Winton*, 113 Cal. 403, 45 Pac. 708], therefore it was incumbent upon the prosecution to prove that defendant did not have a license from the owner to burn, if he did so." It is not necessary to determine whether this novel proposition would under any circumstances be entitled to grave consideration; for it certainly has no value in the case at bar. In the *De Winton* Case it was correctly held that an indictment was bad in which it was merely charged in general terms that the defendant burned a building which was his own property; no other facts as to title,

or as to possession, occupancy, etc., being stated. But it is provided in section 452 of the Penal Code as follows: "To constitute arson it is not necessary that a person other than the accused should have had ownership in the building set on fire. It is sufficient that at the time of the burning another person was rightfully in possession of or was actually occupying such building, or any part thereof." Now, in the case at bar it was averred and proven that the building which was burned was "the property of the Luning Company, a corporation," etc., and that it was "then and there occupied by Mrs. Angela Fawn, John Shaughnessy, and Urbin Hosson." The owner, therefore, would have had no right to burn the building, and certainly no right to give anybody a "license" to do so.

2. Counsel contends that the court erred in refusing some instructions which he asked on the subject of the intent of the appellant in causing the fire. In the bill of exceptions there is a narrative statement that there was testimony tending to establish certain facts, and, among others, that appellant had in the building some property which was insured; and the contention is that the court should have instructed the jury that, if appellant caused the fire for the purpose of defrauding the insurance company, then he was not guilty of arson. The point is thus stated in the brief: "The defendant explicitly requested the court to instruct the jury that, if the intent was to defraud the insurance company, then the defendant could not be convicted under the information, but the court refused to do so." The proposition contended for seems to be that a man may feloniously burn a building not his own, and yet not be guilty of arson if he does it with intent to defraud an insurance company; and that in such case he must be prosecuted under the provisions of section 548 of the Penal Code. But this is not the law. If certain acts constitute arson in all other respects, the crime committed is arson, whether the motive be gain, or revenge, or any other kind of malicious mischief. The main purpose of section 548 is to make criminal certain wrongful and malicious acts which do not constitute arson. Arson can only be committed on a "building." Section 548 does not mention building, and the crimes there created may be committed upon any kind of "property." Arson cannot be committed on a building by one who exclusively owns and occupies it, notwithstanding the fact that it is insured; but burning his own insured building would be a crime, under section 548. That section makes it a crime to either burn or "in any other manner" injure "any property" insured against damage by fire, or by "any other casualty." Its purpose is to prevent the "fraudulent destruction of property insured." It does not deal with "arson," and does not undertake to change the character of that crime. Arson is the same crime as it was before section 548 was enacted. Whether a party might commit guilty acts under such peculiar circumstances as would subject him to prosecu-

tion for either arson or the crime created by said last-named section of the Code is a question not now calling for consideration.

The instructions of the court upon the subject of intent were sufficiently full. The jury were charged, among other things, as follows: "Arson is the willful and malicious burning of a building with intent to destroy it. There must be, to constitute the crime of arson, a willful and malicious burning of the building; and, as contained in the definition of the crime, there must exist intent to destroy it."

No special point is made as to the appeal from the order denying the motion in arrest of judgment. The judgment and orders appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(120 Cal. 680)

VAN LOBEN SELS v. BUNNELL et al.  
(Sac. 271.)<sup>1</sup>

(Supreme Court of California. May 20, 1898.)

DEEDS—NUDUM PACTUM—PURCHASE PRICE—MORTGAGES—PRIORITY.

1. An agreement, by the grantee in a deed conveying overflowed land, to pay, as part consideration, a certain sum yearly per acre, provided the grantor kept it pumped below a certain height, but with no corresponding duty on the grantor's part to pump said land, is not nudum pactum, where the deed expressly declared that the grantee's agreement to pay as set forth was a part of the consideration moving the grantor to its execution.

2. A mortgage to cover a loan which was used to pay for the property secured is not a purchase-price mortgage, within Civ. Code, § 2898, giving such mortgages priority over other liens subject to the recording laws, unless the money was loaned for the express purpose of paying for such property.

Department 2. Appeal from superior court, Sacramento county.

Action by P. J. Van Loben Sels against C. Bunnell, the Germania Building & Loan Association, and others. From a judgment for plaintiff, defendant association appeals. Affirmed.

Robt. T. & W. H. Devlin and W. A. Gett, Jr., for appellant. Johnson & Johnson, for respondent.

HENSHAW, J. Plaintiff brought this action to foreclose a lien upon the real property of defendant C. Bunnell. The Germania Building & Loan Association was made a defendant. It answered, setting up a mortgage upon the property, executed to it by Bunnell, and asked that this mortgage be declared a lien prior and superior to that of plaintiff. The court found defendant Bunnell to be indebted to plaintiff in the sum of \$757.50, gave plaintiff judgment for that amount, together with attorney's fees and costs, decreed to him a lien upon the property superior to that of the loan association, and ordered a sale and a distribution of the proceeds accordingly. From this judgment,

<sup>1</sup> Rehearing denied.

and from the order denying it a new trial, defendant the Germania Building & Loan Association alone appeals.

By a deed executed on December 5, 1891, plaintiff, the then owner, conveyed to defendant Bunnell the land which is subjected to foreclosure in this suit. The land was overflowed land within the boundaries of a reclamation district. The deed was formally executed and acknowledged by both parties to it, and contained the following clauses, covenants, and conditions: "In consideration of the premises, and of the sum of one hundred dollars to him in hand paid by the party of the second part, and of the conditions, covenants, and stipulations by and on behalf of the party of the second part hereinafter expressed and contained, the party of the first part has granted and conveyed," etc. "To have and to hold the same unto the said party of the second part, his heirs and assigns, but upon and subject to the conditions, covenants, and stipulations by and on behalf of the party of the second part hereinafter expressed and contained. And in consideration of the premises the party of the second part hereby covenants, stipulates, and agrees to and with the party of the first part, his heirs and assigns: That, so long as the party of the first part shall continue to hold the record title to said pumping machinery, the party of the second part will pay to the party of the first part the sum of three dollars, United States gold coin of the present standard, per annum, reckoned from November 1st to October 31st next ensuing, for each several acre, and at the same rate for each fraction of an acre, of the land hereby conveyed; such payment to be made on or before the first day of November in each year, and, in case of nonpayment on or before that day, then to bear interest at the rate of one per cent. per month from such first of November until paid; provided, however, that if, during any season, reckoned from November 1st to May 30th next ensuing, the water at the pump of said pumping machinery shall for a period of fourteen consecutive days stand at a height equal to, or higher than, five feet of lake gauge, as at present established, then any such payment made for that year by the party of the second part shall be refunded to him." "That all payments herein agreed to be made by party of the second part to the party of the first part shall be, and are hereby made, a lien on the land hereby conveyed, and, in case of nonpayment, may be recovered in any action brought by party of the first part to recover the same and foreclose such lien; and, in case any such suit be brought, reasonable counsel fees, to be fixed by the court, shall be allowed the plaintiff." "That each and all of the covenants, stipulations, and agreements herein contained shall run with and bind the land herein conveyed, and each several acre and fraction of an acre thereof."



The propositions advanced by appellant are three:

First, that the agreement is a mere nudum pactum, upon which no recovery may be had. Herein it is argued that the plaintiff binds himself to nothing, and that there is no consideration whatever for the defendant Bunnell's promise to pay. The instrument, being in writing, not only imports a consideration for its covenants (Civ. Code, § 1614), but Bunnell's agreement to pay under the terms and conditions set forth is expressly declared to be a part of the consideration moving the grantor to the execution of the deed. The burden was upon appellant to show want of consideration. *Id.* § 1615. And this he has failed to do. It is not of importance, therefore, even if it be true, that there was no obligation upon plaintiff to pump the water from Bunnell's land. There was certainly an inducement for him to pump, if pumping was necessary to reduce the water level; otherwise he lost his right to demand and to collect the stipulated three dollars per acre.

Second, it is contended that appellant's mortgage was a purchase-money mortgage, and as such had priority over plaintiff's lien. This proposition is untenable, for the following reasons: A mortgage, given for the purchase of real property at the time it is conveyed, has priority over all other liens created against the purchaser, subject to the operation of the recording laws. Such is the declaration of section 2898 of the Civil Code. This is but the recognition of an equitable principle which was early declared. It came into existence at a time when title, and not a mere lien, passed to the mortgagee by virtue of the mortgage. It was recognized that the vendor, who has parted with his land, and has taken, to secure part payment of the purchase money, a mortgage upon that same land, should not suffer an impairment of his security, and perhaps an absolute loss of a large part of the purchase price, by other rights, such as dower, or the right of a judgment creditor attaching to the property in the brief time during which title was held by the vendee. To save this result, equity formulated the fiction that when the deed and mortgage were part of the same transaction, and well-nigh simultaneous in time, the seisin of the vendee was too short to allow the attachment to the property of any such liens or claim. It is said, in somewhat technical justification of the fiction, that, the execution of the deed and the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through him, and vests in the mortgagee, without stopping at all, and that, during such instantaneous passage, liens cannot attach to the title. *Curtis v. Root*, 20 Ill. 53; 4 Kent, Comm. 39; *Maybury v. Brien*, 15 Pet. 21. This equitable principle, where recognized, was frequently

extended beyond the vendor, in whose interest it was originally formulated, and made applicable to a third person who had furnished the whole or part of the money used in the purchase of the land. In illustration of this may be cited from this state: *Dillon v. Byrne*, 5 Cal. 455; *Lassen v. Vance*, 8 Cal. 271; *Carr v. Caldwell*, 10 Cal. 380. To like effect are the cases of *Clark v. Munroe*, 14 Mass. 351; *Curtis v. Root*, 20 Ill. 53; *Pearl v. Hervey*, 70 Mo. 160; *Moring v. Dickerson*, 85 N. C. 466; *Jones v. Tainter*, 15 Minn. 512 (Gil. 423); *Carey v. Boyle*, 53 Wis. 574, 11 N. W. 47; *Laidley v. Alken*, 80 Iowa, 112, 45 N. W. 384. But the claims of third persons to have their mortgages upheld as purchase-money mortgages have been recognized only when it has been made to appear that the money was loaned to the purchaser for the express purpose, and was used for the express purpose, of paying for the property. Here it is not pleaded nor found that appellant's mortgage was a purchase-money mortgage; nor did appellant offer any evidence that it had advanced the money secured by the mortgage for the sole and express purpose of paying for the property. The only evidence in the case is a declaration by Bunnell that he so used the money, but this is not sufficient. It is not made to appear that he was not at liberty to have used it for any other purpose. Therefore, so far as the record discloses, the loan was like any other advancement of money to the general use of the borrower, secured by a mortgage upon his realty. Again, the deed and agreement between the vendor and the vendee was itself of record before the execution of appellant's mortgage. If it were to be conceded that appellant's mortgage was a purchase-money mortgage, it could only take priority "subject to the operation of the recording laws." By the operation of those laws there was a subsisting, prior, and valid lien upon the property, with notice of which the appellant was charged at the time he accepted the mortgage.

The third proposition of appellant is that, notwithstanding the terms of the agreement, the covenant sued upon does not run with the land. A determination of this question can be of no consequence to this appellant. Its decision might well be of importance to Bunnell's grantee or assign, but, so far as concerns the loan association, under the case presented, an adjudication in its favor upon the proposition would not advantage it. If the contract amounts to no more than a personal promise of Bunnell, still it is his promise to do a certain thing, and as security for his performance he has given to plaintiff a lien upon his land, which is here foreclosed. The judgment and order are therefore affirmed.

We concur: McFARLAND, J.; TEMPLE, J.



6 Cal. Unrep. 10

**MODOC COUNTY v. MADDEN**, County  
Treasurer, et al. (Sac. 314.)

(Supreme Court of California. May 4, 1898.)

APPEAL—AFFIRMANCE.

A county brought suit to restrain its treasurer from paying a certain warrant, and, upon the hearing, the court dissolved the preliminary injunction, and denied a perpetual injunction; and two days later the county gave notice of appeal, but did not perfect its appeal for over three years. *Held*, that as there was no appearance by respondent, and as the warrant was doubtless paid, the case would not be considered on its merits, and the judgment would be affirmed.

Department 2. Appeal from superior court, Modoc county.

Action by the county of Modoc against John Madden, county treasurer, and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Atty. Gen. Fitzgerald, for appellant. D. W. Jenks and Goodwin & Stewart, for respondents.

**PER CURIAM.** On the 15th day of July, 1893, the board of supervisors of the county of Modoc allowed and approved two claims presented by the respondent John Stanley for supplies furnished by him to the county hospital, aggregating about \$60. The county auditor drew his warrant on the county treasurer in favor of Stanley for this amount. This action was instituted by the district attorney, on behalf of the county, to restrain the treasurer from paying the warrant. It was averred that there were moneys in the treasury available for the purpose, and amply sufficient to pay the warrant, but that it was an illegal and void demand against the county. The argument in this regard is that section 4047 of the Political Code provides that the supervisors must contract for all supplies for county institutions, and that the supplies in payment of which this warrant was drawn had not been furnished under contract. The defendants answered, denying that the claims were unauthorized in law. Upon August 1, 1893, the cause was submitted for decision, without the introduction of evidence upon either side. On the 21st day of August the court made and entered its judgment dissolving the preliminary injunction, denying a perpetual injunction, and dismissing the action, with costs to defendants. Two days later—upon August 23, 1893—the plaintiff served and filed its notice of appeal. There the matter was allowed to rest until November 7, 1896, when the record was certified to by the clerk of the court; and following this, upon December 16, 1896, the transcript was filed. The appellant has filed a brief attacking the validity of the claim upon the ground indicated. Respondent makes no reply, doubtless for the reason that he has long since received the money upon his claims, and has no further interest in the litigation.

Under this state of facts, we must decline either to disturb the judgment, or to consider it upon its merits. The rules of this court are designed, not alone to protect the rights of litigants, but to aid the prompt and proper administration of justice. The remissness of appellant in prosecuting its appeal has resulted in an inexcusable delay of more than three years in filing the transcript. During this time there has been no restraint upon the treasurer, and, beyond peradventure, the warrant has long since been paid, and the respondents may reasonably have concluded that the whole matter had been abandoned. In consequence, this court is deprived of the material assistance, to which it is entitled in the consideration of the question, of a brief from the prevailing party. By reason of the laches of the appellant, it may fairly be concluded that the proposition here involved is, so far as these litigants are concerned, nothing more than a moot question; and this court should not be called upon to decide so important a proposition, under the indicated circumstances. The judgment is therefore affirmed.



(120 Cal. 668)

**RUHL v. MOTT. (Sac. 327.)<sup>1</sup>**

(Supreme Court of California. May 20, 1898.)

**FRAUD — AFFIRMANCE OF CONTRACT — NOTICE —  
CONFIDENTIAL RELATIONSHIP.**

1. Defendant, by deceit, induced plaintiff to purchase land, paying part cash, and giving two notes for the balance, one secured by a mortgage on the land. After discovery of the fraud, plaintiff paid part of the balance by deeding a lot to defendant, and gave a new note and mortgage for the remainder. Defaulting on this, he gave defendant a new note and mortgage for the amount of the old one and interest. *Held*, that his acts subsequent to discovering the fraud amounted to an affirmance of the contract.

2. One who has notice of having been defrauded is bound to ascertain the full extent of the fraud.

3. Plaintiff was a printer, and half of his business came from a firm of which defendant was manager, and, as a result, he reposed great confidence in defendant, and relied on him for advice. *Held*, that this did not establish the confidential relationship defined in Civ. Code, § 2219, which provides that one who assumes a relation of personal confidence with another is deemed a trustee as to dealings between the parties.

Department 2. Appeal from superior court, Sacramento county.

<sup>1</sup> Rehearing denied.



Action by Bernard Ruhl against George M. Mott. Verdict for plaintiff, and, from a judgment and an order denying a new trial, defendant appeals. Reversed.

Albert M. Johnson, for appellant. Robt. T. & W. H. Devlin, for respondent.

HENSHAW, J. These appeals are by defendant from the judgment and from the order denying his motion for a new trial.

1. The plaintiff by his action sought to enforce a rescission of an executed contract for the purchase and sale of agricultural lands in which he was the vendee. His right to relief is based upon (1) alleged false representations as to character and quality of the land, the depth of soil, and the income derived from it; (2) on a breach and abuse of confidential relations existing between the parties; (3) upon promises made by defendant to plaintiff for the purpose of inducing him to enter into the contract, which promises at the time when they were made were not intended by defendant to be performed; (4) weakness of mind of plaintiff, induced by sickness and intoxication, of which defendant took advantage; (5) artifice and deceit by which defendant prevented plaintiff from making an independent examination of the property. Defendant demurred to the sufficiency of the complaint, which demurrer was overruled. He then pleaded in answer, denying all the allegations of fraud, denying the confidential relations and the breach thereof, and pleading affirmatively that, after knowledge upon the part of plaintiff of the condition, kind, and character of the land, plaintiff voluntarily affirmed the contract, and thereby waived any right which he might have had to rescind it. Upon the trial an advisory jury was impaneled by the court, and to it certain special issues were submitted for determination. These issues related to the alleged fraudulent misrepresentations, artifices, and devices practiced by defendant. The verdicts of the jury upon all of these issues were for plaintiff. The judge, with great reluctance, stating that he had himself reached an opposite conclusion from the evidence, adopted these verdicts, and added to them other findings adverse to defendant's contentions, all of which findings are here assailed, and so rendered judgment for plaintiff.

The charges in the complaint are substantially the following: Plaintiff was a book-binder by occupation. A considerable portion of his business he obtained by contract from the printing and stationery house of H. S. Crocker & Co. Defendant was a member of this company, and its business manager in Sacramento. Plaintiff went to defendant, expressing his desire to purchase a piece of land suitable for horticultural purposes. Defendant told him that he had a ranch which was better and cheaper than the land which plaintiff told defendant he

contemplated purchasing. Defendant took plaintiff to visit his land, which was situated about 12 miles from Sacramento, showed him a portion of it, consisting of about 52 acres of rich bottom land,  $2\frac{1}{2}$  acres of which were planted in vines. The farm contained 264 acres, and defendant represented to plaintiff that the land was all of the same quality throughout; that the soil was from 15 to 20 feet deep; that defendant farmed the land through a tenant, and received \$750 a year for his share, while at the same time the tenant, who was not a good farmer, netted about \$1,000 a year additional. Defendant also told plaintiff that the land had cost him \$50 an acre, and further stated that, if the plaintiff would buy the land from him, he would give him all the work of H. S. Crocker & Co., as he had done in the past. He also prevented plaintiff, by artifice and deceit, from talking to anybody, or consulting with or inquiring of the neighbors, hurrying him out to the land, and away from it, and finally prevailed upon him to make a small payment of \$500. Such are the charges of the complaint, which by the findings are declared proven. These findings, as has been intimated, are bitterly assailed by appellant, as being unsupported by the evidence. Under the views hereafter to be expressed, it is unnecessary to enter into the consideration of these questions. The purchase price of the land was \$12,500. The alleged falsity of the declarations consisted in this: that the remaining portion of the 264 acres was not at all of the character of the 52 acres of rich bottom land exhibited to plaintiff. On the contrary, it was "hardpan land,"—land with sterile soil, of but from 6 to 18 inches in depth, entirely unsuited for horticultural purposes, and very poorly adapted to any purposes of agriculture. Throughout this land the bedrock was visible in many places, and the plow struck it constantly. Defendant had not received \$750 income from the place in preceding years, but received \$178 in one year, and \$220 in another year. The 52 acres of bottom land is found to have been worth \$25 an acre, and the rest of the land \$10 an acre. Findings 15 and 16 of the court are as follows: "(15) That plaintiff did not discover immediately after the execution of the conveyance of the land to him, or immediately upon his entry into possession of said land, any discrepancy between the true character of the land and the representations respecting the same made by defendant, and that plaintiff did not discover said discrepancy fully until the month of June, 1894, but, as soon as he had the first intimation that any of said representations were untrue, rescinded the transaction, and offered to restore to defendant everything he had received; but defendant at all times positively refused to accept said offer or to rescind. (16) That at the time that the plaintiff conveyed to the defendant his Sacramento city property, and

executed a note and mortgage therefor, and at the time he executed the mortgage now subsisting upon said premises, he did not know of his rights in the premises; and that he did not acquiesce in the original transaction of 1891, and did not ratify or approve the same, or any part thereof, and he at no time ratified the transaction complained of. Said transactions were but continuations of the original transaction, and were not intended or understood by either party to be, and were not, ratifications." Finding 13 contains like declarations.

Accepting as true, for the purposes of this consideration, all the findings of the court relative to the fraud, misrepresentations, artifice, and deceit by which the plaintiff was induced to purchase, and by which he was prevented from making his own independent examination of the land before purchase, there remains for consideration the important question covered by the findings above quoted,—the question whether plaintiff, by his conduct after discovery, waived or lost his right to rescind. Plaintiff went into possession of the land on the 28th day of October, 1891, when the deed of conveyance was made. The purchase price, \$12,500, was paid by plaintiff in the following manner: \$1,500 cash, his unsecured note for \$5,000, and his note secured by mortgage upon the property itself for \$6,000. Plaintiff began to farm the land through an agent, and subsequently moved to the ranch with his family. One year after the making of the deed, the situation of the parties to the contract changed in the following manner: Plaintiff conveyed to defendant city property for \$9,500. Upon this property there was at the time a mortgage amounting to \$3,500. Defendant accepted the property at the price agreed upon (\$9,500), paid off at plaintiff's request his note at the California State Bank for \$2,000, credited \$3,000 upon the purchase price of the farm, thus leaving \$8,000 due thereon, for which a new note and mortgage were given, and paid the small remainder of the purchase price to plaintiff in money. Concerning this transaction there is no pretense that it was fraudulent in the sense that any undue advantage in values was taken by defendant, or that defendant did not fully and faithfully perform his part of the contract as it was agreed upon between the parties. The averment of the complaint is merely that plaintiff was sick and unable to resist defendant's importunities. The finding of the court is that the plaintiff, though physically sick, continued to transact business. Matters thus remained for another year, when plaintiff, who had defaulted in his interest, gave defendant a new note and mortgage for \$8,600, which amount included the unpaid interest, and the earlier note and mortgage were surrendered and canceled. The only averment in the complaint touching this transaction is that "on November 1, 1893, the defendant induced the

plaintiff to execute to him a new note in the sum of \$8,600, bearing interest at eight and a half per cent. per annum, secured by mortgage." There is no allegation in the bill, nor anything in the proof, to show that any deceit or artifice was employed by defendant in this transaction, any more than in the transaction by which the city property was sold. There is no evidence establishing such deceit, nor is there any finding upon the question. It must result, then, that the transaction of 1892, whereby the city property was purchased by defendant, and a radical change made in the terms and conditions of the original contract of sale of the agricultural land, and the later transaction of 1893, whereby the plaintiff gave a new note and mortgage upon account of his purchase of defendant's ranch, being untainted by fraud, were distinct acts of affirmance by plaintiff of the original contract, if at the time when he entered into them he was aware of the original fraud of which he was the victim in the purchase of the ranch.

It has been said that in this discussion the findings of the court upon these frauds will be accepted as true. The only misrepresentations of which plaintiff can complain, as having induced him to his injury to purchase the property for a sum greater than its value were—First, that the soil was all of the character of the 52 acres exhibited to him; that is to say, deep, rich, bottom land, when in fact all of the rest of the ranch was of shallow, hardpan soil, of almost worthless character; and, second, that defendant represented that he was in receipt of an income of \$750 a year as his share of the crops and profits of the ranch. Whether the defendant did or did not represent the land as good for apple trees, or good for grapes, or good for peach trees, is entirely immaterial—First, because the representations would be upon matters of opinion, and defendant was not a farmer, which fact was known to plaintiff; and, second, because, when plaintiff discovered the true character of the land, he was as fit to judge of its capabilities, or to employ those who were, as was the defendant himself. Nor can it be said that the alleged promise to give plaintiff all the binding business of H. S. Crocker & Co. was made without intention to perform; for it is shown that, for some time after the sale, the business of Crocker & Co. was in fact given to defendant precisely as it previously had been, and no finding of the court declares that the promise was unperformed or made without intent to perform. Plaintiff, it is to be remembered, had been in the possession of the property since the 28th day of October, 1891. Defendant's powers for artifice and deceit as to the character of the land and its depth of soil were at an end. By his own testimony, plaintiff appears to have made an early discovery of that character. He says: "It was in March, 1893, that I went down and saw Mott, and



had a long talk with him about the hardpan that I had found on this place. That was one occasion; but I had also talked with him about the hardpan and the bedrock in January, 1892, less than three months after I bought the property. Yes, in January, 1892, we spoke about some of it, and I spoke to him, and told him that I had found bedrock on the land, and mentioned other things to him, but I do not remember exactly what was said." Again, he is asked if he found fault with anything connected with the trade or with the land between January, 1892, when he complained of its character, and March, 1893, when he had testified that he again spoke about the hardpan, and he answered: "In the summer of 1892 I did find fault about the crops, and about the income, and about what the place would produce, and what it was good for." Again, he says: "It was during the early part of that year (1892), and I had come to the conclusion that I had not been treated rightly, and I thought there was something very wrong about it, as I knew that he had misrepresented things to me, because he had told me of certain things that I then found out were not true. I knew that he had told me things that were not true, because I had found out, being on the place, that misrepresentations had been used by him. I saw that the harvest was not going to be anything like what he told me the income used to be from the place. I had found out that the place would not raise so much as he said it would, and I told him long before I went to Goethe that he had misrepresented things to me, and that I was dissatisfied." All this was before the situation of the parties was changed and the new contract entered into through the sale of the plaintiff's city land, its purchase by Mott, and the application of the proceeds of purchase as above set forth. Again, he testifies that in March, 1893, he found out that the land was hardpan. "Then I went to Mr. Mott, and told him I had found out that the land was bedrock, that struck the plow everywhere; and I believed it was a terrible thing to take me in in that way, and I offered to give him back the farm, and he refused to do it." Notwithstanding this knowledge, in November of the same year he affirmed the contract by including the unpaid interest in a new note, and giving to defendant a new mortgage upon the land for the whole amount thereof.

There can be no doubt that these acts of plaintiff amounted to an affirmation of the original contract after knowledge by him of the fraud. The foregoing quotations from plaintiff's testimony are sufficient to show the unsoundness of finding 15 made by the court. It matters not that plaintiff "did not discover" said discrepancy fully until the month of June, 1894." His own testimony shows that long before that time he had discovered that he had been defrauded as to the

character of the land, and had become satisfied that defendant had deceived him in his statement of the amount of income he had derived from it. These representations, it is always to be remembered, are the only ones which injuriously affected plaintiff in the matter of the purchase. It is true that where one is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case no duty in law is devolved upon him to employ such means of knowledge. But, when thereafter he discovers that he has been put upon and defrauded as to one material matter, notice is at once brought home to him that the man who has been false in one thing may have been false to him in all, and it becomes incumbent upon him to make full investigation. A defrauded party has but one election to rescind, and he must exercise that election with reasonable promptness after discovering the fraud. *Dennis v. Jones*, 44 N. J. Eq. 513, 14 Atl. 913. Delay in rescission is evidence of a waiver of the fraud, and of an election to treat the contract as valid. Any acts evincive of an intent to abide by the contract are evidence of an affirmation of the contract, and of a waiver of the right of rescission. *Delano v. Jacoby*, 96 Cal. 275, 31 Pac. 290; *Martin v. Wine Co.*, 99 Cal. 355, 33 Pac. 1107; *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868; *Bach v. Tuch*, 126 N. Y. 53, 26 N. E. 1019; *Crooks v. Nippolt*, 44 Minn. 239, 46 N. W. 349; *Pearsoll v. Chapin*, 44 Pa. St. 9.

Finding 15 is that, as soon as plaintiff had the first intimation that any of said representations were untrue, he rescinded the transaction. It has been shown by plaintiff's own evidence that he received these intimations but a few months after he entered into possession of the land; and indeed, it was most natural that he should, considering the character of the false representations alleged to have been made. The court finds that he then promptly offered to rescind, and that defendant refused to accept the offer. Upon this, plaintiff's cause of action to enforce a rescission became complete, and that cause of action would not be barred by the statute of limitations for three years. But, if he desired and designed to preserve his cause of action, then, as has been said, he must do nothing thereafter amounting to a waiver of his right to rescind, or equivalent to an affirmation of the contract. Both these things this plaintiff repeatedly did. By findings 13 and 16 it is declared that his subsequent acts were but continuations of the original transaction, and were not intended or understood by either party to be and were not ratifications. The word "ratification" is here perhaps somewhat loosely employed. The finding that the later transactions were but continuations of the original transaction cannot, under the evidence, be upheld. They were, manifestly,



no part of the original contract. Neither of them was in contemplation when the original contract was entered into. They were independent agreements substituted for the original, and changing the status of the parties. They were entered into by the plaintiff after knowledge and notice of the fraud which had been put upon him. His conduct in this regard amounted to a distinct and unequivocal affirmation of the original contract, and a waiver of all right of rescission.

The legal and necessary effect of plaintiff's acts in the premises is sought to be overcome by a finding that "he did not know his rights in the premises." If this language is to be given any meaning, it is a declaration that plaintiff was ignorant of the law, but such ignorance cannot excuse. There may be extreme cases permitting such a plea, but none have been cited, and we need not be at pains to look for them. This, in any event, could not be one of them, for it appears that plaintiff's ignorance of the law was, at the worst, only partial. He seemingly knew enough of the law to perform the legal duty of offering promptly to rescind. This the court finds he did. But it is said that he did not know enough of law to justify a court in holding that his unequivocal later acts of affirmation should bind him. Plaintiff obtained title to this property in 1891. It was only in 1894 that he commenced this action. During that time he was at liberty to obtain legal advice if he had desired so to do. Nor can his ignorance be palliated or excused because of the alleged confidential relations which existed between plaintiff and defendant, or because of plaintiff's alleged weakness of mind. The court does not find that he was of weak mind, and plaintiff's own testimony as to other land transactions, and the uniform financial success with which he met in his speculations, negatives the idea that he was of feeble intellect. The confidential relationship is found by the court in the following language: "One-half or more of all the business done by plaintiff came from the defendant, as manager of the firm of H. S. Crocker & Co.; and, as a result of the relation between them, plaintiff reposed great confidence in defendant, trusted him, and relied upon him for advice." But this finding is not sufficient to establish the confidential relationship defined in section 2219 of the Civil Code, so as to charge the defendant with the high duties pertaining to a trustee, and to shift the burden of proof to show the unfairness of the transaction from the plaintiff, where it naturally rests, to the shoulders of the defendant, and compel the latter to establish the fairness of the sale. It is to be remembered that plaintiff was himself a business man, had bought and sold real estate, and was contracting with the Crocker Company, of which defendant was a manager. The fact that he imposed confidence in the defendant did not cast any duty upon the lat-

ter, unless he "voluntarily assumed a relation of personal confidence" with plaintiff, and this is not found. Equity always views with strictness the business dealings of a man with one who stands in a position of dependence or confidence to him, when that relationship is either voluntarily assumed, or is imposed by operation of law. But it would, indeed, be an anomaly if one dealing with a vendor of land should be allowed to shut his eyes and ears, and make no use of his faculties in determining the value of the property he purchased, and thereafter excuse himself by saying that he reposed confidence in the vendor. He may in fact have done so, but the fact does not establish a confidential relation as known to law, and for his trusting folly neither law nor equity can afford him redress. Finally, it may be added in this connection that it appears from plaintiff's own testimony that he early became convinced, not alone that defendant had misrepresented to him the character of the land and the income derived from it, but equally that defendant was not in fact his friend, but was hostile and false to him. From that time, certainly, he was neither justified nor excused in taking upon faith any of defendant's declarations, and it was his manifest duty to have obtained legal advice if he purposed prosecuting his right of rescission. It is apparent, therefore, assuming the truth and sufficiency of all other matters found, that plaintiff lost his right to rescind the contract by his later acts in affirmation thereof. Wherefore the judgment and order are reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

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(121 Cal. 121)

KELSO v. COLE et al. (S. F. 1093.)<sup>1</sup>  
(Supreme Court of California. June 2, 1898.)  
MUNICIPAL IMPROVEMENT—ASSESSMENT FOR PART.

Gen. Street Law, § 12½, as amended by St. 1889, p. 169, providing that the city council, instead of waiting till the completion of the improvement, may, on completion of two blocks, order an assessment for the proportionate amount of the contract completed, which may thereupon be collected, does not apply where the contract has been abandoned, and the time for its completion has expired.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by John Kelso against P. J. Cole and others. Judgment for defendants. Plaintiff appeals. Affirmed.

J. C. Bates, for appellant. O. K. McMurray and Chas. A. Reynolds, for respondents.

SEARLS, C. Action upon a street assessment. Defendants had judgment for costs. Plaintiff appeals from the judgment, and supports his appeal by a bill of exceptions. Several points are involved in the appeal, only one of which, in our view of the case, calls for consideration.

On April 25, 1894, after the preliminary steps had been taken therefor, the superintendent of streets in and for the city and county of San Francisco entered into a written contract with J. W. Smith, the assignor of plaintiff (the appellant here), to grade to the official line and grade, to macadamize, and

to construct redwood curbs and rock gutter ways on Sunnyside avenue, between Circular avenue and Hamburg street, city and county of San Francisco. The prices to be paid were: for grading, per cubic yard, 14½ cents; redwood curbs, per lineal foot, 13 cents; for macadamizing roadway, including rock gutter ways, per square foot, 2½ cents. The contract was in the usual form, and provided that the work should be completed within 90 days. The time for the performance of the contract was extended from time to time until it finally expired December 16, 1895. On that day, and ever since, no part of the work had been performed between Genessee and Foerster streets, being one block of Sunnyside avenue, included in the contract. The residue of the work was certified by the superintendent of streets to have been completed. On January 13, 1896, the board of supervisors ordered a proportional assessment to be made, under section 12½ of the general street law, as amended in 1889. St. 1889, p. 169. The question, then, is this: Had the board of supervisors jurisdiction to order a proportional assessment under section 12½ of the street act, when a portion of the work had been abandoned by the contractor, and the time for the completion of the whole contract had expired?

Section 12½ is as follows: "The city council, instead of waiting until the completion of the improvement, may, in its discretion, and not otherwise, upon the completion of two blocks or more of any improvement, order the street superintendent to make an assessment for the proportionate amount of the contract completed, and thereupon proceedings and rights of collection of such proportionate amount shall be had as in sections eight, nine, ten, eleven, and twelve of the act, of which this is amendatory, is provided."

All proceedings for work upon streets, etc., in the municipalities of this state, under the act of March 18, 1885, and the amendments thereto, are purely statutory, and can only be conducted in the cases and after the manner provided by the statutes. The authority conferred by these statutes must be strictly pursued. *Haskell v. Bartlett*, 34 Cal. 281; *Smith v. Cofran*, Id. 310; *Smith v. Davis*, 30 Cal. 536; *Brock v. Luning*, 89 Cal. 316, 26 Pac. 972. Under the general law, except as amended by section 12½, one of the prerequisites to the levy of any assessment whatever is that the entire work shall have been completed. In the language of section 8 of the act, "After the contractor of any street work has fulfilled his contract \* \* \* the street superintendent shall make an assessment," etc. So, too, the contract must be fulfilled within the time specified therein, or within such further time as may have been given the contractor during the life of the contract, or no assessment can be levied; and if, after the expiration of the limited time, an extension is granted and the work

<sup>1</sup> Rehearing denied.



is completed, it forms no foundation for a valid assessment. *Raisch v. City and County of San Francisco*, 80 Cal. 1, 22 Pac. 22; *Dougherty v. Bank*, 81 Cal. 162, 22 Pac. 513; *Heft v. Payne*, 97 Cal. 108, 31 Pac. 844; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52. The case of *Fanning v. Schammel*, 68 Cal. 428, 9 Pac. 427, which has been frequently referred to with approbation, was one in which the contract called for the completion of the work within 60 days. The work was not completed within the time, and subsequently the board of supervisors extended the time for its completion. It was held by this court that after its expiration the board had no jurisdiction to revive or validate the contract. The consensus of opinion, as expressed in the cases cited above, and in many others of like import, is that when the time fixed for the completion of the contract has expired, and the work has not been performed, the contract ceases to have any vitality, and jurisdiction to extend it, or to levy an assessment thereon, becomes extinct. The only power reserved is to let the completion of the work anew. This being so, we cannot see upon what principle the board of supervisors can, in its discretion, order a proportional assessment under section 12½ after the contract has been abandoned by the contractor, and the time for its completion has expired. We think section 12½ is intended to apply to an existing contract; to one still in force; to furnish, as we may well suppose, the contractor with funds to aid him in the completion of the work; and that it was not intended to galvanize and give new life to a dead contract,—to confer jurisdiction upon the board to do indirectly what it could not possibly do directly. In the language of the court below: "That section contemplates, as the basis of such an assessment, not only that a part of the improvement has been, but that the whole is to be, completed." We are of opinion the section is provided as a boon to the contractor who in good faith is prosecuting his work within the lines of his agreement, and not as a reward to a defaulting contractor, who has forfeited his right to any relief in the premises. It follows from these views that the assessment was void, and constituted no lien upon the lot of the defendants, and we recommend that the judgment appealed from be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

121 Cal. 30

CITIZENS' BANK OF LOS ANGELES v.  
JONES. (L. A. 438.)

(Supreme Court of California. May 31, 1898.)  
APPEAL—RECORD—CERTIFICATE OF DEPOSIT—CONSTRUCTION—PAROL CONTRACT.

1. A finding of fact cannot be attacked, in the absence of a specification attacking it.

2. The contract between the indorser and the indorsee of a negotiable instrument is written, and cannot be varied by parol evidence of a verbal agreement at the time of the transfer.

3. A certificate of deposit, "payable, \* \* \* on return of this certificate, 12 months after date, with interest \* \* \* for the time specified only. Payable in 6 mo., if desired, with interest. \* \* \* No interest after due,"—is not due at end of six months, so as to relieve the indorser from liability to the indorsee if not then presented for payment, but matures at the end of a year.

Department 1. Appeal from superior court, Los Angeles county.

Action by the Citizens' Bank of Los Angeles against G. M. Jones. Judgment for plaintiff. Defendant appeals. Affirmed.

Jones & Weller, for appellant. F. W. Burnett, for respondent.

VAN FLEET, J. Appeal by defendant from the judgment, and an order denying a new trial. The action was to recover from defendant, as indorser, on a certain certificate of deposit. The certificate was in these words: "No. 5,927. First National Bank of Helena, Montana. (Not subject to check.) October 19, 1895. G. M. Jones has deposited in this bank (\$1,000.00) one thousand dollars, payable to the order of self, on return of this certificate, twelve months after date, with interest at the rate of six per cent. per annum for the time specified only. Payable in 6 mo., if desired, with interest at 6 per cent. No interest after due. No. 70-430. Geo. F. Cooper, Cashier." It was indorsed, "G. M. Jones." The complaint alleged its presentation, with demand of payment, to the maker, on October 19, 1896, that payment was not made, and that due notice of such demand was given the defendant. The answer alleged that defendant's indorsement to plaintiff was made on or about March 6, 1896, and was with the understanding and agreement that plaintiff should present the certificate to the maker for payment at the end of six months from its date; that at the last-mentioned date the maker thereof was in a flourishing condition, and meeting all its obligations as they matured, and that, had the paper been then presented, it would have been promptly paid; that it was the duty of plaintiff, by reason of said agreement, to make demand at said date, and by its failure to do so it had assumed all future risks of collection. The court found the facts alleged in the complaint to be true, and those stated in the answer untrue, and gave judgment for the plaintiff.

Appellant's main contention seems to be, in effect, although not so stated in terms, that the finding against his special defense is not in accord with the evidence. We regard the evidence as substantially conflicting as to the making of any such agreement as that set up in the answer. But, if this were otherwise, appellant is not in a position to assail the finding upon this issue,



since the record contains no specification attacking it. There is but one specification in the record, and that is directed in express terms to the first finding, which refers solely to the averments of the complaint. But, moreover, the evidence offered by defendant in support of his defense was not competent to establish it, and that objection was made; the court, however, permitting it to go in subject to the objection, and reserving its ruling. The evidence simply tended to show a verbal understanding, if any, had at the time of the transfer of the certificate to plaintiff, that the latter would present it at the end of the six months; but whether this understanding was had prior to the indorsement and delivery of the paper, or subsequent thereto, defendant could not state. Manifestly, however, whether before or after, in either event the evidence was wholly inadmissible. If made before indorsement, all negotiations were merged in the writing. If made subsequently, it was made without consideration, and void. The contract between the indorser and indorsee of a negotiable instrument is a written one, and cannot be varied or changed by parol evidence of a verbal promise or agreement made at the time of the indorsement. *Goldman v. Davis*, 23 Cal. 256. The court below having reserved its ruling upon this evidence until final submission, its subsequent finding against appellant upon the issue to which the evidence was directed was in effect a ruling excluding the evidence; and the case may be regarded as though no evidence had been offered by defendant in support of his answer.

The further proposition apparently advanced, that the instrument was by its terms due at the end of six months, and that plaintiff was bound to present it at that time in order to hold the indorser, is not tenable. The paper did not by its terms mature until October 19, 1896. The stipulation therein that it would be paid at the end of six months, "if desired," was an option solely for the benefit of the payee, to be availed of at his election. *Belloc v. Davis*, 38 Cal. 355. And the instrument being negotiable, this privilege passed to the indorsee. The judgment and order are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

120 Cal. 691

PEOPLE v. MONTARIAL. (Cr. 369.)

(Supreme Court of California. May 25, 1898.)

LARCENY—EVIDENCE—EMBEZZLEMENT.

1. M. and P. were roommates, and P. gave M. money, done up in a package, to be placed for safe-keeping in M.'s trunk. M. carried the key, but always unlocked the trunk on request of P., and handed him the package. He had no authority to touch the package in the absence of P., and was only authorized to hand it to P., or replace it in the trunk when P. was

present. *Held*, that M.'s appropriation of the money was grand larceny.

2. Pen. Code, § 503, defines embezzlement as "the fraudulent appropriation of property by a person to whom it has been intrusted." *Held*, that the testimony of a witness that he "intrusted" his money to defendant does not conclusively show that the appropriation of it by defendant was embezzlement, but that expression must be read in the light of his whole testimony and all the circumstances.

3. Where M. induced P. to place his money in a particular place, for the purpose of bringing it within the possession and control of M., intending to thereafter feloniously appropriate it, the accomplishment of such act constitutes larceny.

Department 1. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Louis Montarial was convicted of grand larceny, and appeals. Affirmed.

J. Marion Brooks and D. K. Trask, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. Appellant makes but one point in support of his appeal,—that the evidence did not warrant his conviction of grand larceny, but established, if anything, embezzlement instead. At the time the money was taken it was in two trunks belonging to defendant, \$500 being in one and \$300 in the other, where it had been placed by Paillac, to whom it belonged, some time before, for safe-keeping, under these circumstances: Paillac and the defendant were fellow countrymen and intimate friends, and roomed together at the same house. They had two rooms, one upstairs and the other down, but their intimacy was such that they used them in common, sleeping together in the lower room, and keeping wearing apparel and other articles in the upper one,—each having like access to both, and indifferently carrying the keys. They had been thus situated for several years. Paillac, who had accumulated several hundred dollars, had been in the habit of keeping it buried in the ground in a secret hoard. Observing that the defendant kept his money in his trunk, a discussion arose between them as to the safest way to keep money. Which one of the two first suggested the idea of placing Paillac's money in the defendant's trunks does not clearly appear; Paillac, who testified on the subject, being unable to speak English, and his evidence being given through an interpreter, and leaving the fact in some confusion. At one point he states that the suggestion came from himself, but elsewhere his statements indicate that it was made by defendant. It does appear from his evidence, however, that in the conversation defendant assured Paillac that he "might as well put the money in the trunk"; that it was "safer there than any bank"; and that Paillac had better put his money there, since the latter's trunk was old, and the lock broken,—telling him, "Don't be afraid; it will be a good, safe place;" and fur-

ther, as expressed by the witness, "He said that some time I [Paillac] might die, or an accident fall to me, or I might fall off the wagon, and get killed, and then I [defendant] will know where the money is." The result of the conversation was that Paillac dug up his treasure and placed it in defendant's trunk. This was something over two years prior to the taking. At that time Paillac had some \$500, and he put that amount in a purse, securely tied up in a handkerchief, and handed it to defendant, who in Paillac's presence placed it in the trunk in the upper room, where it remained undisturbed, except when inspected by Paillac, until taken by defendant. Subsequent to this first deposit the \$300 fund was accumulated by Paillac. This latter was the fund to which Paillac resorted for current needs from time to time,—the \$500 being kept intact,—and it was kept in the trunk which stood in their sleeping room downstairs. Like the first, it was always kept in a package securely done up by Paillac himself, and which he would merely hand to the defendant to be placed in the trunk in his presence; the defendant, as the evidence clearly indicates, never being given the right to handle or disturb either package in any way, except in the presence of Paillac, and then only for the purpose of handing them out when wanted by the latter, or replacing them at his direction. And, while defendant carried the keys to the trunks, they were always at the call of Paillac whenever he wished to get at his money; the defendant on such occasions unlocking the trunks for the purpose, and handing out the package, or putting it back, as the case might be. And the evidence indicates that, while Paillac had confidence in his friend, it did not prevent him from keeping a sharp eye on his treasure whenever the defendant opened the trunks to get his clothes, or for any other purpose of his own.

Upon this evidence and some expressions in the testimony of Paillac that, because of his confidence in the defendant, he "intrusted" the money to him to keep for him, that he would not have done so but for his "confidence" in him, and that he would have looked to him to return the money had it been missing, the defendant bases a very strenuous and plausible argument that the facts show a delivery of the money to the defendant which constituted a deposit or bailment, and that in appropriating the money under such circumstances the defendant was guilty of a fraudulent appropriation or embezzlement, and not larceny. But we cannot accede to this view. Taking the whole evidence together, with all it tends to show, and we are satisfied that it does not establish a bailment or intrusting of the money to defendant. As we regard it, the evidence does not show that Paillac ever in

fact really parted with the possession of his money. While it was locked in the trunks of defendant, to which the latter retained the keys, the trunks were at all times as much in the possession of Paillac, and with practically the same freedom of access to the latter, as in that of the defendant. In legal contemplation the use of the trunks was loaned or given to Paillac as a place for keeping his money. The mere fact that defendant carried the keys is not a material consideration. As we have seen, the keys were always forthcoming when demanded by Paillac for access to his money, and the money was, therefore, to all practical intents and purposes, as much under his personal supervision and protection as of defendant; indeed, more so, since the latter had no right or authority to tamper with it in any way, except as directed by its owner.

Much is made by defendant of the fact that Paillac testified that he "intrusted" the money to defendant, and it is urged that this constitutes embezzlement, because that offense consists of "the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503. But, to reach the meaning of the witness, his expressions must be read in the light of his whole testimony and all the circumstances; and when so read it is clear that his money was not intrusted to the keeping of the defendant in a manner to bring it within the definition of embezzlement. Defendant let Paillac have the use of his trunks as a place of safety for his property, and the only dominion defendant rightfully exercised over it was a perfunctory handling of it in the presence of the owner. The case, although differing in its circumstances, is not to be distinguished in principle from that of *People v. Johnson*, 91 Cal. 265, 27 Pac. 663, where it is held that, where the owner puts his property into the hands of another to do some act in relation to it in his presence, he does not part with the possession of it, and the conversion of it *animo furandi* is larceny, and not embezzlement. See, also, 2 Russ. Crimes (8th Am. Ed.) 21.

Moreover, there is, as suggested by the attorney general, another aspect in which the evidence, if so construed by the jury, was sufficient to warrant a conviction of larceny. If the jury believed, as there was evidence tending to show, that the defendant originally induced Paillac to place the money in his trunks for the purpose of getting it into his possession and control, with the intent to thereafter feloniously appropriate it, such act, when accomplished, constituted larceny. *People v. Rae*, 66 Cal. 423, 6 Pac. 1. We are satisfied that the judgment should be affirmed. It is so ordered.

We concur: GAROUTTE, J.; HARRISON, J.



(120 Cal. 635)

In re MOSS. (Sac. 457.)

(Supreme Court of California. May 26, 1898.)

## RIGHTS OF GUARDIAN FOR INCOMPETENT—APPEAL.

1. An appeal may be taken from an order appointing a guardian for an incompetent person, under Code Civ. Proc. §§ 1763, 1764, since the main thing provided for thereby is not the adjudication as to the incompetency, but the appointment of a guardian, and hence the appeal is authorized by section 963, providing for an appeal from any order granting or refusing to grant letters of guardianship.

2. Code Civ. Proc. § 372, providing that mentally incompetent persons can take an appeal only by their general or ad litem guardian, does not apply to an appeal taken directly from the order of guardianship itself.

In bank. Appeal from superior court, San Joaquin county.

In the matter of William F. Moss, an incompetent person. From an order appointing a guardian for him, he appeals. Motion to dismiss the appeal. Denied.

J. G. Swinnerton and Budd & Thompson, for appellant.

McFARLAND, J. This is a motion to dismiss an appeal taken by William F. Moss from an order of the superior court appointing a guardian for him upon the ground of alleged incompetency, under sections 1763 and 1764 of the Code of Civil Procedure.

1. The first contention of respondents is that the order appealed from is not an appealable order. They say in their brief that "the adjudication of incompetency is not appealable." It is not necessary to consider whether or not the order appealed from would be viewed as a final judgment if there were no express provision for an appeal from it, for the Code directly provides for an appeal from the particular order here involved. The main and ultimate purpose of sections 1763 and 1764 is the appointment of a guardian for a person found to be incompetent to manage his business and property. The Code does not seem to contemplate an adjudication of incompetency independent of the appointment of a guardian. Its purpose is to appoint a guardian for an incompetent person. Of course the incompetency would have to be found in some way by the court as a preliminary step to the appointment of a guardian; but the appointment of a guardian is the thing specially directed. Section 1763 provides that when it is represented by a verified petition that a person is insane, "or from any cause mentally incompetent to manage his property," the court must give notice to the person supposed to be incompetent of the time and place of the hearing of that matter, and that the alleged incompetent person must, if able to attend, be produced on the hearing; and section 1764 provides that "if after a full hearing and examination upon such petition it appear to the court that the person in question is incapable of taking care of himself and managing his property, such court

must appoint a guardian of his person and estate with the powers and duties in this chapter specified." There is no provision for a mere adjudication of incompetency; the thing to be done by the court is the appointment of the guardian. And section 963 of the Code of Civil Procedure expressly provides that an appeal may be taken to the supreme court from the superior court "from a judgment or order granting or refusing to grant \* \* \* letters \* \* \* of guardianship."

2. The notice of appeal is signed by Messrs. Nicol & Orr, who are attorneys of this court, and who appeared for the appellant, Moss, in the proceeding in the superior court in which the order of guardianship was made; and it is contended by respondents that, under section 372 of the Code of Civil Procedure, Moss could take an appeal only by his general guardian or by a guardian ad litem appointed by the court. But that section does not apply to a case where the very question involved is the validity of the order of guardianship itself, and where the appeal is taken directly from that order. That section applies only to a case where the order of guardianship has been finally established. But no judgment or order of a superior court is final when an appeal from it is duly pending. If the order appointing a guardian for the appellant be erroneous, it will be reversed; and the appellant's right to the control of his property cannot be held as finally concluded against him by an order from which he has appealed, and from which he has a right to appeal. Some difficulties are suggested by a consideration of the proposition that the appeal stays the execution of the order, and that, if the appellant be really incompetent, his property might be dissipated by designing persons during the pendency of the appeal. There is some force in this suggestion, and apprehended embarrassments might be remedied perhaps by some amendment to the Code in this regard; but more grievous consequences might follow an erroneous adjudication of guardianship, if no appeal were allowed.

3. We see nothing in the statement of respondents that Moss is not "an aggrieved party," or in any of the other contentions made by respondents.

The motion to dismiss the appeal is denied.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN FLEET, J.; HARRISON, J.; HENSHAW, J.

(120 Cal. 638)

In re SPANIER'S ESTATE. (S. F. 1085.)

(Supreme Court of California. May 27, 1898.)

## PROBATE—PAYMENT OF DEBTS—STATUTORY NOTICE OF SETTLEMENT OF ACCOUNTS—ADMINISTRATORS.

1. The probate court has no power to order the payment of a debt from the estate of a deceased person until the settlement of the admin-



istrator's account (Code Civ. Proc. § 1647), and hence a debt paid by the administrator on the order of the court before such settlement cannot be credited to his account on the sole ground that it was ordered paid by the court.

2. An order of the court for the payment of a debt before settlement of the administrator's account is of no force if made without the statutory notice (Code Civ. Proc. §§ 1633, 1634), and without notice to any one except the administrator.

3. An administrator has a standing in court to contest the account of his predecessor, since it is his duty to protect the estate against all unlawful claims.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Joseph Spanier, deceased. From an order settling the final account of A. C. Freese as administrator, he appeals. Affirmed.

R. F. Mogan, for appellant. J. J. McCabe, for respondent.

McFARLAND, J. This is an appeal by A. C. Freese, former administrator of the estate of Joseph Spanier, deceased, from an order of the superior court entered September 21, 1896, settling his final account as such administrator. The transcript consists of fragments taken from the general history of the administration of said estate, and does not very clearly show the facts upon which the litigation has arisen. The appeal involves merely one item of \$150, claimed to have been paid by appellant to one Charles Frank, which item the court refused to allow as a credit. The only objection made in the court below to the refusal to allow this item was, "because the same was paid by said Freese by order and direction of the said court dated April 6, 1896." The facts about this item of \$150, as they may be dimly seen in the transcript, appear to be as follows: Charles Frank, some time in 1890, presented a claim against the estate for \$505.50, for "money loaned by claimant to decedent." The transcript contains an order of court made September 23, 1891, which, after reciting that something that is there called "the matter of the opposition to the claims" of said Frank and of certain other claimants had come on to be heard, orders that the claim of Frank be allowed for \$150, and rejected for all the remainder of the \$505.50. It is difficult to understand exactly what this proceeding was, for the Code does not seem to provide for the trial of an "opposition to claims" except upon the settlement of an administrator's account; but, although the order is recited as having been made by "the court," it may be treated as an order by the judge approving the claim of Frank for \$150, and rejecting it for the rest. Frank did not accept the allowance of \$150, but immediately brought suit in another department of the superior court against the administrator, who was then J. C. Pennie, for the whole of the claim. Judgment in that

suit went against appellant for the whole claim. He appealed to this court, and the appeal was still pending when the order from which the present appeal was taken was made. Proceedings were instituted to remove the appellant from the administration of the estate, which resulted in his removal, and the appointment of John W. Moffitt as his successor, who qualified on May 12, 1896. While those proceedings were pending, and while the said appeal was also pending, the court, on April 6, 1896, made an order that Freese, administrator, "immediately pay" to Frank the \$150. This order recites that by the order of September 23, 1891, Frank's claim was allowed for \$150; that no part of it had been paid; that there were sufficient funds in the hands of Freese to pay it; and that the order of September 23d was in full force and effect, but does not recite that any notice of an application for the order had been given to any person, or that any person interested had appeared or was present when the order was made. And this is the order referred to by appellant in his specification of error in the transcript as "the order and direction of the said court dated April 6, 1896." Immediately after the making of the order, appellant paid the \$150 to Frank's attorney. This was after the filing of his main final account, but for the purpose of charging this \$150 thus paid he filed a supplemental account in which he placed it. On June 17, 1896, the present administrator, Moffitt, filed a verified petition to have said order of April 6th set aside upon various grounds, and, after a hearing, the court, on July 30, 1896, made an order canceling and vacating said order.

We have stated the foregoing facts because counsel, in their briefs, refer to them, but, in our view, many of them are immaterial. It will be observed that there is no question here as to whether the Frank claim was or was not a meritorious claim. If that were the question, the record would present no ground for attacking its rejection by the court. The whole contention of appellant is that it was ordered paid by the order of April 6, 1896, and therefore the court erred in not allowing it in settling appellant's account. But the order of April 6th was one which the court had no power to make, and therefore invalid. With the exception of section 1513 of the Code of Civil Procedure, which relates to certain interest-bearing debts, and does not apply to the case at bar, there is no provision of the probate law to which our attention has been called which gives the court power to order any particular debt paid prior to the settlement of the administrator's account, except that, perhaps, under section 1646, claims for expenses of funeral or last sickness, or family allowance, might, in certain cases, be ordered paid before such settlement. The "payment of debts of the estate" is provided for in the article of the Code, which begins

with section 1643; and section 1647 provides that "upon the settlement of the accounts of the executor or administrator, as required in this chapter, the court must make an order for the payment of the debts as circumstances of the estate require." Sections 1633 and 1634 of the same chapter provide that notice of the day on which the settlement of any account is to be heard must be given in the manner prescribed in said sections; and it is quite apparent that if such notice be not given there can be no valid settlement of the account, and consequently no valid order made for the payment of a claim like that of Frank. The Code seems to contemplate an order for the payment of a debt only upon the settlement of the administrator's account; but if it be assumed that such an order could be made before such settlement, still it would clearly be of no force if made without notice. Therefore, under any view, the order of April 6th here relied on was invalid, because it appears affirmatively that it was made without the statutory notice having been given, and without any notice of any kind to any person other than the attorney for appellant. This is not a case where an administrator, having paid a just debt, asks to have it allowed in his account. The court refused to allow the alleged debt as a credit in appellant's account, and there is no evidence in this record as to the character of the claim, although it appears incidentally in the case of *Frank v. Pennie*, 117 Cal. 254, 49 Pac. 208, referred to in the briefs, that it was a gambling debt. The appellant rests entirely upon the conclusiveness of the said order of April 6th, which, as we have seen, the court had no power to make. Under this view, it is unnecessary to discuss other points made by respondents.

Appellant's contention that the present administrator had no standing to contest the account, because he is not a person interested in the estate, is not maintainable. It is the duty of an administrator to protect the estate against unlawful claims of creditors; and it is also the duty of the court to do so at the suggestion of any person, or on its own motion. The nonresident heir unites with the administrator in supporting the order appealed from. The order is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(121 Cal. 7)

TIBBETTS et al. v. BOWER. (L. A. 385.)  
(Supreme Court of California. May 28, 1898.)

#### APPEAL—GRANTING NEW TRIAL.

Where a new trial, asked for on several grounds, is granted, but the record does not disclose on which one of the grounds it was granted, the order will not be reversed if it could have been properly allowed on any one of said grounds.

Department 1. Appeal from superior court, Kern county; J. W. Mahon, Judge.

Action by Tibbetts Bros. & Cross against W. R. Bower. From an order granting defendant a new trial, plaintiffs appeal. Affirmed.

Alvin Fay, for appellants. T. M. McNamara, for respondent.

VAN FLEET, J. Appeal by plaintiff from an order granting the defendant a new trial. In presenting this appeal, counsel for appellant proceeds upon the assumption and theory that the court below granted the motion for a new trial upon one particular ground, as to which he contends the court was in error, and that hence the order should be reversed. It is not necessary to inquire into the soundness of appellant's view of the law as to the particular point discussed by him, since the record does not sustain his assumption that the new trial was granted upon that ground. The action was in claim and delivery for the recovery of a lot of sheep, and the evidence was substantially conflicting as to the ownership and right to possession of the sheep. The motion for new trial was made upon several grounds, including that of the insufficiency of the evidence to sustain the findings, and the order granting the motion is general in terms. The respondent invokes the well-settled doctrine of this court that where a new trial is asked for on several grounds, and is granted, and the record does not disclose for which one of the reasons it was granted, the order will not be reversed if it could have been properly granted upon any one of the grounds assigned. The case is within this rule, and the action of the court cannot, therefore, be reviewed. The order is affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

(121 Cal. 1)

#### PEOPLE v. SEARCEY. (Cr. 348.)<sup>1</sup>

(Supreme Court of California. May 28, 1898.)

CRIMINAL LAW—SELECTION OF JURORS—CHALLENGE TO PANEL—EXCUSING JURORS—REMARKS OF PROSECUTING ATTORNEY—EVIDENCE OF EXPERIMENTS.

1. Code Civ. Proc. § 206, provides that the jury list shall be composed of names of persons selected from the wards and townships of the county. *Held*, that a challenge to the panel was properly overruled, where the evidence showed no jurors selected from the town of C., but did not show that none had been selected from the township in which C. is located.

2. A court has broad discretion in excusing jurymen, and a defendant tried by a competent jury cannot object that the judge excused certain of the venire for cause.

3. A statement by the district attorney, in his opening statement to the jury, that he would prove certain acts of defendant as evidence of guilt, will not be prejudicial error unless made in bad faith, although he is not permitted to introduce such evidence.

4. A witness testified that he followed tracks in the sand leading from the scene of a homicide; that he compared the tracks, which were

<sup>1</sup> Rehearing denied.



somewhat peculiar, with tracks made by defendant's shoes, and found them the same. He brought before the jury a box of sand containing shoe tracks, which he made with these shoes, which he testified were the same as those found in the sand at the place of the killing. *Held*, that the box of sand, with the impressions, was competent to show, by comparison, the character of the tracks, where the conditions under which they were made were substantially the same.

Department 1. Appeal from superior court, San Bernardino county.

Louis James Searcey was convicted of murder, and appeals. Affirmed.

Benj. F. Bledsoe, Gordon & Hall, and H. M. Willis, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. The defendant has been convicted of the crime of murder, and by the judgment of the court the extreme penalty of the law has been ordered. Many assignments of error are relied upon by this appeal, and they are all of a somewhat technical character. We will specially notice the more important ones.

It is claimed that a challenge to the panel of jurors should have been allowed. The evidence taken upon the hearing of the challenge discloses a very lax performance of duty upon the part of the board of supervisors in selecting the list of trial jurors for the year. The sections of the Code declaring what that duty is evidently either have not been closely studied by the board, or no real effort has been made to follow the law there laid down. It appears that the names of persons were placed upon the list which do not appear upon the last assessment roll. That all names upon the list should appear upon the assessment roll of the preceding year is an important requirement in the eyes of the law. But the mere fact that some names of persons appeared upon the list that did not appear upon the last assessment roll of the county, of itself, is not a sufficient departure from the demands of the law to authorize the trial court in sustaining a challenge to the panel. It further appears that not a single name is found upon the list from Colton, a town possessing 1,500 inhabitants. The law says (Code Civ. Proc. § 206) that this list should be composed of names of persons selected from the wards and townships of the county in proportion to the inhabitants thereof, as near as may be estimated by the board of supervisors. It would seem that by compliance with this provision of the law the names of some persons from Colton would be likely to appear upon this list. But, however this may be, the evidence discloses that the township in which the town of Colton is situated embraces additional territory; and it is not plain from the evidence but that some names upon the list were those of persons living outside of Colton, and yet within the township. If appellant's contention upon this

point be good in law, it was his duty to have shown by some pertinent evidence that the township of Colton was not represented upon the jury list. When he established the fact that Colton was not so represented, such evidence was not sufficient to prove the material issue. The further fact that the judge excused certain of the venire for cause is not a matter for complaint upon the part of the defendant. As to such matters the court's discretion is of the broadest. Defendant in this regard must be satisfied if he is tried by 12 qualified, competent jurors.

In this case a man was murdered upon the railroad track upon the Mojave desert, while traveling westward. The district attorney in his opening statement to the jury, prior to the introduction of any evidence, stated that he proposed to prove that the defendant was likewise traveling westward upon this track at about the same time and place; and also at that time officers of Arizona, with his knowledge, were looking for him, with a view to arrest him upon a charge of burglary committed in that territory. The case is one of purely circumstantial evidence. As suggested, the defendant was near the scene of the murder, traveling westward. Twenty-four hours later he was arrested 30 miles east of that point, traveling eastward. The district attorney by his opening statement proposed to prove these facts for the purpose of showing the improbability of defendant's conduct in traveling towards the arresting officers, unless great reason existed for such action upon his part, and this reason, it was claimed, was found in the fact of the murder. Evidence to this effect was offered before the jury, and under objection was denied admission by the court. Notwithstanding this ruling, it is still insisted by appellant that the statement of the district attorney, as bearing upon the defendant's commission of another offense, constituted prejudicial error.

There is no question but that under certain conditions the prosecution are entitled in law to prove against a defendant an offense other than the one upon which he is being tried. Our state Reports contain many such cases. But whether or not this case is such a one is not a question necessary for decision, for, as already suggested, the court rejected all evidence looking in that direction. Again, we have been cited to no case where a new trial has been ordered by reason of the character of the opening statement of the prosecuting officer. But, though precedent is lacking to the point, we are prepared to say that such misconduct on the part of the prosecuting officer might be found in the character of his opening statement to the jury as to recommend, or even absolutely demand, in the interests of justice, a second trial of the defendant. The principle justifying such a course is well outlined in *People v. Wells*, 100 Cal. 459, 34 Pac. 1078. There a new trial was ordered by reason of



the action of the district attorney merely asking certain questions of various witnesses, the answers to such questions not being admitted by the court. The conclusion of the court was there declared because it was evident from the record that the attorney in asking those questions was acting in bad faith, and attempting by this course to improperly influence the jury to the defendant's damage. That case is an exceptional one in its facts, but not in its law, and the decision is eminently sound. If such misconduct existed here the same results would follow; but it is not at all apparent that the district attorney was acting in bad faith in making the statements to which objection is made. It is not even clearly apparent that his position as to the admissibility of such evidence was wrong in law. As a circumstance tending to show the guilt of the defendant upon the charge of murder, the facts evidencing his conduct in this regard bear with some force. There is certainly no such palpable wrong in his conduct as to justify the conclusion that he was actuated by bad faith in making the statements here under consideration.

Witness Arbois testified that a few days subsequent to the homicide he visited the scene of the crime, and found tracks of a person leading therefrom. He followed these tracks in the sand a distance of 15 miles. At that time he had a pair of shoes in his possession taken from the feet of defendant after his arrest. He compared the tracks in the sand, which were in some respects peculiar, with tracks made by these shoes, and found them the same. He also minutely detailed before the jury the appearance of these tracks in the sand. Thereafter he brought before the jury a box of sand which contained impressions of shoe tracks, and then testified he made these tracks with defendant's shoes, and that the tracks so made were identical with those he found in the sand upon the desert. The introduction in evidence of this box of sand, with the shoe impressions therein, is claimed to constitute error, and many reasons are now urged to support this claim. Counsel cite various cases which refer to the danger in allowing experiments to be made before the jury, and also insist that the conditions which surrounded these tracks when made in the box of sand were not shown to be similar to those upon the desert when the tracks were there made; but we see nothing of material moment in these positions. This evidence hardly partook of the character of an experiment made before the jury. Nothing was done before the eyes of the jury looking towards the making of an experiment. The shape and dimensions of certain tracks were placed before that body, made by the use of a box of sand. Any other im-

pressionable substance as well might have been used. These tracks in the box were declared by the witness to be identical with those found upon the desert. Under such circumstances, this evidence served the purpose of accurately describing to the jury the appearance of the tracks upon the desert. It was an indirect, but entirely satisfactory, and legal way of proving that very material link in the chain of circumstances connecting the defendant with the murder.

It being clear that the evidence was admissible for the purpose of showing by comparison the character of the foot tracks upon the desert, no violation of law occurred upon the ruling of the court. Indeed, we find in the record no objection made by counsel to the admission of the evidence, other than the very general one that "we object to the witness testifying that he made footprints representing the form and shape of those." Was this evidence competent as directly tending to prove that defendant's shoes made the tracks in the desert sand? If defendant's shoes made the tracks in the sand in the box, and those tracks were identical with the tracks found in the sand in the desert, then the evidence would seem important upon that issue. There is but one possible objection that could be made to its admission for the purpose of establishing that fact. That objection would be a specific one, based upon a dissimilarity of conditions under which the tracks in the box and those upon the desert were made. To have any weight looking towards the establishment of this important fact, the tracks in both cases must have been made under substantially the same conditions, and, as already suggested, we find no objection in the record sufficiently specific to raise that question upon this appeal. Yet aside from that consideration, upon a careful examination of the testimony, we conclude the conditions were so substantially alike in the two cases as to justify the admission of the evidence. No testimony was offered bearing upon these conditions other than that of the witness Arbois, and he declares that the sand in the two cases was of the same quality and of the same character of hardness and compactness.

We have examined the remaining assignments of error, and find no substantial merit in them. While the evidence of defendant's guilt is found in a chain of circumstances alone, still, upon a perusal of that evidence as set out in full by the record, we are satisfied the jury was entirely justified in declaring the verdict rendered in the case. For the foregoing reasons the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

121 Cal. 53

**MARKS v. WEINSTOCK, LUBIN & CO.**  
(Sac. 298.)

(Supreme Court of California. May 31, 1898.)

INJUNCTION—DISSOLUTION—APPEAL—REVIEW.

1. A motion to dissolve a temporary injunction, based on an affidavit denying certain allegations in the complaint, and making other allegations, where no answer has been filed, will be denied.

2. The continuance of a preliminary injunction to abate a nuisance is largely a matter of discretion of the court, and its action will not be disturbed on appeal unless abuse of discretion appears.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county; Matt F. Johnson, Judge.

Action by H. Marks against Weinstock, Lubin & Co., a corporation. From an order denying a motion to dissolve a temporary injunction, defendant appeals. Affirmed.

Albert M. Johnson, for appellant. A. L. Hart, for respondent.

**BELCHER, C.** Upon filing the complaint in this case a preliminary injunction was issued, restraining the defendant from placing or maintaining on the sidewalk of a street in the city of Sacramento a certain obstruction, alleged to have been placed and kept there by defendant maliciously, and to the prejudice and damage of the plaintiff. The complaint was duly verified, and stated facts sufficient to entitle the plaintiff to the relief demanded. Without filing any answer, the defendant moved the court to dissolve the injunction upon several grounds. After a hearing the motion was denied, and from that order this appeal is prosecuted.

The motion was based upon two affidavits which were introduced and read by defendant at the hearing,—one made by James Seadler, and the other by A. Bonnheim. The affidavit of Seadler is of no importance, as it simply states the extent of the sidewalk occupied by the obstruction complained of, as alleged in the complaint. The affidavit of Bonnheim, after stating that he is the secretary of defendant, and makes the affidavit for and on behalf of defendant, consists alone of admissions, denials, and allegations as to the facts of the case. It first states that he (the affiant) admits many of the material allegations of the complaint, and then proceeds to state at length what the defendant denies and alleges. For example, it is said: "And the defendant denies that it has placed the said structure or show case upon the said sidewalk maliciously," etc., and "the defendant alleges, on the contrary, that the structure or show case was constructed by it and placed upon said sidewalk lawfully, and for a legitimate purpose," etc. And it is also said: "And defendant further alleges that" in June, 1894, the board of trustees of the city of Sacramento adopted an ordinance, a copy of which is set out, which authorized and justified its action.

We fail to see how this affidavit can subserve the purposes of the defendant. It is not an answer, and cannot take the place of an answer. Clearly, the affiant had no power to admit, deny, or allege any fact; and, until an answer was filed, how could he know what defendant admitted, denied, or alleged? An affidavit is simply and only written proof, taken ex parte, of the facts stated in it; and, as in giving oral testimony, the facts stated should be probative, and not ultimate facts or conclusions. We think it must be held, therefore, that the said affidavit was not sufficient to prove the facts attempted to be proved thereby, or to sustain the defendant's motion.

But, waiving this objection, the order of the court should, in our opinion, be affirmed on other grounds. It is a well-settled rule that the dissolution or continuance of a preliminary injunction is a matter largely within the discretion of the trial court, and its action will not be disturbed on appeal unless it appears from the record that its discretion has been abused. *Patterson v. Board*, 50 Cal. 344; *Parrott v. Floyd*, 54 Cal. 534; *White v. Nunan*, 60 Cal. 406; *Grannis v. Lorden*, 103 Cal. 472, 37 Pac. 375. Here it appears from the complaint that the obstruction complained of was a private as well as a public nuisance, for the abatement of which the plaintiff was entitled to maintain an action. And, as shown by the learned judge of the court below in an opinion delivered when the motion was denied, the obstruction was one not authorized or justified by the ordinance relied upon by the defendant. Under these circumstances, it cannot be said, we think, that the court abused its discretion in denying the defendant's motion. We advise that the order appealed from be affirmed.

We concur: **CHIPMAN, C.; SEARLS, C.**

**PER CURIAM.** For the reasons given in the foregoing opinion the order appealed from is affirmed.

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**In re WINSLOW'S ESTATE.** (Sac. 357.)  
(Supreme Court of California. May 31, 1898.)

ABANDONMENT OF HOMESTEAD—EVIDENCE OF  
DECLARATION.

Civ. Code, §§ 1243, 1244, provide that a homestead of a married claimant can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged by both husband and wife and recorded. *Held*, where a wife declared a homestead on a lot, and subsequently entered into an agreement with her husband that they would henceforth live separate, and that they would divide the property specified in the agreement according to a plan set forth therein; that, in consideration of the payment to the wife of half the value of the lot in question, she transferred to him all her right, title, and interest therein; and that she relinquished all claims against the husband; which agreement was duly acknowledged and recorded, together with a deed to the



lot from the wife to the husband,—that the contract was an abandonment of the homestead by both spouses, although the property was not referred to therein as a homestead.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county.

In the matter of the estate of Robert B. Winslow, deceased, Emily Winslow, his widow, petitions to have the homestead set over to her, which was contested by the mother of the deceased. Petition was granted, and contestant appeals. Reversed.

A. A. De Ligne and H. W. Johnson, for appellant. W. W. Rhodes and C. H. Oatman, for respondent.

BRITT, C. Robert B. Winslow and his wife, Emily, resided on a lot of land, which was community property, in the city of Sacramento. In the year 1890 the wife declared a homestead on the land in manner conformable to the statute. On May 28, 1895, said married parties jointly executed a written instrument reciting that differences had arisen between them; that they desired to adjust the same, and also their property rights, without resort to the courts; and that they had agreed upon a division of their property, particularly described, in accordance with the provisions of such instrument. The property described included the said lot of land, which was referred to as the residence of the parties, and was the only real estate mentioned. It was then declared in said instrument that the said property "is hereby equally divided between the parties; and inasmuch as the said real estate is incapable of partition, it is further agreed that the whole of the aforesaid property, both real and personal, is of the value of \$4,700"; and in consideration of the premises, and of the sum of \$2,350, one-half the said value, to her paid, the wife renounced and relinquished all claims of every kind against the husband, and granted and conveyed to him all her right, title, and interest in and to all the said property, and released him from all obligation for alimony, etc., and agreed never to make any claim on him in any manner whatsoever; and the husband on his part released the wife from all claims he might have or assert against her. It was further agreed that "henceforth the parties shall live separate and apart from each other, it being understood that this agreement is and shall operate as a complete settlement and adjustment of all their property rights and relations and affairs." Said instrument was duly acknowledged by both parties, and recorded in the office where the previous declaration of homestead was recorded. Said Emily further executed to said Robert a formal deed of grant purporting to convey to him the said lot of land "as and for his sole and separate property," which was recorded in the same office. He paid to his wife the sum of \$2,350 mentioned in their

contract, mortgaging the land to raise a portion thereof. The parties separated, and in January, 1896, the husband died, leaving no children. In course of administration of his estate, his widow, the said Emily, petitioned the superior court to set over the said land to her, claiming that the homestead thereon was never abandoned, and that she was entitled to the same as survivor of the marital community. It was valued at \$3,200. Her petition was contested by the mother of the deceased. The court, however, granted the same, and the contestant has appealed.

Under sections 158, 159, Civ. Code, Winslow and wife had contractual power to deal between themselves with the homestead as property in any manner not forbidden by law; but it is provided in sections 1243 and 1244 of the same Code that a homestead of a married claimant can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged by both husband and wife, and recorded in the proper office; and respondent contends that the said contract between herself and her husband constituted no abandonment of the homestead, within this requirement of the statute. It is urged that, admitting the language of the instrument to be expressive of the purpose of the wife to abandon her rights of homestead in the land, yet the husband did not abandon, and hence, under the statute, the abandonment by the wife alone was ineffectual. The law has prescribed no form of words for the abandonment of a homestead, and the meaning of the said instrument of May 28, 1895, is to be determined by the same rules which control the interpretation of other contracts. Among those rules are that the mutual intention of the parties will be given effect so far as the same is lawful and ascertainable from the language employed and the attendant circumstances; that each clause of the contract is to be looked to for light in interpreting the others; and that those things which are necessary to give the contract effect are implied therefrom unless its terms repel the implication. Now, throughout the instrument before us the manifest paramount object of the contract is a division of property, to be final and complete. The parties covenanted that the agreement should operate "as a complete settlement and adjustment of all their property rights and relations and affairs." If the homestead right persisted notwithstanding the contract, then, instead of evidencing a complete settlement of rights in the property described and a division thereof, the instrument effected an adjustment extremely imperfect and incomplete, even during the joint lives of the parties; for in that case neither party could convey or encumber the property without the concurrence of the other, and, in case of an action for divorce, it would still have been within the power of the court to assign as a homestead under section 146, Civ. Code. It is clear that the parties



meant to deal with the unfettered fee in the land, not a mere life estate of either party. The homestead of married persons in this state has been so often likened to an estate in joint tenancy that we need not cite the cases which note the resemblance. What would be thought of a contract between joint tenants, in terms designed to effect a division, complete and final, of the property held by them, which should yet leave intact the right of survivorship? Certainly, all intendments would be indulged against that construction. We hold, therefore, that the contract between Winslow and wife—the same having been acknowledged by both and duly recorded—was an abandonment of the homestead by both spouses. Such abandonment follows from the provisions of the instrument, for they cannot have their natural and obviously intended effect without it.

Respondent has cited several cases claimed to be illustrative of the one at bar: *Burkett v. Burkett*, 78 Cal. 310, 20 Pac. 715; *Oaks v. Oaks*, 94 Cal. 66, 29 Pac. 330; *Estate of Lamb*, 95 Cal. 397, 30 Pac. 568; and others. It seems unnecessary to review those cases; our conclusion in no wise conflicts with them. In *re Davis' Estate*, 106 Cal. 453, 39 Pac. 756, has some similarity to the present case. There an agreement much like that of Winslow and wife—though apparently not involving a homestead—was enforced according to its terms. The court said that the obvious purpose thereof was “not only to definitely sever the property rights of the parties, but mutually to relinquish all inheritable interest of each in the property and estate of the other.”

The point that the homestead was not abandoned because the contract in question did not expressly refer to the property as a homestead is not well taken. See *Head v. Auberry* (Ky.) 38 S. W. 863; *Withers v. Pugh*, 91 Ky. 522, 16 S. W. 277. The order appealed from should be reversed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed.

121 Cal. 101

PEOPLE v. SCOTT. (Cr. 378.)

(Supreme Court of California. May 31, 1898.)

CRIMINAL LAW—RECORD ON APPEAL—EXCEPTIONS.

Exceptions will not be entered in a settled bill of exceptions, where the evidence as to their having been taken is conflicting, and the trial court has refused to enter them.

In bank. Appeal from superior court, Kern county.

L. A. Scott was convicted of crime, and appeals, and petitions to include certain exceptions in settled bill of exceptions. Denied.

J. W. Ahern and W. A. Harris, for appellant. Atty. Gen. Fitzgerald, for the People.

PER CURIAM. This case is before us on a petition by appellant to have certain alleged exceptions included in a bill of exceptions which has been settled by the judge of the superior court, who refused to incorporate them in the bill. The matter was submitted here upon the petition, the answer of the judge, and certain affidavits filed by the parties. The alleged exceptions refer entirely to certain remarks claimed to have been made by counsel for the prosecution in his closing address to the jury; but the evidence as to whether there were any such exceptions is directly conflicting. Under these circumstances, we cannot hold that the superior judge erred or abused his discretion in not allowing the exceptions, nor would we be warranted in declaring here that they should be included in the bill. The petition is denied.



121 Cal. 26

CLARK et al. v. NORDHOLT. (L. A. 442.)

(Supreme Court of California. May 31, 1898.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—  
PLEADING JUDGMENT.

1. Want of probable cause in instituting an action for \$2,030, in which a judgment of \$15 was obtained, is shown by an allegation in a complaint for malicious prosecution that in instituting it, and levying attachment therein, the plaintiff therein acted maliciously and without probable cause; the defendants therein not being indebted to him, except for the \$15, which they had tendered to him, and had always been ready and willing to pay, to his knowledge, and which he had refused.

2. The provision of Code Civ. Proc. § 456, for pleading judgments, is not applicable to a cause litigated in a court of general jurisdiction; so that it is not necessary to set out the jurisdictional facts on which it rested, or allege that it was "duly given and made."

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by T. M. Clark and another against W. F. Nordholt. Judgment for plaintiffs. Defendant appeals. Affirmed.

Edgerton & Hickox, for appellant. Murphy & Gottschalk, for respondents.

GAROUTTE, J. The only question presented by this appeal relates to the sufficiency of the complaint to support the judgment. The action is one of malicious prosecution. It arises from a suit brought by defendant against plaintiffs upon an alleged indebtedness of \$2,030, the issuance of a writ of attachment therein, and a levy upon these plaintiffs' goods to satisfy that demand. This defendant recovered a judgment in that action in the sum of \$15. A general demurrer raises the question involved. It is claimed by appellant: (1) The first count of the complaint shows there was probable cause for the action. (2) The second count of the complaint shows there was probable cause for the action. (3) The first count of the complaint does not show that the action has been legally and finally determined in favor of respondents.

As to subdivision 1, the complaint alleges "that in instituting said action, and in securing said writ of attachment, and in having the attachment levied as hereinafter stated, the said Nordholt acted maliciously and without probable cause, and that these plaintiffs were not indebted to him in said amount of \$2,030, or any other amount, excepting the sum of fifteen dollars, which they had tendered to him, and had always been ready and willing to pay, which was



well known to said Nordholt, and the acceptance of which amount he had refused." This allegation of the complaint shows a want of probable cause.

As to subdivision 2, it is claimed that the allegation of the complaint as to the rendition of a judgment for \$15 in favor of defendant conclusively shows probable cause in the bringing of the action by Nordholt. This count of the complaint also alleged "that in instituting said action, and procuring said writ of attachment, and in having said attachment levied as hereinafter stated, the said defendant, Nordholt, acted maliciously and without probable cause." It follows there is nothing in this contention. "If a person, having a good cause of action against another, willfully sue for a much greater amount than is due, and attach the property of the other, and put him to charges, he is liable." *Weaver v. Page*, 6 Cal. 681.

As to subdivision 3, it is claimed that the judgment in the prior action should have been pleaded, either by setting out the jurisdictional facts upon which it rested, or by alleging that it was "duly given and made." Section 456 of the Code of Civil Procedure, relating to the manner of pleading judgments, is not applicable to causes litigated and decided in courts of general jurisdiction. *Weller v. Dickinson*, 93 Cal. 108, 28 Pac. 854; *Edwards v. Hellings*, 99 Cal. 214, 33 Pac. 799; *Rowe v. Blake*, 112 Cal. 644, 44 Pac. 1084.

This is a frivolous appeal. The judgment is affirmed, and \$50 damages added as a penalty.

We concur: VAN FLEET, J.; HARRISON, J.

121 Cal. 96

HENSLEY v. RECLAMATION DIST. NO. 556.  
(Sac. 322.)

(Supreme Court of California. May 31, 1898.)

#### RECLAMATION DISTRICT—ACTION AGAINST.

Action cannot be maintained against a reclamation district for injury cases by its negligence while bringing a "ditcher" onto plaintiff's land to construct a canal through it, no provision for action against it being made by Pol. Code, from which it derives whatever legal existence it has, and it having no property, and being given power to levy assessments against the lands within it and issue warrants only for the works of reclamation. Pol. Code, §§ 3456-3459.

Department 2. Appeal from superior court, Sacramento county.

Action by Mary A. Hensley against Reclamation District No. 556. Judgment for defendant. Plaintiff appeals. Affirmed.

Stearns & Elliott, for appellant. W. A. Gett, Jr., for respondent.

McFARLAND, J. The court below sustained a general demurrer to the complaint, and rendered judgment for defendant. From this judgment plaintiff appeals.

It is averred that defendant is a corpora-

tion organized and existing "under and by virtue of the Political Code of the state of California, made and provided for the formation and organization of reclamation districts," and that plaintiff is the owner of a certain tract of land included within the district for the reclamation of which the defendant was organized. The gist of the alleged cause of action is that while the defendant was bringing a "ditcher" upon the land of plaintiff for the purpose of constructing a canal through said land, the defendant "negligently and carelessly cut through a levee upon said land of plaintiff, \* \* \* and negligently and carelessly destroyed a certain trough or pump connected with the pumping plant of said plaintiff, \* \* \* and thereby prevented said plaintiff from drawing off from said land the water which annually collected thereon during the wet season"; and that "by reason of such negligence of defendant" water collected and remained on said land, and destroyed a number of fruit trees, to plaintiff's damage in the sum of \$5,071.50. There is a second count in the complaint, but the cause of the alleged damage in both counts is that defendant in proceeding to take a dredger onto the land for the purpose of excavating the canal, negligently allowed the dredger to cut a levee, and thus injured a pumping plant of plaintiff so that she was afterwards unable to free her land from water by said pumping plant. The alleged damage does not seem to be consequential to the work which the defendant was engaged in, namely, making the canal, but was the result of a preliminary act, namely, taking the dredger to the place where the work of making the canal was to be done.

There is a great deal of discussion in the briefs about the responsibility of municipal corporations for damage done by the careless acts of their agents, but it does not seem to be necessary to consider those questions here. Reclamation districts have been organized in this state under various statutes, and the provisions of these statutes have differed materially from each other. In some of them much greater powers were given the district, and much greater liabilities imposed, than in others. This matter is quite fully discussed in the opinion of Mr. Justice Temple in *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 48 Pac. 1016. In the case at bar the only averment pointing to the character, power, and liabilities of the respondent is that it was organized under the provisions of the Political Code. It is not necessary to determine whether or not districts formed under the Political Code can be properly called "corporations." They have been called "quasi public corporations." They are at least "public agencies." *People v. Reclamation Dist. No. 551*, 117 Cal. 121, 48 Pac. 1017. But, if considered corporations, they have only such powers and have only such liabilities as are prescribed by the law

which creates them. They are not corporations organized under the provisions of the Civil Code. Their characters are determined by the provisions of the Political Code, from which they derive whatever legal existence they have. The law which creates them does not anywhere provide that they may be sued, and they can sue only for one purpose,—that is, to collect assessments. There is no provision for perpetual succession, and there are only two or three usual powers of a corporation granted them. If a judgment against a district could be enforced at all, it could be enforced only as against individual owners of land in the district, many of whom are brought into the district against their will; for a district may be formed upon petition of only one-half of the landholders within it. The district has no property out of which a judgment could be satisfied. It is in its essential character a mere agency. Now, it is admitted by appellant that, "if a judgment cannot be collected, it is idle for the court to entertain the action"; and it is quite apparent that in this case no judgment against the respondent could be collected. As before stated, it has no property, and it could obtain means to satisfy a judgment only by levying assessments upon the lands of the district. But it has no power to levy assessments for that purpose. It is given power to levy assessments and issue warrants for one purpose only, namely, "for the works of reclamation." Pol. Code, §§ 3456-3459. Neither its trustees nor its commissioners could be compelled by mandamus to levy assessments to pay such a judgment as is prayed for in the case at bar. This view is determinative of the case against the appellant, and it is not necessary to notice other questions discussed by counsel. Whether or not appellant would have a cause of action against individuals for the alleged acts of negligence complained of is a question which does not here arise. The judgment appealed from is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

121 Cal. 13

HIRSHFELD v. WEILL et al. (L. A. 369.)  
(Supreme Court of California. May 31, 1898.)

#### JOINT DEMURRER—ASSIGNMENT.

1. Complaint stating cause of action as to some defendants will withstand joint demurrer of all defendants claiming that it does not state cause of action.

2. Where four persons jointly interested in a venture place checks received therefrom in a bank with the understanding that it shall collect the same, and pay one-fourth of the proceeds to each of such persons, an assignment by one of the four of his interest to a stranger is good as against another of the four to whom he is indebted.

Department 1. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by David Hirshfeld against A. Weill

and others. Judgment for plaintiff. Defendants appeal. Affirmed.

J. W. Ahern, for appellants. T. M. McNamara, for respondent.

GAROUTTE, J. This appeal presents questions arising upon a judgment roll not containing a bill of exceptions. There are many defendants in the action, and they filed a joint demurrer, claiming that the complaint did not state facts sufficient to constitute a cause of action, and also claiming that there was a misjoinder of parties defendant. The general demurrer being joint, if a cause of action be stated against any of the defendants it was properly overruled. *Azevedo v. Orr*, 100 Cal. 293, 34 Pac. 777. The court there said: "So, also, a joint demurrer by all of the defendants must be overruled if the complaint is good against either of them." It is here conceded that a cause of action is stated against some of the defendants. Again, in speaking of a misjoinder of parties defendant, the court in the above case said: "A complaint is not necessarily defective in which there is united with some defendants another against whom no liability is alleged or recovery sought, and an order overruling a demurrer for misjoinder of parties defendant does not constitute a reversible error if it can be seen that the rights of the parties have not been prejudiced." We deem it plain that no rights of the defendants have been prejudiced by the action of the trial court in overruling the demurrer to the complaint as to a misjoinder of parties.

Weill & Alexander (partners), Elliott, Davis, and Miller were jointly interested in a business venture, from which was received, as proceeds thereof, various checks, drafts, bills, and notes. As to the disposition of these evidences of indebtedness, etc., the trial court made the following finding of fact: "That by and with the consent of the defendants John A. Miller and T. J. Davis, and for the mutual benefit of the said John A. Miller, T. J. Davis, Weill & Alexander, and E. E. Elliott, the said drafts, orders, notes, and due bills were received from said tenants by the defendants Weill & Alexander and E. E. Elliott, and by them placed in the custody and possession of the defendant the Kern Valley Bank for collection, with the understanding that the said Kern Valley Bank should collect the same, and from the proceeds thereof pay" expenses of collection and certain other named indebtedness, and out of the surplus "pay to the defendants Weill & Alexander one-quarter share thereof, to the defendant John A. Miller one-quarter share thereof, and to the defendant T. J. Davis one-quarter share thereof." The court further found that the bank accepted the trust, made the collections, paid the amount due as expenses of collection and the other named indebtedness, and held a surplus of \$3,751.92, one-half of which it refused, upon demand,



to pay this plaintiff, assignee of Davis and Miller. Both Davis and Miller were indebted to Weill & Alexander at the time they assigned their interest in the fund to this plaintiff; and it is now claimed that this indebtedness of Davis and Miller should be allowed in favor of Weill & Alexander, and that plaintiff's interest in the fund held by the bank should be reduced to that extent. We are unable to call to mind any principle of law that would justify such application of the fund. It is not Weill & Alexander who own or control the fund held by the bank. Again, they are not indebted to Davis and Miller, the assignors of plaintiff. These owners of the fund all stand alike, and the bank is the party holding the fund, and bound to pay it to the parties entitled, as theretofore agreed upon. The court below has taken this view of the litigation, and upon these facts has rendered a money judgment against the bank alone. It necessarily follows that the indebtedness of Davis and Miller to Weill & Alexander could not be set off in this action. They had no valid claim against Weill & Alexander, and, consequently, held nothing against which Weill & Alexander's claim against them might be set off. For the foregoing reasons the judgment is affirmed.

We concur. VAN FLEET, J.; HARRISON, J.

121 Cal. 11

THOMSON v. THOMSON. (S. F. 1175.)

(Supreme Court of California. May 31, 1898.)

DIVORCE—FINDINGS ON DEFAULT JUDGMENT—DESERTION—TIME FOR COMMENCING ACTION.

1. Findings of fact and law, where the judgment is rendered on default, are unnecessary, and form no part of the judgment roll (Code Civ. Proc. § 670), and hence cannot be considered on appeal.

2. A complaint for divorce filed April 1, 1895, charged desertion without cause, and against plaintiff's will, and without his consent, prior to February 1, 1894. The action was not defended, and the trial court found that all the material allegations of the complaint were sustained by competent evidence. *Held*, that a finding that the action was barred by Civ. Code, § 124, subd. 3, providing that when desertion is charged the divorce will not be granted when there is an unreasonable lapse of time before the commencement of the action, was erroneous, since section 125 defines unnecessary delay as such as establishes the presumption of collusion, condonation, or acquiescence, all of which are negatived by the complaint.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by David Thomson against Sarah Thomson. From a judgment for defendant, plaintiff appeals. Reversed.

W. W. Davidson, for appellant.

BRITT, C. Action for divorce, begun April 1, 1895. Plaintiff alleged in his complaint,

among other things: "That prior to the 1st day of February, 1894, the defendant \* \* \* willfully and without cause deserted and abandoned the plaintiff, and ever since and still continues so to willfully and without cause desert and abandon said plaintiff, and to live separate and apart from him, without any reason, and against his will, and without his consent." The defendant did not answer the complaint, or otherwise appear in the action. In the judgment it was recited that the cause was heard upon the complaint "and upon the proofs herein taken, from which it appears that all the material allegations of the complaint are sustained by testimony free from all legal exceptions as to its competency, admissibility, and sufficiency"; whereupon the court denied a divorce "on the ground that said action is barred by reason of the provisions of subdivision 3 of section 124 of the Civil Code of California." The paper entitled "Findings of Fact and Conclusions of Law," printed in the transcript, on which appellant lays much stress in argument, cannot be considered. As there was no answer, findings were unnecessary, and form no part of the judgment roll. Code Civ. Proc. § 670; Murray v. Murray, 115 Cal. 266, 47 Pac. 37. But, in our opinion, the determination of the court is at variance with the facts recited in the judgment. The said subdivision 3 of section 124, Civ. Code, provides that a divorce must be denied in actions on the ground of desertion (among others) when there is an unreasonable lapse of time before the commencement of the action. Section 125, following, defines unreasonable lapse of time to be such delay as establishes the presumption of connivance, collusion, or condonation of the offense, or full acquiescence in the same, with intent to continue the marriage relation notwithstanding the commission of the offense. Now, connivance and collusion imply consent to the act complained of. Civ. Code, §§ 112, 114; 2 Bish. Mar., Div. & Sep. §§ 203, 250. Acquiescence is consent by silence; condonation is forgiveness, and is revoked when the condonee commits the offense anew. Civ. Code, § 121. None of these matters of defense could co-exist with the facts alleged by plaintiff that defendant deserted him, and still continues such desertion, without cause, and against his will, and without his consent; which allegation is shown by the recitals of the judgment to have been well proved. Hence it appears that the plaintiff established his case, and the judgment denying the relief he claimed was erroneous, and is not helped by the reason assigned therein. It should therefore be reversed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.



6 Cal. Unrep. 12

BIXBY v. CRAFTS et al. (Sac. 515.)

(Supreme Court of California. May 31, 1898.)

## PLEDGE—CONVERSION—WAIVER—LIMITATIONS.

1. A pledgee of stock, even if he converts it, by depositing it in escrow under an agreement to convey it to one on exercise of his option of purchase on all the corporation's property, does not thereby lose his lien, under Civ. Code, § 2910, the pledgor having waived the tort by electing to treat the pledgee's contract as authorized.

2. The statute of limitations, to be availed of, must be pleaded.

Commissioners' decision. Department 1. Appeal from superior court, Sierra county.

Action by A. M. Bixby against S. S. Crafts and others. From the judgment, plaintiff appeals. Affirmed.

F. D. Soward, for appellant. F. D. Wehe and S. B. Davidson, for respondents.

BRITT, C. On February 4, 1880, plaintiff transferred in pledge to defendant S. S. Crafts certain shares of stock in the Hope Mining Company, a corporation, as security to Crafts for past and future advances of cash and merchandise had and to be had of him by plaintiff. On August 1, 1895, said mining company entered into a contract with defendant F. W. Page, whereby the latter obtained the option to purchase all the company's property within the period of 18 months, upon terms specified in the contract. Crafts and other holders of the company's stock ratified such contract, and agreed, on the consummation thereof by Page, to convey to him their several holdings of stock, the certificates of which they deposited in escrow pending the exercise of Page's option. Plaintiff commenced this action on November 13, 1895. In his amended complaint (to which said corporation was made a party defendant) he averred, among other things, that he waives "the tort of defendant S. S. Crafts in so executing the aforesaid agreement, and elects to treat such contract and deposit of the aforesaid stock in escrow as binding upon himself, save and except that his rights thereunder be protected by a decree of this court." He prayed that an account be taken to determine the amount due from him to Crafts; that any balance found due be paid by Page out of money to become payable from him under said contract with the Hope Mining Company; and that he (the plaintiff) be subrogated to the rights of Crafts therein. There was a cross complaint by Crafts, to which pleading plaintiff answered. By its judgment the court ascertained the amount due from plaintiff to Crafts, and decreed that plaintiff be allowed to redeem his stock by paying such amount within 90 days; otherwise that the stock be sold by the sheriff to raise the same, balance of the proceeds of sale, if any, to be paid to plaintiff, any dividends accruing meanwhile to be used in effecting redemption, and plaintiff to receive any excess thereof.

On appeal it is argued that by the contract with Page, and by depositing the certificate of

stock in escrow, Crafts converted the stock, and so lost his lien as pledgee. Civ. Code, § 2910. But plaintiff seems to overlook the fact that by his pleading he waived the tort of Crafts in this behalf (if tort there was), and elected to treat the contract with Page as one Crafts had authority to make. It is said also that Crafts' account against plaintiff was barred by the statute of limitations, and hence that his lien on the stock was lost. Civ. Code, § 2911. It is sufficient reply to say that plaintiff did not in his answer to the cross complaint, or elsewhere, plead the bar of the statute. Plaintiff further complains that the court did not subrogate him to the right of Crafts under the contract with Page; but by redeeming the stock, as allowed by the judgment, he would become entitled as holder thereof to his proportionate part of all the benefits derived by the corporation from the contract with Page, and Crafts was entitled to nothing more than that. It is not perceived how plaintiff could have any other subrogation. The judgment fully protected the rights of plaintiff, and should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

121 Cal. 8

WILSON v. DONALDSON et al. (Sac. 468.)

(Supreme Court of California. May 31, 1898.)

## CHattel MORTGAGES—LABORER'S LIEN—PRIORITY.

A chattel mortgage on growing crops, for money used for seed and plowing, takes precedence over laborer's lien for harvesting, there being no other statutory provision as to priority than that, "other things being equal, different liens \* \* \* have priority according to the time of their creation."

Department 1. Appeal from superior court, Sacramento county.

Action by Ellen M. Wilson against William Donaldson and others. Judgment for plaintiff. Defendant C. L. Donaldson appeals. Affirmed.

A. E. Mutter and W. A. Gett, Jr., for appellant. Albert M. Johnson, for respondent.

GAROUTTE, J. Respondent, owning a certain tract of land, leased it to defendant William Donaldson for a share of the crop as rent, to be delivered in the sack to her. He also gave her a chattel mortgage upon all his interest in the growing crop to secure a then existing indebtedness. William Donaldson hired appellant, C. L. Donaldson, to harvest the crop at an agreed price of one dollar per acre. The grain was harvested under this contract, and upon the completion of the work this appellant took possession of 250 sacks of the grain, claiming a lien thereon to the extent of his contract price for the labor performed. Respondent claims the property under her chattel mortgage, exe-

cut and recorded before the grain was ready for harvesting.

Appellant contends that he is entitled to a lien upon the grain by virtue of sections 3051 and 3052 of the Civil Code, which relate to statutory liens created when labor is performed upon personal property under the various circumstances there enumerated. Upon principle, *Douglass v. McFarland*, 92 Cal. 636, 28 Pac. 687, to some extent at least, supports the right of appellant, Donaldson, to claim a lien upon the grain for his labor under the circumstances we have detailed. For the purposes of the case, it may be conceded that he is entitled to a lien. Such concession being made, the important question at once presents itself, does this statutory laborer's lien of Donaldson take priority over the lien created by the chattel mortgage? An examination of the authorities upon the question from the various states of the Union discloses a conflict of judicial opinion. A well-considered case upholding the priority of the statutory or laborer's lien may be found in *Case v. Allen*, 21 Kan. 217. But the great weight of authority is the other way. *Pingrey, Chat. Mortg.* §§ 730, 731; *Jones, Liens*, § 691; *Jones, Chat. Mortg.* § 472; *Storms v. Smith*, 137 Mass. 201; *Ingalls v. Vance*, 61 Vt. 582, 18 Atl. 452; *Hanch v. Ripley*, 127 Ind. 151, 26 N. E. 70. It is well said in the case last cited: "As the agister's lien depends alone upon the statute, it can have no greater force than the statute gives; and as the legislature has, as we have said, manifested no intention of giving to it superiority over other liens, it can have none." In the absence of the statute, the appellant would have no lien whatever. All his rights come from the statute, and therefore must be weighed and limited by the statute. If the legislature had desired to give such lien claimants a priority over contract liens, it was an easy thing to have said so. And a declaration to that effect, not violative of constitutional rights, might be in line with a sound public policy. But here there is no such declaration, and it is not for the courts to ingraft such an amendment upon the law.

We have in this state a legislative declaration as to priority of liens in general which reads as follows: "Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia." Civ. Code, § 2897. It may well be said that "other things" are equal in this case. If not equal, then they preponderate largely in favor of the chattel mortgage. This is no question of balancing existing equities between the chattel mortgagor and the chattel mortgagee, but a question of equities between the chattel mortgagee and a third party,—a stranger,—and such equities are all in favor of the chattel mortgagee. We find none in favor of the third party, the statutory lien claimant. The chattel mortgagee gave full value for her right of lien, and was first

in point of time. She notified all the world of her rights, and warned the world to deal with the property at their peril. She made a contract expressly authorized by the law, and did all that the law demanded of her in order to preserve the fruits of her contract. No court of equity can suggest a single defect in her conduct. Upon the other hand, this appellant, with full knowledge of the existence of the chattel mortgage, contracted to harvest the crop. He did this voluntarily, and if he suffers loss by such conduct it is his own fault. It was a matter of choice upon his part to do the work, and he assumed the risk of losing his share when he entered into the contract. To be sure, his labor may have been necessary for the preservation of the crop. At the same time it may be said that the chattel mortgage lien was occasioned by the advance of money to furnish the seed and plow the ground. If the words "other things" found in the statute quoted refer to equities (which we do not decide), then it may readily be seen that those words furnish no comfort to appellant.

It would seem that a great number of the cases cited from other states, tending to support appellant's contention as to the priority of a statutory lien over a contract lien, may be distinguished from the principle we deem controlling in this state. In many jurisdictions where these decisions are found a chattel mortgage carries with it title to the property and the immediate right of possession. In this state there is no such law, either as to the title or the right of possession. As the law stands in those states, the mortgagor by consent retaining possession of the property, the courts seem to hold that repairs necessary for its preservation, when ordered by the mortgagor in possession, being made upon the mortgagee's property, are deemed in equity to be made at his request. It may be said that in such cases the question is hardly one of priority of liens. The remaining contention relied upon by appellant has no substantial merit. For the foregoing reasons the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.



121 Cal. 47

WILLIAMS v. HARTER et al. (Sac. 363.)  
(Supreme Court of California. May 31, 1893.)  
WATERS—RIGHT TO APPROPRIATE—CONVEYANCES  
—INJUNCTION—PLEADING—JUDGMENT—FINDINGS  
—DAMAGES—EVIDENCE—APPEAL—RECORD—REVIEW.

1. Under Code Civ. Proc. § 526, providing that an injunction may be granted where defendant is doing some act in violation of plaintiff's rights, a complaint alleging ownership and right to use the waters of certain springs, and defendant's interference therewith, states a cause of action.

2. Where defendants in an action for diversion of a water flow admit the diversion, and set up a claim of right to use the water on



land farmed by them jointly, a finding that defendants jointly caused the diversion is not necessary to support a joint judgment against them.

3. In an action for the wrongful diversion of waters, the court found that plaintiff was the owner of the waters, and that defendants had diverted same to their own lands, depriving plaintiff of their use. *Held*, that a finding that the diversion was wrongful was unnecessary.

4. An occupant of public land, without title, may, by use of the waters from springs on adjoining public land, acquire a right to their use as against subsequent purchasers of the land on which such springs are situated.

5. In a controversy over the ownership of waters from springs, a deed was introduced purporting to convey "one certain water ditch out of M. creek," and "also a certain water ditch taken from a tributary to M. creek, and taken out of said creek." The springs were tributaries of M. creek, having channels leading thereto; and the ditch connected the two channels, and ran thence to the land where the water was used. This ditch was in use, carrying waters, when the conveyance was made. *Held*, that the deed sufficiently described the ditch carrying the waters from the springs.

6. Where a water right has been acquired by means of a ditch used in carrying it, a conveyance of the ditch is a conveyance of the water right.

7. In an action for the wrongful diversion of waters, it appeared that the water was necessary for raising hay on plaintiff's land. During the time of the diversion, plaintiff's hay crop was from 50 to 100 tons short, and hay was worth \$4 to \$5 a ton. *Held*, that a verdict of \$200 was not excessive.

8. A finding based on conflicting evidence will not be disturbed.

9. Under Code Civ. Proc. § 1849, providing that the declaration of a grantor, made while holding title, shall be evidence against the grantee, declarations as to the extent of his title made by a grantor prior to the conveyance are admissible.

10. In a controversy over water rights, testimony that, subsequent to the acquisition of plaintiff's right to use the water, a third person filed on the land where the waters were situated, and conveyed his rights to defendant, is immaterial.

11. Testimony that a third person would not have purchased certain lands unless plaintiff's predecessor made certain representations as to his right to waters thereon is hearsay and inadmissible.

12. Where a witness is erroneously asked whether certain statements were made in his presence, and he denies it, the error is harmless.

13. Where defendants claim that, because of representations made by plaintiff's predecessor as to his right to use certain waters, plaintiff is estopped to claim the right to such use, testimony that prior thereto, in a conversation with plaintiff's predecessor concerning such water rights, defendants made no such claim, is competent.

14. An objection that a new trial was arbitrarily denied without a hearing cannot be raised on appeal by affidavit printed in the transcript, but must be made by exception incorporated in a settled bill of exceptions.

Commissioners' decision. Department 1. Appeal from superior court, Modoc county; G. G. Clough, Judge.

Action by Mary E. Williams, as executrix of the last will of George E. Williams, deceased, against George Harter and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Spencer & Clark, for appellants. J. D. Goodwin and D. W. Jenks, for respondent.

BELCHER, C. George E. Williams died testate in the county of Modoc in 1891, owning a large tract of land in that county. His will was duly admitted to probate, and Mary E. Williams, his surviving wife, was appointed executrix thereof. As such executrix, she brought this action to obtain an injunction restraining the defendants from diverting water from the said lands, and also to recover damages for past diversions. It is alleged in the complaint that the estate of said decedent now owns and occupies, and it and its grantors and predecessors have owned and occupied for more than 20 years last past, a large tract of land in Modoc county, known as the "Williams Ranch," and which is particularly described. The complaint also describes two certain springs of water, their location and capacity, and a ditch leading therefrom, which it is alleged diverts and conveys all of the water of said springs to and upon said land, where the same is used for irrigation, for the watering of stock, and for domestic purposes, and has been so used by plaintiff's testator and his grantor for the last 20 years or more, when not prevented from so doing by defendants. It is further alleged that the grantor of plaintiff's testator, one J. N. Stone, constructed the said ditch, and thereby diverted and appropriated, and acquired a right to, all the waters of both of said springs, in the year 1871, and that he conveyed all his rights thereto to said testator in the year 1877. It is also alleged that within the year before filing the complaint, which was on August 25, 1891, the defendants entered upon plaintiff's said dams and ditch, at sundry points, and broke and destroyed the same, and placed dams in said ditch, and have thereby diverted the waters of said springs from plaintiff's ditch, and deprived her of the use thereof, and threaten to continue so to do, to her damage, etc. The defendants filed separate demurrers to the complaint, which were overruled, and then filed a joint answer denying all its material averments, except as to the diversion of the water, and setting up title in themselves to the waters of the said springs—First, by prescription; second, as owners of the riparian lands; and, third, by estoppel. The case was tried, and the court found all the facts in favor of the plaintiff, and gave judgment in her favor, granting the injunction as prayed for, and awarding damages in the sum of \$200. From that judgment, and an order denying a new trial, defendants appeal.

1. We think the complaint stated facts sufficient to constitute a cause of action and to entitle the plaintiff to the relief demanded, and the court therefore did not err in overruling the demurrers. The facts showing plaintiff's ownership and right to the possession and use of the waters of the said springs,



and the interference with that right by defendants, are clearly and succinctly stated. And, if the averments in this regard were true,—and the demurrers admitted them to be so,—then a case was made clearly entitling plaintiff to an injunction and to damages against both defendants, as they appear to have acted jointly and in concert in committing the wrongs complained of. Code Civ. Proc. § 526.

2. Appellants contend that the judgment entered against them jointly for \$200 damages was not supported or justified by the findings, for the reason that there is no finding “that the defendants are jointly liable, or jointly committed the acts complained of,” or that the acts alleged to have been done by defendants “were done wrongfully or without right.” By their answer the defendants, in effect, admitted that they had diverted the waters of the said springs from the plaintiff’s ditch, and, to justify their acts in so doing, they set up a claim of ownership of the said waters in themselves, and a right to use the same “to irrigate their own land,” which they alleged they had “occupied and jointly farmed” during the last five years, being “jointly interested in said lands and crops thereon, and the whole thereof.” This clearly implies that the diversion was by concert of action on the part of defendants, and no special finding to that effect was necessary. The court found that plaintiff was the owner of all the water flowing from said springs, and that defendants committed the acts charged, in depriving her of the use thereof. This being so, a finding that the acts were done wrongfully or without right would have been quite superfluous.

3. Appellants contend that none of the findings of the court, 14 in number, except those numbered 2 and 3, which simply describe the location of the said springs, and the natural channels leading therefrom to Montgomery creek, were justified by the evidence. After carefully reviewing the evidence, which, with the exhibits, covers about 200 pages of the printed transcript, we conclude that there was evidence sufficient to justify all the findings complained of. It is true that on most of the issues raised there was a conflict in the evidence, but that cannot be considered here. It appears that all of the lands now owned by plaintiff and defendants were public lands of the United States in 1871–72. The springs arose on the N.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of a certain section 24; and the defendants’ grantor, one Cowins, made application to purchase the same, with other lands, in March, 1880, under the desert land act, made full payment in November, 1882, and received a government patent therefor in August, 1890. Finding 1 is: “That ever since the spring of 1871 plaintiff and her grantor of the ditches and water rights hereinafter mentioned, and her testator, have continuously occupied the south-

east quarter of section 12” in the township in which the said section 24 is situated, and at the time this action was commenced she and her said testator had owned the said quarter section, and during all of said time had used the same for raising crops of hay, grain, and vegetables thereon, and that irrigation thereof was necessary to the growing of such crops. It is objected that Stone did not convey this quarter section to Williams, and the latter never acquired title thereto until May, 1884, and that there is no evidence that they made use of the land, or raised crops of hay, grain, and vegetables thereon, until after the title thereto was obtained. Counsel say: “It is clear from the evidence that plaintiff’s testator had no right to the use of the land until 1884. What use he made of it, if any, up to this time, was unlawful.” There was evidence that both Stone and Williams cultivated the said land, and raised crops thereon, before 1884, and their use of the land was not unlawful. All public lands are open to occupation and settlement by citizens of the United States, and the law is settled that the water flowing from springs on public lands may be diverted to other public lands, and there used for irrigation or other necessary purposes, and a right to the same acquired, as against any one who subsequently obtains title to the land on which the springs are situated. *De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. 563, and 22 Pac. 198; *Ely v. Ferguson*, 91 Cal. 187, 27 Pac. 587. Findings 4 and 5 are in regard to the construction of the ditches by Stone in 1871–72, the diversion and appropriation of the waters of the springs through and by means of the same, the continued use thereof afterwards by Stone and his grantee, and the present use by plaintiff of the said ditches, and of all the water flowing from said springs. It would subserve no useful purpose to set out the evidence, of which there was a large amount, bearing upon the facts found, but we think it must be held sufficient to justify the conclusions of the court. Conceding, however, that Stone had a good title to this water, it is claimed that plaintiff failed to connect herself with his title, and cannot, therefore, have the benefit of it. Counsel say: “The deed to a ditch and water right offered in evidence by plaintiff doesn’t purport or intend to convey any ditch or water right, as counsel have attempted to prove in this case,” and that “the deed is irrelevant and immaterial for the reason that there is no allegation in plaintiff’s complaint to support it.” The deed referred to purports to convey by quitclaim “one certain water ditch taken out of Montgomery creek, on the west side of said creek,” etc. “Also, one certain water ditch, taken from a tributary of Montgomery creek, and taken out of said creek,” etc. The springs were tributaries of Montgomery creek, having well-defined channels leading thereto, and, so far

as appears, were the only tributaries of that creek. The ditch in controversy was constructed from the channel of one of the springs to the channel of the other, and thence to the lands where the water was used, and it is not shown that there was any other ditch leading from said tributaries. Stone owned an interest in the Montgomery creek ditch, and in the ditch leading from the channels of the springs, and it does not appear that he owned any interest in any other ditch or ditches. The ditch from the springs was in use by Stone, conveying the waters thereof to his lands, when the deed was made; and, upon the execution of the deed, Williams took possession of the ditch and water, and used them continuously thereafter until interrupted by defendants. Looking at all the evidence, therefore, we think it sufficiently appears that Stone intended to, and did, by his deed, convey this spring ditch to Williams. But it is claimed that the deed only purports to convey the ditch, and not any right to the waters of the springs, and therefore Williams acquired thereby no interest in the waters flowing from the springs. The answer to this claim is obvious. If Stone owned the ditch, and by means of it had appropriated and acquired a right to the waters of the springs, then the waters were incidental or appurtenant to the ditch, and a conveyance of the ditch carried with it the water right. Findings 6 and 7 are in regard to the diversion of the water from plaintiff's ditch by defendants, and the damage resulting therefrom. It is claimed that finding 6 was not justified because it was not shown that defendants jointly did the acts charged, but that point has already been sufficiently disposed of. And it is claimed that finding 7 was not justified, because the damages allowed the plaintiff were excessive. There was evidence that this water was necessary for the successful raising of hay on plaintiff's land, that defendants turned the water away from plaintiff's land during the irrigation season of 1891, that her hay crop was short that season from 50 to 100 tons, and that it was worth from \$4 to \$5 per ton. If this was so,—and the court must have believed it,—it cannot be successfully claimed that \$200 was an excessive sum to be allowed as damages. Findings 8, 9, 10, 11, 12, and 13 are in regard to the adverse use of the waters of said springs by the defendants and their grantors, and the statutes of limitation pleaded by defendants. In view of the evidence, we think there can be no plausible pretense that defendants had acquired by adverse user any right to the waters of the springs, against the plaintiff, or that her cause of action was barred by the statutes of limitation; and therefore no further discussion of these points is called for. Finding 14 is in regard to the facts pleaded and attempted to be proved by defendants to show that plaintiff was estopped from claiming a right to the waters of said springs,

by reason of the acts and statements of her testator at and about the time defendants purchased their lands from Cowins, in June, 1886. It is true that defendants introduced evidence tending to show facts which, if believed, would have established an estoppel, but these facts were squarely and positively contradicted by evidence given on the other side. The court must have believed the evidence on behalf of the plaintiff to be true, and the judgment cannot, therefore, be disturbed on this ground.

4. At the trial 76 exceptions to the rulings of the court were reserved by defendants, but less than one-half of them are discussed or referred to by counsel, and the others will therefore not be noticed. Twelve of the exceptions are based upon the admission of evidence relating to the diversion of the water from plaintiff's land by defendants, and the damages caused thereby to plaintiff by reason of her diminished crop of hay in 1891. There is no dispute that good crops of hay could not be raised on plaintiff's land without water to irrigate it, and she was clearly entitled to recover such damages as she sustained by reason of the wrongful diversion of the water. What that damage was, if any, could only be determined from the testimony of witnesses who had familiarly known the land and the crops raised thereon in prior years, and also the condition of the crop, and the market value thereof, raised in 1891. The witnesses gave testimony as to all the requisite facts, and it was quite sufficient to show that the damage caused was as large at least as the sum fixed by the court. Without reviewing separately the several rulings complained of, we deem it enough to say that we see in them no reversible error. Exceptions 21, 22, and 30 are based upon the admission of evidence as to declarations made by Cowins, defendants' grantor, while he was the owner and in possession of the land on which the said springs are located, relating to the ownership and right to use the waters of the springs and the ditches leading therefrom. That the evidence was admissible is not now a debatable question. Our Code provides: "Where, however, one derives title to real property from another, the declaration, act or omission of the latter, while holding the title, in relation to the property, is evidence against the former." Code Civ. Proc. § 1849. And the rule upon the subject is thus stated by Field, J., in *Stanley v. Green*, 12 Cal. 148: "That such declarations of the grantor are admissible, not only as against himself, but against parties claiming under him, is a familiar principle. The subsequent claimants are considered as standing in his place, and as having taken the title cum onere, subject to the same charges and restrictions which attached to it in his hands. It matters not whether the declarations relate to the limits of the party's own premises, or to the extent of his neighbor's, or to the bound-



any line between them, or to the nature of the title he asserts. If their purport is to restrict his own premises, or lessen his own title, they are admissible." See, also, *Bollo v. Navarro*, 33 Cal. 459; *People v. Blake*, 60 Cal. 497; *Sharp v. Blankenship*, 79 Cal. 411, 21 Pac. 842. Exceptions 42 to 47, inclusive, are based upon the admission in evidence of plaintiff's title papers. The objections were that the papers were irrelevant and immaterial; and all that is said in support of them is that the objections should have been sustained, and the court erred in overruling them. We think the rulings were proper, and nothing further need be said of them here. Exception 48 is based upon the denial by the court of defendants' motion to strike out testimony. The motion was made near the close of plaintiff's testimony in chief, and was as follows: "We now move to strike out the testimony of the witnesses with reference to Stone's use of the water or the use of the land on the one hundred and sixty acres west of the Williams house," etc., "on the ground that it is irrelevant, immaterial, and incompetent, there being no connection shown between Stone and Williams. No transfer or no title having passed from Stone to Williams there, his use or occupancy of that land cannot go to their benefit." It is not clear what was meant by this motion, as the court was asked to strike out the testimony relating to the use of the water "or" the use of the land. If, however, the theory was, as it would seem to have been, that all the testimony relating to Stone's use of the water should be stricken out, because it was used by him on government land, which he never acquired title to, and never conveyed to Williams, then, as we have already seen, the theory was unsound, and the testimony sought to be stricken out was relevant, material, and competent. Exceptions 57 and 58 are based upon rulings of the court excluding certain evidence. Thomas Montgomery was a witness for defendants, and was asked by their counsel: "State whether or not you ever made any filing on that desert land where the springs are." The question was objected to as immaterial unless defendants were connected with it. Counsel then stated: "I propose to show, and offer to show, that Thomas Montgomery in 1877 filed upon this desert land upon which the springs rise; that he laid claim to the land, made use of the land, made use of the waters thereon; that he transferred what interest he had to Dalton, and Dalton to Cowins, and Cowins to defendants in this action." And again: "I offer to prove, with documents I have here now, and wish to offer, that Thomas Montgomery in 1877 filed upon this land upon which these springs rise, and used it, and used the water of these springs upon that land." This offered evidence was rejected, and hence the said two exceptions. The defendants had already put in evidence a

deed from Montgomery to Dalton, from Dalton to Cowins, and from Cowins to defendants, conveying to them certain adjacent land, and all water rights connected therewith, which Montgomery had owned; but in the deeds no mention was made of the said desert land. The witness had also testified, without objection, as to his occupancy of the said desert land, and the use he had made of the springs thereon. It had also been shown that Cowins filed upon the land on which the said springs rise in March, 1880, and made final payment therefor in November, 1882. Under the circumstances shown, then, Stone having already appropriated the waters of the springs, whether Montgomery filed on the land or not was evidently immaterial. Exception 59 is based upon the refusal of the court to permit J. P. Harter to answer this question: "State to the court whether or not there would have been a purchase of that place if Williams had not told you to the contrary." George Harter, and not the witness, was the purchaser of the place; and the latter could not, therefore, be presumed to know, unless by hearsay, whether there would have been any purchase or not. The material question on this point was, what did Williams represent to George Harter as to the title to this water? As to this, the witness, without objection, had testified fully; and he also stated the damage George Harter would sustain if deprived of the water. Besides, George Harter, the only one competent to answer the question, testified fully upon this point, and defendants thereby obtained all the information asked for. There was evidently, therefore, no reversible error in this ruling. Exceptions 60 to 63, inclusive, are based upon the rulings of the court in allowing questions to be propounded to the witness J. P. Harter, on cross-examination, as to whether, in his presence, George Harter made certain statements to Williams in regard to the ownership of the waters in controversy. It was objected that the questions were not proper cross-examination, and it is claimed that the rulings in allowing them were therefore erroneous. A sufficient answer to this point is that the witness denied that any such statements as those suggested to him were made by George Harter. Clearly, therefore, the defendants were not prejudiced by the question, even if improper. Exceptions 74, 75, and 76 are based on the testimony of D. W. Jenks, given in rebuttal, detailing certain conversations held between the Harters and Williams, in the office of the witness, in relation to this water dispute. On cross-examination the attention of each of the Harters had been called to those conversations, and an effort made to have them state them in substance. The purpose of Jenks' testimony is clear. It was to show that at that time, as disclosed by the conversation, there was no claim or pretense that Williams had misrepresented his title



to this water, or that he had estopped himself from asserting his title. The importance and materiality of the testimony are evident, and it was clearly admissible.

5. The point is made that the judge of the court below, before whom the motion for new trial was heard, arbitrarily denied the motion, without hearing or considering the grounds presented and urged in support thereof. To sustain this point, two affidavits, made ten days after the motion was denied, are printed in the transcript, and there is also found there a counter affidavit made still later. These affidavits form no part of the record, and cannot be considered. If the defendants desired to have the matter brought before this court for review, they should at the time have excepted to the action of the court, and had the facts embodied and settled in a bill of exceptions. Besides, the real and only question is, did the court err in denying the motion? We find in the record no valid ground for reversal, and advise that the judgment and order appealed from be affirmed.

We concur: CHIPMAN, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(121 Cal. 74)

SAN PEDRO LUMBER CO. et al. v. REYNOLDS et al. (L. A. 265.)<sup>1</sup>

(Supreme Court of California. May 31, 1898.)

CORPORATIONS—AGENCY—EXTENT OF LIABILITY—  
EVIDENCE—ACCOUNT BOOKS—RELEASE  
—PLEADING—LIMITATIONS.

1. One occupying a position of trust is bound to exercise reasonable skill and diligence, and to act with the highest good faith, in the performance of his duties.

2. The by-laws of a corporation provided that the general manager should have charge of all the company's property, and control of all persons in its employ, with power to discharge them at will, and that he should cause regular and accurate accounts to be kept by a competent bookkeeper. *Held*, that the general manager was liable for funds misappropriated by the company's bookkeeper.

3. The books of a corporation, kept under the supervision of its general manager (it being his duty, under the by-laws, to cause a correct set of accounts to be kept), are admissible in an action by the corporation against him for neglect of his duties and embezzlement, both to prove his negligence and the amount of his liability.

4. Where books are introduced in evidence in an action by a corporation against its manager for defalcation and negligence, the corporation is not bound by their contents, but may introduce independent evidence of loss.

5. A schedule of summaries of the contents of books and records, made by an expert (the books and records themselves being voluminous, and covering the transactions of many years), is admissible.

6. It is not error, in stating an account, to use a schedule of summaries of the contents of books and records introduced in evidence, prepared by an expert; the schedule not being ac-

cepted as true, except where shown to be so by all the evidence.

7. Where employes of a corporation embezzled corporate funds, through the manager's negligence, and he himself misappropriated the corporation's property, the burden was on him to show that he was not liable for the total loss.

8. Where defective account books show a loss, they are prima facie evidence of the existence of such loss.

9. Through defendant's negligence, a bookkeeper of a corporation embezzled corporate funds. With the connivance of the same bookkeeper, defendant himself misappropriated property of the corporation, of which he was general manager. After discovery of the bookkeeper's defalcation, defendant, in the name of the corporation, but without its knowledge, commenced a suit against the bookkeeper, and obtained a judgment, which was satisfied. *Held*, that the recovery and satisfaction of the judgment did not release defendant.

10. The release of a joint tortfeasor is not available as a defense, unless pleaded by the party relying on it.

11. The statute of limitations does not begin to run against an agent, for misappropriation, until discovery by the principal of the defalcation.

Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by the San Pedro Lumber Company and others against Merick Reynolds and others. Judgment for plaintiffs, and from an order denying a motion for a new trial the defendants appeal. Affirmed.

M. L. Graff, for appellants. S. M. White and R. H. F. Variel, for respondents.

HENSHAW, J. This is an appeal from the order denying defendants a new trial. The appeal from the judgment in the same case will be found reported in the 111th volume of our Reports, at page 588, and in 44 Pac. 309. In the opinion there delivered, the nature of the case, and many of the facts necessary to an understanding of this appeal are presented. Others will be set forth as occasion may demand for a full understanding of the questions.

The plaintiff corporation was engaged in the lumber business. Its legal residence and place of the meetings of its board of directors was the city of San Francisco. It owned and conducted a large lumber yard in San Pedro, and others in the different towns in the southern part of the state. The general manager of its business was the defendant Merick Reynolds. From the date of the incorporation of the company, in 1882, until October, 1889, Reynolds had occupied this position. His duties as such manager were regulated and prescribed by the ninth article of the by-laws, which reads as follows: "The manager or managers shall be appointed by the board of directors, and shall hold office during the pleasure of the board. It shall be the duty of the manager or managers, under the direction of the board of directors, to superintend, oversee, and direct the operations of the company outside of San Francisco. He or they shall have the immediate control, command, and

<sup>1</sup> Rehearing denied.

direction of all the persons in the employ of the company outside of San Francisco. He or they shall have charge and custody of all the property of the company, real and personal, used or occupied in or about the company's premises outside of San Francisco. He or they shall cause to be kept regular and accurate accounts of all transactions in business of the company. All such accounts shall be kept by a competent bookkeeper. He or they shall monthly, and as often as the board shall direct, transmit to the secretary abstracts of his accounts, with the necessary vouchers. He or they shall have power to discharge or suspend any or all persons acting under his or their orders, and transact such other business as the board of directors may authorize. The manager or managers shall in all things, and at all times, comply with the directions or instructions given by the board of directors." The provisions of the by-laws were actually known to Reynolds. They entered into, and became a part of, his contract of employment. *Society v. Wennerhold*, 81 Cal. 528, 22 Pac. 920. In September, 1889, plaintiff corporation made claim to Reynolds that a large amount of money was due from him to it, arising from peculations, defalcations, embezzlements, and breaches of trust in his management of the corporate affairs. Reynolds, in response to the demand of the plaintiff that security should be given for the amount of its losses so incurred, which amount was at the time undetermined and undeterminable (for the examination of the books had not then been completed), made to Hooper, the president of the corporation, as its trustee, a written assignment and pledge of certain stock owned by him. This property was pledged "as security for the payment by the undersigned, Merick Reynolds, of all sums of money that are now due or owing from me to the San Pedro Lumber Company, a corporation, or which may hereafter, upon careful investigation of the books and affairs of said company, be found to be due or owing from me to the said corporation, or for the payment of which I may be liable, either in law or equity, to the said corporation, or for which I may be liable in any manner by reason of having been the agent or employé of said corporation"; authorizing the pledgee to hold or to sell the stock "for the payment of the aforesaid sums of money now due or owing as aforesaid, or hereafter ascertained to be due or owing." When its examination of the books had been completed, plaintiff brought its action to foreclose its lien upon the pledged stock. It averred that it had suffered losses by the embezzlements, defalcations, and improper conduct of the defendant to the amount of over \$53,000; that the exact amount could not be determined without an accounting. It prayed for such an accounting, and for a sale of the stock, and a reimbursement from the proceeds of

the sale in such amount as might be found due. This action was instituted after demand for payment had been made upon Reynolds. Defendants answered by denial, and by pleading a tender of \$20,000 alleged to have been made to Hooper, which it is averred was the full amount of all possible demands of plaintiff against defendant Reynolds. By cross complaint they sought to recover damages for the full value of the stock, insisting that Hooper's refusal to accept the tender amounted to a conversion thereof. Upon the trial the court held the action to be one to foreclose the lien upon the pledged stock, to which foreclosure an account was a necessary incident. Notwithstanding the vast amount of labor involved in the stating of such an account, or perhaps because of it, the court declined to refer the matter, but retained it, heard the testimony, and itself stated the account, rendering judgment for the plaintiff in the sum of \$48,432.44.

Reynolds, as has been said, was the manager of the corporation, under the by-law above quoted. The principal place of business was at San Pedro, where Reynolds himself was located. It was the duty of the bookkeepers and employés in charge of the other lumber yards to report to the principal office, at San Pedro, where the general books and accounts of the plaintiff were kept. The principal bookkeeper was thus located at San Pedro, under the immediate direction and supervision of Reynolds. In 1886 one C. K. Drane became the bookkeeper at San Pedro, and continued to act as such until August 17, 1889, when he disappeared. He has not since been heard from, and his abiding place is unknown. Twelve days after his disappearance, Reynolds communicated with Hooper, in San Francisco; informing him of the disappearance of Drane, and of his belief that Drane was a defaulter. An examination of the books of the company was promptly instituted. This examination was made by C. F. Lutgen, an expert accountant and a witness upon the trial. At the time the examination was instituted the officers of the corporation seem to have entertained no thought that Reynolds was himself in any degree culpable. This conviction was soon brought home to them. After knowledge, they promptly charged Reynolds with dereliction in duty, and the abstraction of corporate funds. Reynolds, in several letters to the president of the corporation, confessed his wrongdoing, begged forgiveness, and promised restitution of all that the company had lost. To give but a single quotation, upon October 3, 1889, he writes: "Oh, Mr. Hooper, won't you forgive me my acts and permit this \* \* \*. I see where I erred, and I beg and implore you, for the sake of the family I have, to be lenient with me. \* \* \* I know you have great reason to be very much offended, and I am very much ashamed. Still, I beg you, overlook my



fault. Permit me to repay. I did not realize at the time of my offense that I was acting in such bad faith to my best friends."

The first consideration which invites attention is that of the position which Merick Reynolds occupied in relation to the corporation, the duties which attached to that position, and the legal consequences which must follow a failure to perform those duties. Appellants challenge certain findings of the court making declarations in this regard, and contend that, as Reynolds was general manager, he was liable only for want of ordinary care in employing the bookkeeper, Drane; that Reynolds' position is like, and his responsibility the same as, that of a director of a corporation in his relation to the stockholders. The cases of *Scott v. Depeyster*, 1 Edw. Ch. 513, and *Bank v. Caperton*, 87 Ky. 306, 8 S. W. 885, are here cited. But the present is not an action by a stockholder against a director. The duties of Reynolds as manager are not identical with the duties of a director, and the cases are not in point. Reynolds was the agent of the corporation. In him were vested great powers, and upon him were cast grave responsibilities. His position was a position of trust, and, in the performance of that trust, he was required to exercise reasonable skill, diligence, and care, and to act in the highest good faith towards his principal. 1 Lawson, Rights, Rem. & Prac. §§ 82, 83. The by-law above quoted became a part of Reynolds' contract of employment. It measured his powers, fixed his duties, and defined his responsibilities. He had immediate control of all the employes of the company outside of San Francisco, and could retain or discharge at his pleasure. It was his duty to cause to be kept regular and accurate accounts of all the transactions of the company by a competent bookkeeper, and he was to transmit monthly, or as often as the board directed, abstracts of accounts, with necessary vouchers. For his failure to exercise due care in regard to these matters he was responsible to his principal. But it is not merely with negligent omissions that he is charged. The case against him is not made up wholly, or even mainly, of averments and proofs that by reason of his negligence others in the employ of the company succeeded in embezzling its funds. The gravamen of the charges is that the defendant himself both connived at and procured numerous false entries in the books kept under his immediate supervision and direction by the bookkeeper, Drane, and that the falsification of these books was for Reynolds' own improper ends. It is charged that Reynolds himself knowingly and corruptly embezzled funds of the corporation, and concealed his peculations by an elaborate system of deceptive and fraudulent entries running through the books. It is true, the books were actually kept by Drane. It is true that Reynolds did not personally employ Drane.

He was sent to San Pedro as bookkeeper by Hooper, the president of the corporation. But these facts do not even tend to exonerate Reynolds in the matters charged. It clearly appears from the evidence that Reynolds dominated Drane, and frequently directed the making of false entries, whose effect was to advantage Reynolds alone, and not Drane. In many instances Drane could not have made the entries without himself knowing of their falsity. It is not surprising that, seeing his superior thus misappropriating the moneys of the company, Drane, while complacently aiding him in the work, should, when opportunity presented, have stolen upon his own account. For all of these thefts, Reynolds, under the terms of his employment, was chargeable. If he had given strict and upright attention to his duties, Drane's embezzlements could not have been successfully carried out. They were made possible by Reynolds' own frauds, and his wide departure from the lines of his duty. Being himself engaged in unlawful appropriations, and using Drane to conceal the acts, Reynolds was in no position to criticize, check, or expose the like acts of his confederate and assistant.

Plaintiff introduced in evidence, over the objection and exception of defendants, the books of the corporation. These books, while not in the handwriting of Reynolds, were under his immediate care and supervision, and he was responsible for their accurate keeping under his contract of employment. It is contended by appellants that the books were not admissible, and sundry arguments are advanced in support of the proposition. It is said that they should be treated as are treated the books of a tradesman,—admissible only if supported by independent evidence to their correctness, and then only as to the accounts of a tradesman with his customers; that these books, as was contended and shown by the prosecution, were not correctly kept, and that, therefore, they were inadmissible; that they were not used in establishing the account of the corporation against the customer; and that, therefore, they were inadmissible. Again, it is said that they were inadmissible against defendant Reynolds for any purpose; and herein the cases of *Rudd v. Robinson*, 126 N. Y. 113, 26 N. E. 1046, *Scott v. Depuyster*, supra, and *Neilson v. Crawford*, 52 Cal. 248, are relied upon. This last proposition depends entirely for its force upon the point heretofore considered; that is to say, upon the relationship which existed between the corporation and Reynolds, and the duty of Reynolds as manager. With Reynolds' duties thus defined, it will at once be seen that *Rudd v. Robinson* and *Scott v. Depuyster* are not at all in point. Those cases were similar. In *Rudd v. Robinson* the action was to charge one of the members of the corporation with a personal liability to the corporation. There was no proof that the defendant had actual



knowledge of the entries contained in the books, or that he authorized the entries, or caused them to be made. "There was no proof from which the law would raise the legal presumption that he had knowledge of the entries, unless he was chargeable with such knowledge from the mere fact that he was a stockholder and trustee of the corporation. There is no rule of law which charges a director or stockholder of a corporation with actual knowledge of its business transactions, merely because he is such a director or stockholder. In this case the broad claim is made that, in an action by a corporation against one of its members to enforce a personal liability of the corporation, its books are competent evidence against him to show the different accounts between him and it, and to establish the extent of his liability to it, upon their simple production, and proof that they are the books kept as such by its officers and agents." The foregoing is a quotation from the opinion in *Rudd v. Robinson*. The distinction between that case and the one at bar becomes immediately apparent. Here the positive duty was cast upon Reynolds, not alone under the general laws of agency (*Mechem, Ag. § 528*), but expressly by the terms of his employment, to cause to be kept proper books of account. These books are offered by him to the corporation as containing an accurate and faithful record of his stewardship. In addition to being the corporation's books, they are the agent's accounts. They are statements—declarations—of the agent as to the manner in which he has transacted the business of his principal, and of the dispositions which he has made of the property intrusted to him. They are admissible against him, as are any declarations or admissions of a party going to a matter in issue. This proposition is expressly declared in *Neilson v. Crawford*, relied upon by appellants, where it is said: "In an action brought against the corporation itself for the recovery of a debt, the books of account kept by the corporation would be admissible in evidence, because they are the declarations and admissions of the corporation entered by its servants and under its control." So here the statements of the books were the declarations and admissions of Reynolds, entered by those over whom he exercised supervision and control. In *Neilson v. Crawford* it was held that, in an action brought by a creditor of a corporation to recover on the stockholder's liability for his proportion of an indebtedness to the corporation, the books of the corporation were not admissible in evidence in behalf of the plaintiff to prove the indebtedness; but in *McGowan v. McDonald*, 111 Cal. 57, 43 Pac. 418, a contrary rule is announced, and it is said that any evidence competent to establish the liability of the corporation would be competent to establish the liability of the stockholder. However, as has been said and shown, the case is not in

point; for Reynolds, as agent, was charged with the duty of keeping and presenting to his principal correct accounts, and the accounts which he kept were admissible as prima facie evidence against him. 2 Whart. Ev. § 1333; *Mechem, Ag. § 100*; 1 *Greenl. Ev. §§ 150-154*.

Appellants' argument that plaintiff, having offered the books in evidence, is bound by them, may not be sustained. The books were offered for a twofold purpose: First, to show that the agent did not keep either strict or accurate accounts of his dealings with the property intrusted to him; and, second, for the distinct purpose of showing by the books, coupled with independent proof, that part of the property with the custody of which Reynolds was chargeable was not accounted for by him, and was not by him delivered to the possession of his principal. The first purpose (that is to say, the failure of the agent to keep accurate accounts) was established by the very introduction of the books. They spoke for themselves. Upon their face it could be seen and determined whether or not there were irregularities of double charges, overcharges, improper charges, or omitted charges. This did not amount to proof that the corporation had sustained loss, but it was direct proof that the agent had failed in his duty to keep, by the books, an accurate record or history of his dealings and transactions with the corporation's property. It is quite true that, since bookkeeping is only a history of transactions, a man does not lose money merely by faulty bookkeeping. This proposition, however, was fully realized, and frequently stated, by both court and counsel, during the trial of the cause. When, however, to the proof of faulty bookkeeping is added evidence from independent sources that large sums of money which would be due to the corporation under a correct statement of accounts were not in fact received by the corporation, then at once the duty is cast upon the trustee, not alone to explain the entries, but as well to account for the moneys.

The expert, Lutgen, when on the witness stand, presented certain schedules which he testified were summarizations of what the books showed. By these schedules appeared shortages and defalcations to the amount sued for. It is insisted by appellants that they were not admissible. In *Burton v. Driggs*, 20 Wall. 136, it is well said: "When it is necessary to prove the results of voluminous facts, or of the examination of many books and papers, and the examination cannot be conveniently made in court, the results may be proved by the person who made the examination. Here the object was to prove, not that the books did, but that they did not, show certain things. The results sought to be established were not affirmative, but negative. If such testimony be competent as to the former, a multo fortiori must it be so to prove the latter." Says

Greenleaf (1 Greenl. Ev. § 93): "A further relaxation of the rule has been admitted where the evidence is the result of voluminous facts, or of the inspection of many books and papers, the examination of which could not conveniently take place in court." Here the expert, Lutgen, was showing, by his schedules, not alone what the books did contain, but what they should have contained and did not contain. The records of accounts, with their vouchers, were most voluminous. It is said by the respondents that they would weigh a ton, and appellants concede that this estimate is not far from the truth. The transactions covered years in time, and millions of dollars in value. Lutgen was rigidly cross-examined as to the items composing his schedules, and their correctness was established. They were, therefore, unquestionably, admissible.

It is further said by appellants that the court accepted the estimates as shown by Lutgen's schedules, and charged defendants accordingly, and that this was error. Herein they rely upon and quote the case of *Association v. Childs* (Wis.) 33 Am. St. Rep. 57 (s. c. 52 N. W. 600), to the following effect: "In an action by a corporation against its president and treasurer to recover for losses alleged to have been sustained through their negligent and unauthorized acts, it is error for the trial court, without judicial examination as to its accuracy and justice, to adopt, as a basis of judicial action against the defendants, the report of an expert accountant employed by plaintiff to examine into its accounts, and ascertain the extent of such losses." We need not take issue with the law thus declared, for the facts are at entire variance with those in the present case. Here the court itself heard all the evidence, and stated its own account. All the books, papers, and vouchers were before it. Lutgen's schedules were no more than the summarization of the results of his expert examination of these accounts. The court did not accept them as true, saving as they were shown to be true by all the evidence. As a result of this patient hearing of a vast mass of testimony, and after a most laborious examination of the accounts made by itself, the court rendered a judgment, for a large amount, it is true, but not for the amount which it was contended by plaintiffs was properly chargeable against Reynolds.

Appellants admit that a large sum of money is due from Reynolds upon account of his embezzlements and improper charges. But it is insisted that the court erred in charging him with any other or greater amount than the sum of \$15,312.74. It is further said that the evidence does not show that Reynolds ever received any greater amount than that mentioned; and it is suggested, and, indeed, argued, that the further sums going to make up the judgment, if lost to the corporation, were lost by the speculations of Drane, with which Reynolds

was in no wise chargeable. Upon the part of the respondent it is answered that, having in view the duties of Reynolds under his trust, when it showed that he did not cause to be kept faithful and accurate accounts, the duty of an accounting was cast upon him; that when it further showed that, in specific instances, Reynolds had defrauded and despoiled the corporation, the burden of proof shifted to him to account for every dollar of its property which had passed into his possession; that it was only necessary, therefore, for the corporation to prove that a specific amount of money had been lost; it was the duty of Reynolds to satisfactorily explain what had become of it, and, if he failed so to do, he was chargeable with it. This argument is certainly sound. It was not necessary for the corporation to prove that all of the money had been abstracted and embezzled by Reynolds. It was for him to show what had become of it. Aside from the admission of his counsel as to the amount due from Reynolds to the corporation, no doubt can be entertained, from the other evidence in the case, that Reynolds was a proved embezzler to a very considerable amount. There are the admissions in his letters to which we have adverted. But, in addition, there are many items charged upon the books whereby it manifestly appears, and, indeed, is admitted, that the moneys of the corporation were by him abstracted. For example, it is proved that Reynolds carried a dummy name upon the pay roll for years; that he caused the bookkeepers to enter upon their books the salary of one Lewis, at the rate of \$15 a week; that there was no Lewis; and that he drew and used this money for his own ends. It is shown that he did this not only under Drane, the corrupt bookkeeper, but under the bookkeeper who had preceded Drane; and it is further shown that when the president of the corporation, during the time when the books were under investigation, asked him who and where Lewis was, Reynolds stepped to the door of the office, looked up and down the wharf, and replied that he was about the yard somewhere, and that he was surprised he was not in sight, and added, "Drane knows him." Drane at that time had absconded, and was out of the state. The pay-roll speculations alone, as admitted by Reynolds' counsel, exceed \$6,000. Again, it was shown that Reynolds purchased a piece of land, and built thereon a house with lumber and labor supplied under his orders from the corporation yard, and made no charge against himself for the amount. Without multiplying instances, it is sufficient to say that there are numerous items in small amounts entered in the books, under the direction of Reynolds, all showing direct appropriations for his benefit. His moral turpitude in the matter is demonstrated. In addition, and as going generally to the irregular manner in which the books were kept, it is shown, without



contradiction, that from January 1, 1887, to August 31, 1889, 700 checks were drawn against the bank for the aggregate amount of \$260,000, and that no one of these checks was entered in the cash books or other books of the company. And, finally, the expert testified that, in 15 years of experience as an expert accountant, he had never seen books so cunningly falsified as were those in the case on trial.

In addition to these sums which were thus directly traced to Reynolds, it was shown by the corporation that it had not received other large sums. The evidence did not disclose what had become of these moneys. But enough had been proved to cast the burden upon Reynolds of accounting for all of this property with which he was primarily chargeable, and in any instance in which he fails he must bear the loss. This accounting he could make either by a showing that the principal in fact received the property, or, admitting the loss, by establishing that it occurred through no failure upon his part to perform his duties. No such proof does defendant offer. In Whart. Ag. § 299, it is said: "The agent is bound to debit or charge himself in the account with all money and other things which have come into his hands in his agency; and if, by his own fault, he has let any of them be lost or perish, he must charge himself, in place of these, with the sums at which the damage resulting from their loss may be estimated." In 2 Pom. Eq. Jur. § 1063, it is said: "A failure to keep full and accurate accounts raises all presumptions against the trustee, and may subject him to pecuniary loss as for moneys received and not duly accounted for." An affirmative duty was cast upon Reynolds to cause to be kept accurate accounts. Instead of doing this, the books were falsified under his direction and for his benefit in a great many instances, and in very many ways. Upon establishing his agency and these facts, the burden of proof shifted to him to account for all of the losses which the company by its *prima facie* case established, and in any instance where he failed to account for property he was chargeable with it or its value. *Rubidoex v. Parks*, 48 Cal. 215; *Young v. Powell*, 87 Mo. 128; *Darling v. Younker*, 37 Ohio St. 487; *Marvin v. Brooks*, 94 N. Y. 76; *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203; *Bank v. Cooper*, 137 U. S. 473, 11 Sup. Ct. 160; *Bailey, Onus Probandi*, p. 316; *Kerr, Fraud & M.* p. 151; 2 Pom. Eq. Jur. § 959; *Bigelow, Fraud*, p. 301. The effect of the evidence establishing fraud in specific instances is thus declared by Wharton in his work on Evidence (page 39): "We may, in fine, conclude generally that, when a mass of action is examined in block, it is allowable to assume, as a presumption of fact, that, if a part of it is tainted in a particular way, the rest is so tainted. Thus, where most of the vouchers produced by a party in proving his accounts show an over-

charging of items, it may be inferred, as a presumption of fact, that a like proportion of the items not vouched are overcharged."

It is again urged by appellants that the court relied solely upon the evidence of the books, and that no other evidence was offered in arriving at the amount of its judgment, and that, the books being a mere history of transactions, appellants were improperly charged with losses which were not proved to exist, but which only appeared to exist by reason of defective bookkeeping. To this it may be said that, where the defective bookkeeping shows a loss, that is at least *prima facie* evidence that the loss existed. But, in addition to that, there is the evidence of the expert, Lutgen, on behalf of respondents, as follows: "Q. And that was relied upon by you to make up your defalcation of \$53,000? A. I told you already, Mr. Graff, partly it was; partly it was relied upon, upon the absence of money, because afterwards I did not find the money for these remittances and for these defalcations. If I had found the money afterwards, there would have been no defalcation; but, through the absence of money, it became a defalcation or defalcations." Indeed, with the burden cast upon him, defendant Reynolds throughout the whole case lamentably failed to account for any of these sums.

It has been noted that in the month of August, 1889, the bookkeeper, Drane, fled the state. After his flight, Reynolds, in the name of the San Pedro Company, brought action against him for the sum of \$5,000, moneys had and received, and attached some of his property within the jurisdiction of the court. Drane, of course, made no answer. Judgment passed for the corporation, and was satisfied out of the property. At this time Reynolds' complicity and culpability were not suspected by his employer, but, furthermore, the corporation not only did not authorize the action, but did not know of it. Upon this appeal Reynolds urges that, as he and Drane were joint tortfeasors, this judgment so obtained against Drane must operate as a complete satisfaction for all the corporation's demands against him. It seems scarcely necessary to do more than state the proposition, for the statement carries with it the refutation of its soundness. However, it may be added that before appellants could rely upon this satisfaction, having the opportunity, they should have pleaded it, and they did not do so.

It is unnecessary to discuss appellants' tender of \$20,000. If the tender were in itself good, and kept good, it is more than doubtful whether the case is one in which a tender could be made at all; remembering that the stock was pledged for an undetermined amount, and for an amount undeterminable until after an accounting had. *Iron Works v. Montague*, 108 Mass. 248; *Bartlett v. Johnson*, 9 Allen, 530; *McDaniels v. Bank*, 70 Am. Dec. 406; *Beatty v. Sylvester*, 3 Nev. 228. In any event the tender was not for



the amount found due. *Lumber Co. v. Reynolds*, 111 Cal. 588, 44 Pac. 309. Nor was the offer made in compliance with the law. *Chielovich v. Krauss* (Cal.) 11 Pac. 781.

The statute of limitations cannot be successfully invoked. Reynolds was acting in a fiduciary capacity. Such of his acts as resulted in loss to the corporation were concealed breaches of his trust. The statute of limitations would not begin to run in his favor, so as to enable him to escape the results of an accounting, until after knowledge by his principal of his derelictions. In this case the accounting was promptly demanded after discovery.

The record in this case is very voluminous. The labor entailed in its examination is far from slight, but that labor has been made as light as possible by the very able and exhaustive presentations in the briefs of counsel upon either side. It is thought that the court may with propriety express its appreciation of the valuable aid which counsel have afforded. The order appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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MELVIN v. STATE. (Sac. 287.)

(Supreme Court of California, May 31, 1898.)

STATE BOARD OF AGRICULTURE—IMPLIED AUTHORITY—TORT OF PUBLIC OFFICERS—LIABILITY OF STATE—"DEBT" DEFINED.

1. Act April 15, 1880 (St. 1880, p. 49), gives the state board of agriculture control of the State Agricultural Society; authorizing it to make needful changes in its constitution, rules, etc., and provide for an annual fair. *Held*, that authority to provide for an admission fee may be implied therefrom, though it does not follow that the society is organized for gain.

2. The officers of the State Agricultural Society gave on its grounds an exhibition of speed contests, unauthorized by the state, and impliedly discouraged by a provision in its appropriation to the society, that no part of it should be used for such purpose. *Held*, that where the officers neglected to keep a stand, upon which a visitor to such exhibition was seated, safe and secure, and the same gave way, and the visitor was injured, their negligence was a tort committed by them in the performance of a public duty, and not upon a contract entered into by the state with the injured party, and the state is not liable therefor.

3. Act April 15, 1880 (St. 1880, p. 49), gives the state board of agriculture control of the State Agricultural Society, and authorizes it to provide for an annual fair, and provides that in no event should the state be liable for any debt created by said board. *Held*, that the term "debt" includes an unliquidated demand arising by implication of law from an injury to a visitor to the fair due to an act of nonfeasance of the officers of the society.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county.

Action by E. W. Melvin against the state of California. From an order setting aside a verdict for plaintiff, and granting a new trial, he appeals. Affirmed.

A. J. Bruner, Hiram Johnson, and H. V. Morehouse, for appellant. Atty. Gen. Fitzgerald, for the State.

SEARLS, C. Action to recover damages from the state for injuries received at the state fair at Sacramento in 1891. Plaintiff had a verdict, which, on motion of defendant, was set aside, and a new trial granted. Plaintiff appeals from the order, and brings the case here on a bill of exceptions.

The complaint avers, in substance, that in September, 1891, defendant held, conducted, and controlled an exhibition called a "state fair" at Sacramento, state of California, which said state fair was held by defendant for its own use and benefit, and for the purpose of exhibiting and displaying to all persons who should attend the products of defendant and other articles placed on exhibition therein, to which the defendant invited the public; that defendant sold tickets entitling the purchasers thereof to admission to the grounds and building where defendant held said fair; that plaintiff on or about September 10, 1891, purchased of the defendant a season ticket, for which he paid five dollars, which entitled him to admission to said state fair, and the ground and buildings where the same was held; that on the 12th day of September, 1891, plaintiff entered Agricultural Park to view the exhibition there being held by defendant, and occupied a seat upon a stand which defendant had provided and maintained for the purpose of those who chose to occupy said stand and seats, and defendant promised that said stand and seats were safe for said purpose; that said stand and seats were not safe and secure, if occupied, of which plaintiff had no knowledge; that defendant knew said stand was weak, insecure, and unsafe, but neglected and refused to repair the same, and invited the public to occupy the same while in such insecure condition; that, while plaintiff was seated upon such stand, by reason of its weakness it gave way and fell, carrying plaintiff with it, whereby he was injured (describing his injuries), and damaged in the sum of \$25,000; that plaintiff presented his claim for damages to the board of examiners of defendant, and the same was rejected. The answer of defendant denied all the allegations of the complaint; alleged contributory negligence; averred that the fair was held by the State Agricultural Society for its use and benefit, and not for the state; said society derived all the benefit and profits thereof, which were the exclusive property of said society. The cause was tried by a jury, and a verdict of \$10,000 rendered in favor of plaintiff.

It seems to be conceded by both parties to the litigation that, while the motion for a new trial was based upon several grounds, the motion was granted upon the ground that the state is protected from liability by

reason of its sovereignty, and by reason of the several statutes applicable, or deemed applicable, to the facts as presented. The California State Agricultural Society, as originally constituted, was a corporation created by an act of the legislature approved May 13, 1854. St. 1854, p. 56. The first section of the act established a corporation to be known and designated by the name and style of the "State Agricultural Society," with powers to sue and be sued; to contract and be contracted with; to have and use a common seal; to adopt by-laws, ordinances, rules, and regulations, etc. The subsequent sections authorize the corporation to purchase and hold land not exceeding two sections, to be held for the purpose of establishing a model experimental farm, erecting inclosures, etc., calculated, among other things, for an exhibition of various breeds of horses, cattle, mules, and other stock, and of agricultural, mechanical, and domestic manufactures and productions. Membership was attained by the payment of \$10 annually. Officers were to be elected by the members yearly. The act appropriated \$5,000 each year for four years to the society, to be used only in the payment of premiums. There were other provisions in the act not necessary to be mentioned here. Various statutes were subsequently passed, altering somewhat the charter of the corporation, and appropriating money thereto, up to the adoption of our present constitution, in 1879. Section 22 of article 4 of that instrument contains, among other provisions, the following: "No money shall ever be appropriated or drawn from the state treasury for the use or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the state as a state institution. \* \* \*" Section 7 of article 12 of the same instrument provides that "the legislature shall not extend any franchise or charter \* \* \* of any corporation now existing, or which shall hereafter exist under the laws of this state."

It is apparent from the foregoing provisions of the constitution of 1879 that it became impossible for the state to grant further aid to the State Agricultural Society so long as it remained a private or quasi public corporation, and not under the exclusive management and control of the state. To obviate this difficulty, as we may well suppose, the legislature, at its next session after the adoption of the constitution, enacted a law, on April 15, 1880 (St. 1880, p. 49), entitled "An act to provide for the management and control of the State Agricultural Society." Section 1 of the act is as follows: "The State Agricultural Society is hereby declared to be a state institution." The second section requires the governor, within 10 days after the passage of the act, to appoint 12 resident citizens of the state, who shall, when organized, constitute "a state board of

agriculture." They are required to qualify as required by the constitution; to meet at the office of the State Agricultural Society; to elect one of their number as president of the board for a term of one year; to elect a secretary and treasurer, not of their number, to hold office at the discretion of the board. The fifth section is as follows: "The state board of agriculture shall be charged with the exclusive management and control of the State Agricultural Society as a state institution; shall have possession and care of its property, and be intrusted with the direction of its entire business and financial affairs. They shall define the duties of the secretary and treasurer, fix their bonds and compensation, and shall have power to make all necessary changes in the constitution and rules of the society; to adapt the same to the provisions of this act, and to the management of the society, its meetings and exhibitions. They shall provide for an annual fair or exhibition by the society of all the industries and industrial products of the state, at the city of Sacramento; provided that in no event shall the state be liable for any premium awarded or debt created by said board of agriculture." The sixth section authorizes the board to appoint all necessary marshals and police to keep order and preserve the peace at the annual fairs of the society, and gives to such officers when appointed the same authority in preserving the peace on the grounds and in the buildings as other peace officers. Section 7 is as follows: "Said board shall use all suitable means to collect and disseminate all kinds of information calculated to educate and benefit the industrial classes, develop the resources and advance the material interests of the state, and shall, on or before the first day of February of each year, report to the governor a full and detailed account of their transactions, statistics and information gained, and also a full financial statement of all funds received and disbursed. They shall also make such suggestions and recommendations as experience and good policy may dictate for the improvement and advancement of the agricultural and kindred industries." The act provides that all members of the board shall be appointed by the governor, and contains provisions in regard to county and district agricultural societies not necessary to this inquiry. It also repeals all laws and parts of laws in conflict with the act. We take judicial notice of the fact that the legislature has, at each of its sessions since the passage of the foregoing act of 1880, appropriated sums of money for the State Agricultural Society, ranging from \$4,500 in 1880 to \$40,000 in 1897.

Until February 28, 1893, nearly a year and a half after plaintiff's alleged cause of action accrued, no suit could be maintained against this state. On the last-mentioned date an act was passed (St. 1893, p. 57) entitled "An act to authorize suits against the state, and regulating



the procedure therein." The first section of the act is as follows: "All persons who have, or shall hereafter have, claims on contract or for negligence against the state not allowed by the state board of examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the state in any of the courts of this state of competent jurisdiction, and prosecute the same to final judgment. The rules of practice in civil cases shall apply to such suits, except as herein otherwise provided." Section 32 of article 4 of the constitution is in part as follows: "The legislature shall have no power \* \* \* to pay, or to authorize the payment of, any claim hereafter created against the state, or any county or municipality of the state, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

1. The State Agricultural Society, under the act of 1880, became, ever since has been, and now is, a state institution. The state board of agriculture provided for therein is "charged with the exclusive management and control of the State Agricultural Society as a state institution." We find none of the elements of a private corporation in its creation, its powers, or the mode of their exercise. Its objects are public and educational. They aim to improve agricultural and kindred industries, to disseminate information calculated to educate and benefit the industrial classes, and to advance by such means the material interests of the state. These objects are not widely different from those sought by our public-school system. The legislature found ample authority for its action in the constitution. Section 1 of article 9 of that instrument is as follows: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement." The act in question pursues the line thus indicated. The board constituted thereby is but the agency through which the sovereign authority of the state is carried out. The state appropriates its money, and the society receives it in aid of the benign objects in view. The state receives no pecuniary return. One object of requiring the annual report from the board of its receipts and expenditures doubtless is that the legislature may become familiar with the needs of the society, and gauge its appropriations accordingly. Respondent contends that, as there was no statute expressly authorizing the board of agriculture to charge admission fees to the state fair, their conduct in so doing was without authority of law and void. We are of opinion, however, that under the authority given to the board to provide for an annual fair, etc., to alter the constitution, and to make needful rules, etc., the authority to provide for an admission fee may be implied. It does not follow, however, that the society is organized for

gain. It exists for the sole purpose of promoting the public interest in the business of agriculture and kindred objects. It is an agency of the government, and in no sense an organization for pecuniary profit to the state. *Daggett v. Colgan*, 92 Cal. 56, 28 Pac. 51.

2. The states are not suable, except with their own consent. *Railroad Co. v. Tennessee*, 101 U. S. 337; *Railroad Co. v. Alabama*, Id. 832. No claim arises against any government, in favor of an individual, by reason of the misfeasance, laches, or unauthorized exercise of powers by its officers or agents. *Gibbons v. U. S.*, 8 Wall. 269; *Clodfelter v. State*, 86 N. C. 51, 53; *Chapman v. State*, 104 Cal. 690, 38 Pac. 457; *Green v. State*, 73 Cal. 29, 11 Pac. 602, and 14 Pac. 610; *Bourn v. Hart*, 93 Cal. 321, 28 Pac. 951; *Story*, Ag. § 319. It follows from those and kindred authorities that, if the acts of the board of agriculture and its subordinates constituted a tort, pure and simple, it gave to the appellant no right of action against the state; and the passage of the act of 1893, after the commission of the tort, did not have the effect of giving a right of action for a wrong, where none before existed. The act was permissive, and gave to parties having demands against the state a remedy, by action at law, where no such remedy before existed. We do not regard the fact that a tort may be waived and an action in assumpsit maintained, as conclusive upon this point. In most cases of tort this may be done, but when an action is brought against the state, which was not liable for a tort at the time the cause of action arose, the allegations of the complaint should aver such facts as show distinctly an authorized contract, and the proofs should correspond therewith. All this the plaintiff averred in the present case. The answer denied all these allegations. The evidence showed simply that plaintiff purchased a season ticket which entitled him to admission to the state fair, that on the day of his injury he visited Agricultural Park to witness a horse race or races there being carried on, and that on that day there was no other exhibit than the races. The state had made no legal provision for races or contests of speed. It had impliedly, at least, discouraged them. In the appropriation bill of the then current year, viz. 1891, the legislature appropriated \$40,000 "for aid to State Agricultural Society, \* \* \* provided that no moneys appropriated for agricultural societies shall be drawn, paid or used for racing or speed contests." Under these circumstances, we fail to see any foundation for plaintiff's claim, except the duty which devolved upon the officers by operation of law to see to it that plaintiff was not injured by any act of misfeasance or nonfeasance on their part, which duty would have been equally binding upon them had plaintiff, by their consent, entered the grounds without the payment of an admission fee. To neglect this duty was negligence, and negligence under such circumstances was a tort committed by such officers in the performance of a public duty, and not



upon a contract entered into by the state with the plaintiff. The case of *Gibbons v. U. S.*, 8 Wall. 269, at pages 274, 275, is instructive on this last point.

If, however, it be conceded that plaintiff's cause of action arose out of contract, the question still remains, can plaintiff, under the act of 1880, recover against the state in this action? It will be remembered that the fifth section of that act, after conferring authority upon the state board of agriculture to manage and control the society, and enjoining upon the board the duty of providing for an annual exhibition, etc., closes as follows: "Provided, that in no event shall the state be liable for any premium awarded or debt created by said board of agriculture." That the state could limit its liability in the premises as to future contracts, we do not doubt. Parties dealing thereafter with the board did so with full knowledge of the law as it stood, and cannot complain if they are precluded from redress against the state. Appellant contends, however, with great earnestness, that the term "debt created" does not cover a case like the present. It is true that the primary definition of a "debt" is a sum of money due by certain and express agreement. 3 Bl. Comm. 154. "An action at law to recover a specified sum of money alleged to be due." Burrill, Law Dict. The term "debt," however, has a much broader popular significance than the foregoing technical definition, and includes that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to another, or to perform for his benefit; thing owed; obligation; liability. Webst. Dict. So, too, in statutes the term is often construed as including liabilities. In *Carver v. Manufacturing Co.*, 2 Story, 432, 439, Fed. Cas. No. 2,485, it was held that "debts contracted," in a statute relating to individual liabilities of members of manufacturing corporations, was equivalent to "dues owing" or "liabilities incurred." A debtor is one who owes anything, or who is under obligation, arising from express agreement, implication of law, or from the principles of natural justice, to render and pay a sum of money to another. *Stanly v. Ogden*, 2 Root, 259. In *Dunsmoor v. Furstenfeldt*, 88 Cal., at page 529, 26 Pac. 520, it is said: "Any kind of obligation of one man to pay money to another is a debt. 'A debt signifies what one owes. There is always some obligation that it shall be paid; but the manner in which \* \* \* it is to be paid, or the means of coercing payment, do not enter into the definition,'"—citing *Rodman v. Munson*, 13 Barb. 197. Reference is also made to *Insurance Co. v. Meeker*, 37 N. J. Law, 300, for a full exposition of the word

"debt," as used in law, and especially in statutes. It is sufficient to say of that case that it supports the definition of "debt" as enunciated in *Dunsmoor v. Furstenfeldt*. Part 2 of our Civil Code relates to "Special Relations of Debtor and Creditor." Title 1 of the part contains general principles. Section 3429 is as follows: "A debtor, within the meaning of this title [title 1], is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent." Section 3430 is as follows: "A creditor, within the meaning of this title, is one in whose favor an obligation exists, by reason of which he is or may become entitled to the payment of money." So far as we have observed, wherever the term "debt" is used in our Code, it is so used in that broader sense which includes demands or obligations upon contracts payable in money. To illustrate: An executor or administrator "must \* \* \* collect all debts due to the decedent or to the estate." Code Civ. Proc. § 1581. Manifestly, as we think, he is thereby authorized to collect, not only all demands on contracts payable in sums certain, but also those obligations or demands capable of liquidation. "The earnings of the wife are not liable for the debts of the husband." Civ. Code, § 168. "The separate property of the husband is not liable for the debts of the wife contracted before marriage." Id. § 170. See, also, section 171. In all these provisions we think it plain that the construction to be put on the statute is, not that the spouses were simply to enjoy immunity from such contracts for sums of money due by certain and express agreement, which fixed the amount due, independent of extrinsic circumstances,—from such contracts as would have supported an action of debt at common law,—but rather that the word "debt" is to be used in its modern legal significance, as including any sort of obligation to pay money, and that it signifies what either of the spouses owes. So in the present case, we are of opinion that by the term "debt," used in the statute of 1880, it was intended to hold the state free from liability for the obligations which the state board of agriculture might incur, calling directly or indirectly for the payment of money. It follows that granting the motion for a new trial was proper, and we recommend that the order appealed from be affirmed.

We concur: HAYNES, C.; BELCHER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

121 Cal. 199

**SAVINGS BANK OF SAN DIEGO COUNTY v. DALEY et al. (L. A. 374.)**

(Supreme Court of California. June 13, 1898.)

**ATTORNEY WITH POWER—MORTGAGE FOR PERSONAL BENEFIT—VALIDITY—DESCRIPTION OF PROPERTY.**

1. A husband made a deed of trust of certain land to secure his debt. He thereafter deeded the land to his wife, and, under a power of attorney from her, executed a new mortgage in her name, and new notes, in consideration of the surrender of the deed of trust and the execution of deeds to the land by the trustee to the wife. *Held* that, since the lien had been created by the husband prior to the transfer to the wife, the mortgage given in her name under the power of attorney was valid as against her.

2. Where the owner of a Mexican grant has surveyed and subdivided it in the same way as the United States public lands are subdivided, a description in a mortgage by such subdivision is sufficient.

Department 2. Appeal from superior court, San Diego county.

Action by the Savings Bank of San Diego County against Thomas J. Daley and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Works & Works, for appellants. McNeely & Whitehead, for respondent.

**PER CURIAM.** This is an action to foreclose a mortgage alleged to have been made on the 16th day of November, 1891, by the defendants, Thomas J. Daley and his wife, Sarah M. Daley, to secure a promissory note of that date for \$29,395.73, alleged to have been made by the said Daley and his wife. The court rendered judgment foreclosing the mortgage for the amount of the note and interest (with the exception of the amount of \$300 for a certain overdraft, which need not be further considered). Defendants appeal from the judgment, and from an order denying a motion for a new trial.

The note and mortgage were made and executed by the appellant Thomas J. Daley in his own right, and by the appellant Sarah M. Daley by the said Thomas J. Daley, her attorney in fact; and the main contention of appellants is that the said Thomas had no authority to execute the mortgage as attorney for Sarah. The court below did not render any personal judgment against Sarah on the note, but held that Thomas had authority to execute for her the mortgage, and decreed a foreclosure against her. On the 30th day of September, 1889, the defendant Sarah M. Daley duly executed a power of attorney to the defendant Thomas J. Daley, which upon its face, beyond doubt, authorized him to execute the mortgage in question. But the contention of appellants is that the mortgage was given to secure a personal indebtedness of Thomas; that the plaintiff was aware of that fact at the time the mortgage was executed; and that, therefore, under certain authorities cited, the mortgage as to Sarah was

void. Admitting the principle contended for to be correct, still it is not applicable to this case. The facts are these: On October 10, 1890, the appellant Thomas J. Daley was indebted to a corporation called the Consolidated Bank on five several promissory notes, in the sum of about \$25,000; and on that day he executed to one John Ginty a trust deed of the lands here involved, to secure such indebtedness. Afterwards, on December 18, 1890, he made a deed of gift to his wife of all "his right, title, and interest" in said lands. Afterwards the present plaintiff and respondent paid the full amount due on said notes to the Consolidated Bank, and the last-named bank assigned and transferred to plaintiff all the said indebtedness secured by said trust deed. Afterwards, on November 16, 1891, the said appellant Thomas J. Daley, for himself and for the said Sarah, as her attorney in fact under said power, executed the note and mortgage sued on in this action, the consideration therefor being the said indebtedness secured by said trust deed. In consideration of this new note and mortgage, the old notes were delivered up; and Ginty, at the instance of plaintiff, jointly with said Thomas, executed to Sarah a quitclaim deed for said lands. The surrendering of the old notes, the execution of the deed and mortgage, and the recording of the same, were all done at the same time and as parts of the same transaction.

To the foregoing facts the principle that an attorney with power to mortgage cannot make a valid mortgage for his own personal debt, and for his own personal advantage alone, does not apply. The deed of trust was a subsisting lien against and a burden upon the lands to which Sarah held the legal title, to the same extent as the lien created by the mortgage; and the mere change in the form of the lien did not change her position. It cannot be said, therefore, that, within the authorities cited by appellants, the mortgage was made for the sole advantage of the attorney in fact. The lien for the personal indebtedness of the attorney in fact had been created before the deed, the consideration of which was merely love and affection, had been made to Sarah, and before she had any interest in the lands. The facts, therefore, do not show any legal limitation of the express power given in the power of attorney to execute the mortgage. It is true that there had been a former deed made by Thomas to his wife, in 1888; but as that deed had not been recorded, and as the respondent had no notice of it, it is not to be considered as affecting this case.

The other point made by appellants is that the mortgage does not contain a sufficient description of the lands sought to be mortgaged. The premises were within a Mexican grant, and the main description is by subdivisions, as though they had been upon public lands, and surveyed by the United States government; and the contention is that, as govern-



ment surveys are not made upon the Mexican grants, therefore the description is meaningless and void. But the case is similar to that of *Rea v. Haffenden*, 116 Cal. 596, 48 Pac. 716, where it is held that if the owner of a Mexican grant has surveyed and subdivided the same in the same way as if the grant were a part of the public domain, a description in a mortgage by such subdivisions is sufficient. There are no other points in the case calling for discussion. The judgment and order appealed from are affirmed.

(121 Cal. 55)

McDONALD v. McCOY et al. (L. A. 366.)<sup>1</sup>

(Supreme Court of California. May 31, 1898.)

PUBLIC LANDS—AGENCY—RATIFICATION—ESTOPPEL—RECITALS IN DECREE OF CONFIRMATION—CONCLUSIVENESS—PATENTS—MEXICAN GRANTS—ACTIONS IN REM—MORTGAGES—CONCLUSIVENESS OF DECISIONS—QUIETING TITLE—HEIRSHIP—LIMITATIONS—ADVERSE POSSESSION.

1. A principal cannot ratify an unauthorized agreement to sell by his agent, after he himself has disposed of the subject of such agreement.

2. A contract to procure a deed to land from its owner or pay damages is not such a contract as can be ratified by such owner, so as to make it his contract, and thereby pass title to the party of the second part to the contract, who goes into possession thereunder.

3. The fact that intestate was in possession of land, claiming to hold under the owner, but never having paid any consideration or received a deed, does not estop his widow from securing a deed from the owner, having the claim confirmed by the United States courts, and acquiring the title for herself instead of for his estate.

4. Recitals in a decree of confirmation of title to lands by the United States district court as to how the property accrued to the parties named,—as whether by inheritance or otherwise,—are not binding, and not even evidence against the parties to the judgment, under Code Civ. Proc. §§ 1908-1911, providing, in effect, that only the matters directly in issue shall be deemed concluded by the judgment.

5. An order of the United States court recited that it appeared that intestate was the real claimant of certain land, and that while prosecuting the claim he had joined the army, and lost his life, and therefore a rehearing was granted to his widow and children. Thereafter the title was confirmed, and a patent was granted conveying the land to M., N., and H., widow and heirs of B., and to "their" heirs and assigns; to have and to hold the said tract to the said M., N., and H., widow and heirs of B., deceased, and to "their" heirs and assigns forever. There were other heirs of B. not named in the patent. *Held*, that the legal title was by the patent vested in the grantees named, and the title was not made subject to any trust in favor of the other heirs by virtue of its terms.

6. A patent issued to the conferee of the Mexican grant takes effect by relation as a deed of the United States at the date of the presentation of the petition for confirmation.

7. Purchasers of land between the time of filing the petition for confirmation of title and the granting of the patent acquire legal rights which are not disturbed by the subsequent patent.

8. The judgment in an action to determine conflicting claims to real estate, where a mortgagee whose mortgage was recorded was not made a party, does not bind him, since the action is in rem only in so far that personal

service of process is not required to give jurisdiction.

9. The title derived by a mortgagee who purchases at his foreclosure sale dates back to the date of the mortgage.

10. A decision on appeal as to the ownership of land is not res judicata in an action between different persons, where the facts appear as materially different.

11. A patent to lands in confirmation of a Mexican grant issued to the original applicant or his legal representatives embraces representatives of the original petitioner by contract as well as by operation of law, leaving the question open in a court of law as to the party to whom the patent should inure.

12. In an action to quiet title, where plaintiff avers a legal title, and asks to have it so adjudicated, he cannot afterwards ask to have it adjudicated that he has an equitable title, and that defendant holds the legal title in trust for him.

13. Code Civ. Proc. § 1664, authorizing an action to determine heirship and the ownership of property in the estate of a deceased person, does not authorize the determination of adverse claims by third persons to the property, and a judgment therein is not conclusive as to persons claiming the property as their own.

14. Limitations do not begin to run against a purchaser at a foreclosure sale until the delivery of the deed.

15. Code Civ. Proc. § 325, providing that in no case shall adverse possession of land be considered established unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and that the party has paid all the taxes levied thereon, is not complied with by the redemption of such land from tax sales, where the party has failed to pay the taxes when due during such five years.

Department 2. Appeal from superior court San Diego county; E. S. Torrance, Judge.

Action by J. Wade McDonald against Winifred McCoy and others. From a judgment for plaintiff, defendants appeal. Reversed.

Nougues & Boone and W. P. McNally, for appellants. McDonald & McDonald, for respondent.

TEMPLE, J. This action was brought to quiet title against several defendants, but no defense is made except by the representatives of Maurice Dore, deceased, who are the appellants. The plaintiff, in his complaint, avers that he is the owner and in possession of the land in question, and yet the defendants assert title thereto, and slander and deny the right and title of the plaintiff therein, and by such assertion of their alleged rights, and slander and denial of the right and title of the plaintiff, the defendants have created doubts and thrown suspicion upon plaintiff's title. He demands judgment that his title is good, and paramount to the title and claim of defendants, and each of them. Appellants deny plaintiff's allegation of title, allege title in Dore, and assert certain equities.

The controversy involves the Rancho Jamul, in San Diego county, except a portion thereof, which had been set apart to Mrs. Burton as a homestead. In 1831 a provisional grant was made to Pío Pico. In January, 1851, Juan Forster, in his own name, as party of the first part, contracted with Lo-

<sup>1</sup> Rehearing denied.



pez, Crossthwaite, Richard Rust, and William E. Rust, as parties of the second part, to sell to them the right, title, and interest of Pio Pico in the Rancho Jamul for \$2,000, to be paid to Juan Forster, "agent as aforesaid." Five hundred dollars was to be paid in cash, and a like sum when Pico should deliver to them a deed in fee simple, and also some further sums; but, if Pico should refuse to ratify the agreement on the part of Forster, or to deliver the deed, then Forster agreed to pay to the parties of the second part \$500 so advanced by them, and all damages resulting from their being dispossessed; and for the true and faithful performance of this last covenant Forster bound himself, his heirs, executors, and administrators. The deed of Pico, by the terms of the agreement, was to be delivered to the parties of the second part on or before the 1st of March, 1851. It never was delivered, and it does not appear that anything was ever done in performance of the contract by any one. In October, 1852, a petition in the name of Pico was filed in the United States land commission, asking for a confirmation of the title. The claim was rejected by the commissioners in 1855. According to an affidavit made by Maria S. Burton, and filed in the United States district court in 1880, Burton, in 1853, purchased the right of Lopez and Crossthwaite under the contract, and took possession of the land; and in 1854 he purchased the interests of Richard and William E. Rust. In 1867, nearly 12 years after the claim had been rejected, an appearance was entered in the United States district court on behalf of Gen. Burton. For what purpose does not appear. Burton left the state in 1859, and never returned. He was an officer in the army of the United States during the Civil War, and, according to the affidavit of Mrs. Burton, from the hardships and exposures in that service he contracted a disease from which he died at Ft. Adams in 1869. June 24, 1870, Mrs. Burton purchased the land from Pico, and took his deed to herself. Not as a ratification of the sale made by Forster, but to rebut the possibility of any such presumption, it was recited in the deed to her from Pico as follows: "To have and to hold unto her, the said Maria S. Burton, her heirs and assigns forever, to and for their benefit, and none other." On the 23d day of August—nearly three months after the deed from Pico to her—Mrs. Burton made the affidavit, in which there was evidently an attempt to excuse the failure to prosecute the claim by showing that Gen. Burton was the real claimant, and that no laches could be charged to him, because he was engaged in the service of his country as an officer in the army. In the same affidavit Mrs. Burton states that Pico did not ratify the sale made by Forster while Lopez and his associates were in possession, but never objected to the possession of Gen. Burton; "and since my husband's death said

Pico has, in favor of myself and my children, ratified and confirmed the claim of my husband and ourselves to the land, and for our protection and security has executed and delivered to me a deed of conveyance of the land to myself, which deed is duly acknowledged and recorded in the county of San Diego, where the land lies." "I did not know, and have never heard until about a month ago, that an absolute grant of the land had been made by Manuel Victoria to Don Pio Pico, and am confident that my husband was never aware of the fact while he was in this state," etc. The affidavit of Pio Pico which had been filed in the United States district court was also put in evidence by respondent. It was filed in the district court August 26, 1870, by Mrs. Burton. In this affidavit Pico states that he did not present the petition to the commissioners for confirmation because Forster had sold the land, and others had taken possession, and he states: "Although I never confirmed the agreement entered into by Don Juan Forster as my agent and Bonifacio Lopez, Phillip Crossthwaite, Richard Rust, and William E. Rust, I have confirmed the land to the heirs of General H. S. Burton, late of the army of the United States, who succeeded to the interests of the parties above mentioned, and with that object I have conveyed said rancho of 'Jamul' to the widow of General Burton by deed which is duly executed, acknowledged, and recorded, and I have no interest or claim in the land." Respondent also read in evidence a writing bearing date August, 1870, executed by Pio Pico, in which the contract made by Juan Forster is set out in full, after which it proceeds: "Now, therefore, in consideration of the sum of five hundred dollars to me in hand paid by each of the parties named in said instrument as the parties of the second part, and for divers other good and sufficient considerations thereunto moving, I, said Pio Pico, have ratified, confirmed, and made valid, and by these presents do ratify, confirm, and make valid, the said agreement," etc.

At the time of the execution of this instrument Pio Pico did not own the land, having conveyed the same three months before to Mrs. Burton, to have and to hold for herself and her heirs forever, and for none others. He was not, therefore, in a position that he could ratify the contract had it been capable of being ratified by him, which it was not. No previous authority given to Forster could have made this contract the contract of Pio Pico. It did not purport to be his contract, or to bind him. By it Forster simply undertook to procure a deed from Pico, or pay damages. It may be doubted whether under any circumstances a ratification could be made, after Gen. Burton's death, which would have the effect of causing the title to vest in his heirs by succession. Title cannot be conveyed to the dead. But it may be conceded that, had there been

a contract which purported to bind Pico, and which was, therefore, capable of ratification, and that Burton had become the owner of such contract, a ratification of this contract after Burton's death and conveyance to his heirs in performance thereof, the title, though not strictly acquired by decedent, would have been subject to administration in Burton's estate, or at least in some mode might have been made subject to administration. Burton, however, had no contract which purported to have been made by Pico, and which could be made the contract of Pico by ratification; and, had it been capable of ratification, still, before the attempt to ratify, Pico had parted with his interest in the property. The formal attempt to ratify must, then, be left out of the case. But it is said that Gen. Burton was in possession, claiming under Pico, and that Mrs. Burton used her position as his widow and heir to obtain the deed from Pico, and the confirmation of the claim by the United States court, and cannot now deny that the title was acquired for the benefit of the estate. It is not really proven in this case by any competent evidence that General Burton ever purchased the rights of Lopez and others under the contract with Forster. He most likely did acquire from them the possession of the land. Mrs. Burton's affidavit shows that Gen. Burton never knew that Pico had a grant for the land other than the provisional grant of 1831, and, of course, he knew that conferred no title. Indeed, Mrs. Burton attributes Burton's delay to prosecute the claim to his ignorance of the fact that Pico had any title. Burton's appearance was entered while he was an invalid, out of the state; and Mrs. Burton's affidavit also shows that he never paid any attention to the claim other than to employ attorneys. Ignorance of the existence of the grant is the only explanation that can be given of the fact that nothing was done in performance of the Forster contract, and no attempt made to get a deed from Pico, and of the failure to prosecute the claim for confirmation. I think that the evidence fails to show that Burton did claim under Pico. If this were otherwise, I still fail to find anything in the facts which would estop Mrs. Burton from acquiring title for herself.

The next question is whether there was anything in the proceedings had in the United States district court which will conclude those claiming under Mrs. Burton and her children. On the 26th of August, 1870, on motion of Mrs. Burton, an order was entered reciting that it appeared that Gen. Burton was the real claimant, and that, while prosecuting the claim in the name of the original grantee, he was ordered East, and lost his life in the Civil War, and therefore no laches could be attached to him for not prosecuting the claim, and therefore a rehearing was granted in favor of his widow and children, who were his sole heirs. September 21, 1870,

an order was entered reciting that Henry S. Burton died seised and possessed of Jamul, having purchased it in his lifetime, and substituting the names of Mrs. Burton and her two children as claimants in lieu of Pio Pico. On the same day the decree of confirmation was entered, which contains the following: "This court does hereby order, adjudge, and decree that the claim of Maria A. Burton, Nellie Burton, and Henry H. Burton is a good and valid claim, and the same be, and is hereby, confirmed to them, as the legal representatives of the said Henry S. Burton, deceased." The patent was issued in October, 1876, and granted to Maria A. Burton, Nellie Burton, and Henry H. Burton, widow and heirs of Henry S. Burton, deceased, and to their heirs and assigns, the tract, etc.; "to have and to hold the said tract to the said Maria A. Burton, Nellie Burton, and Henry H. Burton, widow and heirs of Henry S. Burton, deceased, and to their heirs and assigns forever." It was not the province of the United States district court to determine who the heirs of Gen. Burton were, or whether the property accrued to the parties named by inheritance or otherwise. These recitals in the orders and in the judgment bind no one, and are not evidence of the facts recited, even as against the parties to the judgment. Code Civ. Proc. § 1908; *Lillis v. Ditch Co.*, 95 Cal. 553, 30 Pac. 1108; *Freem. Judgm.* § 257. At the time of the entry of the decree of confirmation neither of the parties named was the legal representative of Gen. Burton in any other sense than that they were heirs, but not the only heirs, of Gen. Burton. He had been married previous to his marriage to Mrs. Maria A. Burton, and had other descendants capable of inheriting. After the confirmation of the grant, to wit, in 1872, Mrs. Burton and her two children mortgaged the land to Maurice Dore to secure a loan of \$10,000. Mrs. Burton then claimed and represented to Dore that she and her children were sole owners of the land. Indeed, Mrs. Burton and her children always so claimed until Dore commenced a suit to foreclose his mortgage, when, in her answer filed August 26, 1880, she admitted that she had believed that the land belonged to herself and children, but had discovered that it was community property of herself and Gen. Burton. Had she been able to pay the debt due on the mortgage, probably she would never have discovered that Jamul belonged to the estate. Since these recitals in the proceedings in the United States circuit court do not bind those claiming under the patent, are not even competent evidence tending to prove the facts, and were received over the objections of appellants, who now insist upon the rulings as error, such facts, unless otherwise proven, have no legitimate bearing upon the question here involved. We come then to the effect of the patent.

It may be noted here that the grant is not



to the grantees as heirs. It is to Maria A. Burton, Nellie Burton, and Henry H. Burton, widow and heirs of Henry S. Burton, deceased. It is not to the heirs of the intestate, but to the persons named, their heirs and assigns. This is, of course, the plainest possible indication that they held for themselves. The persons named were not the only heirs, nor even the only children, of Henry S. Burton. We are also to notice that, had all the heirs been named, still the title vested in them by the patent was as tenants in common owning equally, and not according to our laws of succession. As before stated, the district court had no jurisdiction over probate matters, and could not declare the succession. It is admitted by all that the legal title was, by the patent, vested in the grantees named; and it seems from the authorities that it was not, by virtue of the recitals in the patent, made subject to any trust in favor of any one. On its face it was an absolute title. In *Christy v. Fisher*, 58 Cal. 256, it was held that, although a patent was issued to Halleck Peachy and Van Winkle, as executors of Joseph L. Folsom, deceased, yet the persons named, though not in fact executors, could convey a complete title to the land. In *Hartley v. Brown*, 46 Cal. 202, Antone Moria Armijo was the original grantee. He died before confirmation, and the grant was confirmed to his heirs, and the patent was to them. The heirs conveyed the land to the plaintiffs in that action before the issuance of the patent. The defendants claimed under a probate sale made in the estate of the original grantee. It was held, in the absence of further showing, that the conveyances direct from the heirs must prevail over those claiming under a probate sale. In all these cases the opposing equities do plainly appear, while in the case at bar there were none. The cases are cited to show that the recitals in the patent do not imply a trust; that, if the title was received in trust for Burton's estate, that must be shown by evidence aliunde. Here Burton was not the grantee, nor the petitioner for confirmation, and never acquired any right or title, legal or equitable, from such grantee; nor did he hold a contract which purported to vest in him any such right; and, if it could be held that he did have a contract, I think it is fully shown that it never was ratified.

It is said that the mortgage to Maurice Dore was in form a quitclaim, and, having been given before the patent was issued, did not carry the after-acquired title. I am not sure that plaintiff has any concern in that question, but there is nothing in the proposition. It has been uniformly held that the patent issued to the confirmer of the Mexican grant takes effect by relation as a deed of the United States at the date of the presentation of the petition for confirmation. *Moore v. Wilkinson*, 13 Cal. 478; *Touchard*

*v. Crow*, 20 Cal. 150; *Clark v. Lockwood*, 21 Cal. 220; *Schmitt v. Giovanari*, 43 Cal. 617; *Bihler v. Platt*, 52 Cal. 550. We start with the title in the petitioner at that date, and titles subsequently derived from him in any legal mode are valid, no matter to whom the patent may subsequently be issued. Nor do purchasers intermediate the filing of the petition and the patent acquire a mere equity; nor, if such intermediate rights are mere equities, are they disturbed by the subsequent patent.

It is contended by the plaintiff that appellants are estopped from asserting any claim to the Rancho Jamul by the judgment rendered in a suit to quiet title brought by G. W. B. McDonald, administrator of the estate of Henry S. Burton, deceased, in 1883, against Leach, Capron, and others, Dore having foreclosed his mortgage given by Mrs. Burton and children, purchased the property at the foreclosure sale through his agent, and in 1883 sold and caused the land to be conveyed to Wallace Leach and John G. Capron. They executed to his agent, Bayley, a mortgage to secure the payment of \$4,000, which was the purchase money, or a part thereof. Some few months afterwards, to wit, on December 21, 1883, McDonald, as administrator of Henry S. Burton, deceased, commenced an action against Leach, Capron, and others to have it adjudged that said Rancho Jamul was property of the estate subject to administration, and that the legal title held by Mrs. Burton and her children was held in trust for said estate, and "to vest hereafter in this plaintiff as administrator, and to be disposed of by him in due course of administration." Dore's mortgage was duly recorded before this action was commenced, but neither Dore nor Bayley were made parties, or served with process, and neither appeared in, or in any mode participated in, the action. April 28, 1887, judgment was entered in that action to the effect the rancho is and was the property of the estate of Henry S. Burton, deceased, and subject to the administration thereof, and that all title held by said defendants Leach, Capron, and Ingraham, or either of them, was declared to be held in trust, and for the use and benefit of said estate. Of course, the estate of a deceased person is not a person or an entity capable of acquiring or holding title, and the only rational meaning of this decree is that the rancho was part of the estate of Henry S. Burton, deceased, and that the beneficial interest therein had devolved upon Mrs. Burton and her children as heirs of Gen. Burton. Plaintiff derives his title through a probate sale in the estate of Henry S. Burton made in 1895.

I think it clear that the appellants here are not bound by the judgment in the former suit. It is not an estoppel as to them. It is suggested that the action to determine conflicting claims to real estate under our Code



is in rem, and binds the whole world. Otherwise an action of that character cannot be maintained against claimants who cannot be personally served. There is much plausibility in the argument that it is an action of that character, just as a suit to foreclose a mortgage may be so regarded. But neither in this case nor in actions of foreclosure is provision made for the notice to all interested, whether parties to the record or not, and it has never been held that judgments in such cases are conclusive except upon parties and their privies. They are not in the full sense actions in rem, but so far only that personal service of process is not required to give jurisdiction. The effect of a judgment as an estoppel is declared in section 1908 of the Code of Civil Procedure. It is true, Dore claims under Leach and Capron, who were parties to the action. Dore was then, however, a mortgagee, and his mortgage had been duly recorded. When his mortgage was foreclosed, his title derived from a sale under the decree dated back to the date of the mortgage, which was prior to the commencement of the action. Jones, *Mortg.* § 1654; *Brady v. Burke*, 90 Cal. 6, 27 Pac. 52. But it is contended that, conceding that the judgment in the case of McDonald against Burton is not conclusive as an adjudication, it should be so regarded as an authority. The facts, it is said, were substantially the same, and that case was twice appealed to this court. 68 Cal. 445, 9 Pac. 714, and same case under title *Burton v. Burton*, 79 Cal. 490, 21 Pac. 847. In the first appeal the facts are recited at length, and the principal ones correspond very closely to those here considered. I do not understand that it was there held that the decree of confirmation and the patent by their terms show that the title was received by the patentees in trust for the heirs of Henry S. Burton, but the conclusion was founded mainly upon the evidence of ratification found in the record. In some important respects the facts cited as tending to show ratification differ from those now presented. I notice three which seem to be important: (1) It is said that Pico ratified the sale made by Forster without receiving any consideration from her. There is no express evidence in the present record that Mrs. Burton actually paid Pico for his deed, but all the presumptions are very strong to that effect. The facts recited in the attempt at a formal ratification are that Pico had received \$500 from each of the parties of the second part to the agreement with Forster. Both Pico and Mrs. Burton testify, in effect, that he had never ratified the agreement in their favor, but only in favor of Mrs. Burton. Of course, the deed imports a consideration, and it is not to be supposed that he transferred all this land, to which it was then found he had a good title, for nothing. (2) It does not appear that it was then apparent that the Forster agreement did not purport to bind Pico,

or to be his contract, and therefore was incapable of being ratified by him. (3) It did not then appear that the parties named in the decree and patent were not the only heirs of Gen. Burton. That fact now plainly appears, and, in my opinion, has an important bearing upon the question of ratification. It throws light upon the intention of Mrs. Burton in taking the deeds from Pico, and explains the extraordinary clause in the deed from Pico to her: "Maria A. Burton, her heirs and assigns, are to have and hold said rancho to and for her and their benefit, and for none others." It is no wonder that she always asserted that the property did not belong to the estate of Gen. Burton, but was the individual property of herself and children. Where she procured the money with which she paid Pico does not appear, unless in the evidence which tends to show that she used a portion of the money which she got from Dore to pay the expense of procuring the confirmation. The decision in the former case, being based upon facts materially different, cannot, in my opinion, be taken as controlling here. It does not constitute the law of the case, and, unless founded entirely upon the supposition that title accrued to Gen. Burton through the ratification referred to, it is opposed to the cases already cited upon the effect of the confirmation and patent, and also to the line of decisions commencing with *Estrada v. Murphy*, 19 Cal. 248, and also to the following cases in the supreme court of the United States: *Hogan v. Page*, 2 Wall. 605; *Carpenter v. Rannels*, 19 Wall. 138; *Steinbach v. Stewart*, 11 Wall. 566.

In *Hogan v. Page* it is said that the land office at an early day, to avoid the necessity of determining derivative titles, adopted the formula of issuing the patent in terms to the original applicants or his legal representatives, and that the formula "or his legal representatives" embraces representatives of the original grantee in the land by contract, such as "assignees or grantees, as well as by operation of law." Substituting the phrase "original petitioner" for "original grantee," this is the precise effect, as I understand it, which has been given to a patent in confirmation of a Mexican grant in California, although no such formula has been used. Under this rule it is not necessary that the United States district court should inquire as to the derivation of title from Pico, nor did it. The recitals in various orders in regard to Henry S. Burton have reference only to the question of laches in the prosecution of the claim. The court was made to believe that Henry S. Burton was the real claimant, and because he was in the service of his country excused the delay. This was not an adjudication of that fact, nor do I see how the use of this pretense can estop Maurice Dore from showing that as matter of fact Gen. Burton never had a pretense of title in law or in equity, and never knew that a grant had been made

to Pico. The court had no occasion to determine who were the legal representatives either of Pico or Burton. Whoever received the patent, the title would inure to those who could derive title from Pico subsequent to the filing of his petition with the United States land commission. The sale to Lopez and others was prior to that date, and it is only through the deed to Mrs. Burton that any derivative title can be shown. Rights founded upon this contract which antedated that time, even had Pico been the contracting party, could not be recognized save in a court of equity.

The plaintiff avers a legal title, and asks to have it so adjudged. He cannot now, in lieu of that, have it adjudged that he has an equitable title, and that defendants hold the legal title in trust for him. *Von Drachenfels v. Doolittle*, 77 Cal. 295, 19 Pac. 518; *Harrigan v. Mowry*, 84 Cal. 456, 22 Pac. 658, and 24 Pac. 48; *Burris v. Adams*, 96 Cal. 667, 31 Pac. 565. If such a suit could be maintained, it would, as pointed out by Judge McFarland in the last case cited above, reverse the present rule, which requires a party claiming to have equities to set them up. A person claiming that an adverse title was fraudulently acquired, and that he is entitled to have it conveyed to him, might sue to quiet title, and thus avoid the necessity of setting up the facts constituting the alleged fraud. This may not be done. The learned judge of the trial court found that plaintiff had the legal title. Had the title come to the heirs of Burton by succession, this would have been correct; for in such case the legal title would have been in the heirs, subject to being divested by appropriate proceedings in the administration of the estate of Henry S. Burton. But, since it could not have been so vested by the decree of confirmation, and the patent does not purport to grant the land to them as the representatives of Burton, it cannot be held that they held the title subject to administration.

In 1887, Maggie Leach, as executrix of Wallace Leach, then deceased, commenced an action under section 1664 of the Code of Civil Procedure to determine heirship to the estate of Henry S. Burton. In her complaint she described the property here in controversy, and claimed title thereto derived from the heirs of Henry S. Burton, deceased. Maurice Dore was served with summons in this proceeding, but did not appear. It was adjudged that the estate of Wallace Leach owned an undivided five-sixths of the property as grantee of some of the heirs of Henry S. Burton, deceased. Plaintiff contends that this judgment concludes the heirs of Maurice Dore, that they cannot deny that the property belongs to the estate of Henry S. Burton, and that the title derived from a subsequent foreclosure of the mortgage against the estate of Leach was simply the right of Mrs. Burton and her children as the heirs of Henry S. Burton. Section 1664 is in article 2 of

chapter 11 of title 11, and concerns distribution and final settlement of estates of deceased persons. The proceeding is a step in the distribution of estates. The purpose is to determine heirship and the ownership of property of the estate, and the decree is made conclusive only in distribution and of title to property of the estate. It provides no means of determining adverse claims, or what property belongs to the estate. Had Dore appeared, and alleged that his claim was that the described property did not belong to the estate, he would not have been heard. The decree did not affect the claim of the appellants.

In 1889 the administrator of the estate of Henry S. Burton, deceased, by virtue of the decree in the case of McDonald against Burton, above mentioned, was put into possession of Rancho Jamul. He continued in possession as such administrator until after the administrator's deed to plaintiff, February 18, 1895. Respondent claims that title as against the appellants, if they claim adversely to the estate, has been acquired by the statute of limitations. There are two answers to this contention: (1) So far as appears, appellants have not even yet been able to procure a deed to themselves conveying the legal title to them under their decree of foreclosure. They have had, therefore, no right of action at law to recover the property. *Leonard v. Flynn*, 89 Cal. 535, 26 Pac. 1097. (2) While the administrator was in possession, no taxes were paid. The rancho was assessed for taxes each year, and the taxes were regularly allowed to become delinquent, and under the statute the land was sold to the state. After the probate sale in 1895, the administrator redeemed the property from these sales, by paying to the state the required amounts, and received certificates showing that a redemption had been effected. Section 325 of the Code of Civil Procedure, in addition to the requirements as to the character of the possession in other respects, provides that in no case shall the adverse possession be considered established unless it be shown that the land has been occupied and claimed for the period of five years continuously, and the parties have paid all taxes which have been levied and assessed on the land. It appears, then, that while the administrator was maintaining his possession, which it is claimed was adverse, he did not pay the taxes which were assessed upon the land, or any portion thereof, but, on the contrary, allowed the land to be sold for the delinquency. No taxes were paid, even if such redemption could be called a payment of taxes, until he ceased to have or to claim any right to possession. But, though the redemption had been effected while he was still in possession claiming title, it would not have been a compliance with the law. If there is anything of benefit to the state contemplated by this anomalous law, it is that it will have a tendency to induce people



to pay their taxes, and not compel the state to take the title subject to redemption. If it is an element in the adverse possession tending to show good faith, certainly during those years in which the taxes have not been paid the possession lacks an essential element required in the statute. During all the years in which the delinquency was allowed, the true owner might forbear suit because of his knowledge that the person in possession had not paid taxes, thereby indicating that he was not holding adversely. The plaintiff, I think, is not in a position to invoke the statute of limitations.

Holding these views, I have not found it necessary to consider the appellants' alleged equities, or whether they should have been allowed to amend their answer, and plead the statute of limitations. The judgment and order appealed from are reversed, and a new trial awarded.

We concur: McFARLAND, J.; HENSHAW, J.

121 Cal. 115

HINES v. WARD et al. (Sac. 189.)

(Supreme Court of California. June 1, 1898.)

MORTGAGE—MERGER—ESTOPPEL—ELECTION OF REMEDIES.

A mortgagee, to whom the mortgagor has deeded the mortgaged premises in satisfaction of the mortgage, is not estopped to deny a merger as against one who, without his knowledge, obtained judgment against the mortgagor between date of mortgage and deed, though he commenced an action against the judgment creditor and sheriff alone to enjoin sale under the judgment, and preserved a bill of exceptions to the order dissolving the injunction, and took an appeal therefrom, which, however, he did not prosecute, he having amended his complaint, and made the mortgagor a party, which was enough to entitle him to relief under the prayer for general relief.

In bank. Appeal from superior court, Lassen county.

Action by F. Hines against F. G. Ward and others. Judgment for plaintiff. Defendant L. E. Richter appeals. Affirmed.

Shinn & Shinn, for appellant. Goodwin & Goodwin, for respondent.

VAN FLEET, J. Plaintiff held a mortgage, given and recorded in June, 1890, on land of defendant Tunison to secure the latter's note, on which there was due in May, 1894, the sum of \$1,500. Being insolvent, and unable to pay the note, and desiring to avoid the expense of foreclosure and sale, Tunison requested plaintiff to take a deed of the mortgaged premises in satisfaction of the debt, representing to plaintiff and assuring him that there was no other incumbrance or lien upon the land. Plaintiff, believing and relying upon Tunison's representations, consented, without an examination of the record, to accept such deed, and thereupon on May 19, 1894, Tunison and wife

made and executed to plaintiff a deed of the premises, which the latter took, and in consideration thereof surrendered and canceled the note, and satisfied the mortgage, and placed his deed of record. In fact, the defendant Richter had in March, 1894, without plaintiff's knowledge, but with the knowledge of Tunison, recovered a judgment against the latter in the superior court of the county, which judgment appeared of record as having been entered and docketed on the 27th of that month; and in August, 1894, Richter caused an execution based upon said judgment to be levied upon the land by the defendant Ward, as sheriff of the county, who advertised the land for sale thereunder. The existence of this judgment and the proceedings taken thereunder being thus brought to the knowledge of the plaintiff, he commenced this action. In the complaint, as originally filed, Richter and Ward, the sheriff, were alone made parties defendant, the complaint alleging the facts as above stated, and also setting out the facts as to the manner in which Richter's judgment had been procured and docketed, and praying for a perpetual injunction restraining the sale, and for general equitable relief. Upon the complaint as thus framed a temporary injunction restraining the sale was granted, but subsequently the court below sustained a demurrer to the complaint, and dissolved the injunction, but with leave to plaintiff to amend. Plaintiff thereupon filed an amended complaint, adding and bringing in Tunison as a party defendant, and, alleging otherwise substantially the same facts stated in his original complaint, asked that the satisfaction of said mortgage be canceled and set aside, that plaintiff be restored to his rights thereunder, and that the mortgage be foreclosed, and the land sold in satisfaction of the indebtedness. The complaint also alleged that the land at the time of its conveyance to plaintiff was of no greater value than the amount due on the note, and that plaintiff was ready and willing to reconvey the land to Tunison. Tunison was duly served, but failed to appear, and his default was entered. Defendant Richter answered the amended complaint, pleading the filing of said original complaint and the relief asked thereunder, and the fact that plaintiff had preserved a bill of exceptions to the order dissolving the injunction, as showing an election by plaintiff to stand upon his legal title acquired under said deed, and pleading said facts as operating an estoppel against plaintiff to have the relief sought in his amended complaint. Upon the trial the court found the facts substantially as alleged in the amended complaint, and, without finding or passing expressly upon the question of an estoppel, awarded plaintiff the relief sought. From this judgment defendant Richter appeals.

The contention of appellant is that the conveyance from Tunison had the effect to merge



plaintiff's rights under the mortgage in the legal title carried by the deed, and relieve the land of the mortgage lien, thereby leaving it subject to the lien of appellant's judgment, and liable to sale in satisfaction thereof. It is well established that equity will interpose to prevent a merger where from the circumstances it is apparent that it was not the intention of the grantee that a merger should take place; and where it appears to be for the interest of the grantee that there should be no merger of the lesser estate, such will be presumed to have been his intention. The rule is thus expressed by Mr. Jones: "There is generally an advantage to the mortgagee in preserving his mortgage title; and, when there is, no merger takes place. It is a general rule, therefore, that the mortgagee's acquisition of the equity of redemption does not merge his legal estate as mortgagee so as to prevent his setting up his mortgage to defeat an intermediate title, such as a second mortgage, or a subsequent lien, unless such appears to have been the intention of the parties, and justice requires it; and such intention will not be presumed where the mortgagee's interest requires that the mortgage should remain in force. The intention is a question of fact." Jones, *Mortg.* § 870. And, further: "Even where the parties have undertaken to discharge the mortgage upon the uniting of the estates of the mortgagor and the mortgagee in the latter, it will still be upheld as a source of title whenever it is for his interest, by reason of some intervening title or other cause, that it should not be regarded as merged. It is presumed as matter of law that the party must have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title, or for other purposes of security; and this presumption applies although the parties, through ignorance of such intervening title, or through inadvertence, have actually discharged the mortgage and canceled the notes, and really intended to extinguish them. The circumstances of the case must, however, be such that no injustice will be done to any one else, as where the mortgagee has taken a conveyance of the property in satisfaction of the debt, and, though he has discharged his mortgage, he has done nothing else to preclude the supposition that he intended to take the property in satisfaction of the debt. It may, therefore, be deduced from the authorities, as a general rule, that when the mortgagee acquires the equity of redemption, in whatever way and whatever he does with his mortgage, he will be regarded as holding the legal and equitable title separately, if his interest requires this severance. The law presumes the intention to be in accordance with his real interest, whatever he may at the time have seemed to intend." *Id.* § 873. These principles are not questioned by appellant, but he contends that plaintiff,—having a right either to stand upon his legal title, or

repudiate it, and have recourse to his mortgage,—by bringing his action to enjoin the sale of the land, with knowledge of appellant's judgment, apparently upon the theory that he held the absolute title free from the lien of that judgment, plainly manifested the intention to assert a merger, and made an unequivocal election to stand upon such legal title, which effectually estopped and precluded him, as against appellant, from thereafter resorting to his mortgage, and proceeding upon the theory that no merger had in fact been intended; and it is claimed that the court below erred in not finding upon said plea of estoppel, and that the judgment must, for that reason, be reversed.

But we do not regard the facts relied on as constituting an estoppel against plaintiff. Certainly, the mere fact that plaintiff in his original complaint proceeded upon a somewhat erroneous theory as to the relief which he was entitled to have under the facts alleged cannot, in reason, be held to constitute such conclusive evidence of an election as to preclude him from thereafter and in the same action so amending his complaint as to entitle him to the relief which the facts otherwise warranted. The only obstacle under the original complaint to the relief which he was eventually awarded was the failure to make Tunison, the mortgagor, a party defendant. But for that defect, plaintiff could have had, under his prayer for general relief, all that the judgment now gives him. This defect was susceptible of being cured by the amendment, which it was clearly within the discretion of the court to allow, and thereupon the original complaint was superseded in the action for all purposes. Nor do we see anything in aid of appellant's contention in the fact that subsequent to the amendment of his complaint plaintiff saw fit to preserve a bill of exceptions to the order dissolving the injunction, and thereafter, as incidentally appears, took an appeal from that order. This mere tentative effort to preserve his right to have that order reviewed did not necessarily imply an election or intention to eventually abide by the attitude assumed in the original complaint. Such intention was in fact negated by amending his complaint, and proceeding to judgment thereunder. Moreover, it does not appear that plaintiff ever took any further steps towards the prosecution of said appeal. It is true that a party having inconsistent remedies may not pursue both, but must choose between them; and, having clearly elected to proceed upon one, will be debarred from invoking the other. But what amounts to such election is not always clear. The general rule undoubtedly is that the remedy first sought must be pursued to judgment (*Herm. Estop.* § 1057), and the cases relied on by appellant mostly present instances of that character. Some of them go to the extent of holding that, where a party has brought his action in pur-

suit of one remedy, he cannot, by dismissing it before judgment, be permitted to pursue another and different remedy, but that the commencement of the first is a conclusive election by which he is bound. Whether this extension of the doctrine is one sustained by the reason of the rule, and so to be commended, need not be determined, since the facts do not, as we have seen, bring this case within it. While the amendment of the complaint worked a change in some respects in the character and extent of the relief which could be awarded thereunder, it was not, as appellant, in effect, contends, in any just sense a discontinuance or abandonment of the action as originally brought. The doctrine of election, as applied to a choice of remedies, which precludes a party from claiming repugnant rights, is but an extension of the general principles of equitable estoppel, and proceeds upon a like theory, that the inconsistent attitude of the party will put his adversary to some disadvantage. Here appellant has lost no advantage which he had a legal right to claim. He may still look to the equity of redemption in satisfaction of any lien he may have by virtue of his judgment. It follows that appellant was not injured by the failure of the court below to find upon his plea of estoppel, and this conclusion renders it unnecessary to pass upon the other questions argued. The judgment is affirmed.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

121 Cal. 125

In re HALE'S ESTATE. (S. F. 935.)

(Supreme Court of California. June 2, 1898.)

EXECUTORS AND ADMINISTRATORS—DISTRIBUTION  
—SOLVENCY OF ESTATE—BONDS FROM  
LEGATEES.

1. Evidence that an estate was worth \$462,000, with an admitted present indebtedness of \$250,000, an undetermined demand for \$160,000, and a probable expense of settling the estate of \$24,000, and that the income thereof was insufficient to pay interest, expenses, and taxes, does not sustain a finding, for the purpose of an order of partial distribution, under Code Civ. Proc. §§ 1658-1663, that the estate was but little indebted, and that deferred payments amounting to over \$5,000, and annuities aggregating \$150 per month, could be paid annuitants without loss to creditors.

2. Failure of a court to take a bond from legatees receiving a partial distribution is error, unless excused by Code Civ. Proc. § 1663, authorizing it, when the time to present claims has expired, and all claims allowed are paid, or sufficiently secured, and the court is satisfied the estate will not be injured.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Petition by Mary Hale and others for an order for the payment of annuities from the

estate of Joseph P. Hale, deceased. From an order therefor, the administratrix and others appeal. Reversed.

A. D. Keyes and Galpin & Zeigler, for appellants. Mat Clarken, Osgood Putnam, and M. Cooney, for respondents.

VAN FLEET, J. By his will the deceased, among other dispositions, left to Mary Hale and Margaret Ryan, his sisters, and John Hale, a brother, each a bequest in the nature of a life annuity in the sum of \$50 per month. The will was probated in May, 1893. In June, 1896, the respondents filed petitions in the court below setting up that said annuities had not been paid; that the estate was in a condition to pay the same; and praying a distribution thereof; and asking that the amounts accrued thereon, respectively, be ordered paid at once, and that thereafter the monthly payments be made as they should fall due. The widow, as administratrix with the will annexed and as a devisee under the will, and the daughter, as a devisee, and certain creditors of the estate, made opposition to the granting of the petitions, setting up that the estate was largely indebted, and that such distribution could not then be had without detriment to the interests of the estate and injury to the creditors. The petitions were heard together, and the court made findings of fact, upon which it based an order granting the distribution asked. The order directed the administratrix to pay to Mary Hale \$2,492.36, to John Hale a like sum, and to Margaret Ryan \$622.20, found to be the amounts, respectively, accrued and unpaid upon said annuities, and directed the administratrix to thereafter make payments upon said annuities monthly as they should fall due. These amounts were directed to be paid out of any funds then in the hands of the administratrix, or which should thereafter be received by her from the rents or profits of a certain parcel of real estate upon which, by the terms of the will, said annuities were made primarily chargeable. From this order the parties making the opposition thereto appeal.

1. The objection most strongly urged against the propriety of the order is that the evidence does not sustain the findings upon which the order rests, and we are satisfied that this objection must be sustained. The material facts found by the court were: "That the estate of said deceased is but little indebted, and that the shares of said Mary Hale, Margaret Ryan, and John Hale, prayed for in their said petitions, may be allowed to them without loss to the creditors of said estate, and that there will remain in the hands of the administratrix undisturbed, after the payment and delivery to them of their respective shares, sufficient property of the said estate to pay in full all claims and debts against any and all creditors of said estate, and also all costs and expenses of



administration, and all devises and legacies under the will of said testator."

This finding is placed among the conclusions of law as a legal deduction from certain probative facts found by the court, but it is, nevertheless, a finding of facts, and, indeed, embraces the essential, ultimate facts which are indispensable under the statute to authorize and empower the court to make the order in question. Code Civ. Proc. §§ 1658-1663, inclusive. These sections authorize an order of partial distribution only in the event that "it appears that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate." Id. §§ 1661, 1663. Without the existence of these facts, the court cannot competently make such an order, even in the absence of opposition thereto. In *re Painter*, 115 Cal. 635, 640, 47 Pac. 700. The contemplation of the statute is that, unless these facts exist, there is no right to partial distribution, no matter what the condition of the estate may be in other respects.

Neither the probative findings of the court nor the evidence in the case sustain the finding as to the existence of these jurisdictional facts. The evidence was without conflict, and shows, in substance, this: The value of the entire assets of the estate remaining at the time of the hearing, exclusive of certain corporate stock in the Flores Hale Company, the value of which was not ascertained, was shown to be about \$462,000, consisting almost exclusively of real estate. The allowed claims and demands existing and unpaid against the estate at that time amounted, as found by the court, to \$235,000. This amount, however, covers only the principal of the allowed claims, and does not include unpaid interest on the unsecured claims, which item, ignored by the finding, amounted at the time to about \$25,000, augmenting the indebtedness by that sum. The finding also ignores the existence of a rejected claim for the sum of \$160,000, a suit for which was then pending against the estate and undetermined. Of the total amount of the admitted indebtedness about \$117,000—consisting of one claim of \$50,000 and another of \$67,000—was secured by mortgage on the real property of the estate. Another claim of about \$3,000 was secured by personal property in the hands of the creditor, and the balance of about \$107,000 was unsecured. The interest on the mortgage indebtedness the administratrix had been compelled to keep paid in order to avoid threatened foreclosure and forced sale of the property, which, as the evidence tends to show, would have entailed great sacrifice and loss to the estate. The interest on the unsecured claims, as indicated above, had not been paid, but had accumulated since their allowance, a period of about three years. The income from the property of the estate was shown to be at the time of the application about \$1,500 per month. The

interest on the mortgage indebtedness alone is shown to amount to considerably more than \$700 per month; the necessary expense of maintaining and caring for the property of the estate, collecting rents, etc., was upward of \$400 per month, exclusive of taxes and interest; the taxes on the property of the estate are about \$3,500 a year, the amount of the insurance not appearing; the family allowance to the widow is \$350 per month,—thus making an aggregate monthly outgo, without payment of the interest accruing on the unsecured debts, of some \$1,700 or \$1,800. The amount of ready funds in the hands of the administratrix at the date of the application is not shown, but at the date of her last previous statement, rendered some two months prior thereto, there appeared but a little over \$300 cash on hand, and no sales of property had been made thereafter. These figures are given in round numbers, but they are, we think, in every instance, within the limits shown by the evidence. In fact, the only real attack upon this showing by respondents is the claim that the item of 58,000 shares in the Flores Hale Company, above referred to, found to be an asset of the estate, should be included in estimating the value of the property, and which they claim was shown to be worth from \$100 to \$200 per share. But there is no proper basis for this claim. While the court finds this stock to be one of the assets, it *ex industria* fails to place any value upon it; nor was there any competent evidence from which such value could be ascertained. The property of the company is situated wholly in Mexico, and the stock has never paid any dividends, nor has it any market value. It was returned unvalued in the inventory, and there the finding of the court properly left it. Even if the vague estimate of the witnesses as to its possible value could be regarded for any purpose, its consideration was for the court below, and it has ignored it.

We have, then, an estate valued at \$462,000, with an admitted present indebtedness, including interest, of over \$250,000, an undetermined demand for \$160,000, and a probable additional expense of \$24,000, found to be the probable expense of closing the estate, aggregating a possible indebtedness of considerably over \$400,000. This statement leaves no necessity for argument to show that the finding that the estate is but little indebted is not supported by the evidence. In estimating the indebtedness for the purposes of this order, the court could not ignore and leave out of account the undetermined demand of \$160,000 while it still remained a possibility, however improbable its recovery may have appeared, since, obviously, the court could not definitely say that it would not eventually be established. But, independently of this consideration, the amount of the fixed obligations shown, considering the value of the assets and the con-



dition of the estate generally, wholly negative the finding. It is true, as said in Crock-er's Estate, 105 Cal. 368, 38 Pac. 954, that the requirement of the statute that the estate shall be but little indebted is to be construed relatively, and not absolutely, and "merely refers to a condition of things in which the debts are small when considered in connection with the value of the estate." But, whether this requirement of the statute be construed relatively or absolutely, the condition shown to exist in this state does not bring it within the statute.

Nor can it be truly said, under the evidence, that this order can be sustained without injury to the creditors of the estate. It does not follow that the latter will not be injured because there may remain assets sufficient to meet their demands at some possible future time. Where claims have been established, creditors have a right primarily to have them first paid before the property is taken by the devisees or heirs; and, if the distribution of property to the latter is to result in postponing or deferring that payment, the creditors are thereby injured. The statute expressly contemplates that it is only where the distribution will not injuriously interfere with the ability of the estate to meet the demands of creditors that it may be had. Here the evidence shows beyond question that to take the money necessary to pay respondents, at this time, will not only necessarily deprive the administratrix of the means to pay the accruing interest on the allowed demands and the current expenses of administration, but will in all probability greatly embarrass the estate by requiring a sacrifice of its property at forced sale. Such a result is not within the purposes of the statute. It in no way aids respondents' position that the payment to them is ordered to be made only out of funds derived from the income of property upon which their annuities are primarily made a charge. That property is as much chargeable with the debts and other obligations of the estate as any other, if it shall be necessary to resort thereto for such purpose, and the evidence does not show that such resort will not be required.

2. There is but one other objection which we deem it necessary at this time to notice. The court below very clearly erred in dispensing with the necessity of a bond by the respondents to answer for their proportion of the debts of the estate. The only circumstances under which the giving of such bond may be excused upon a partial distribution is where it appears that the time for presenting claims against the estate has expired, "and all claims that have been allowed have been paid or are secured by mortgage upon real estate sufficient to pay them, and the court is satisfied that no injury can result to the estate." Code Civ. Proc. § 1663; St. 1889, p. 93. The evidence here admittedly shows that a large propor-

tion of the demands were unsecured by mortgage or otherwise, and that such unsecured demands had not been paid. The case was therefore not one in which the court was authorized to dispense with the requirement of a bond. For these reasons the order must be reversed, and it is so ordered.

We concur: HARRISON, J.; GAROUTTE, J.

(121 Cal. 28)

WHEELER v. ELDRED et al. (S. F. 759.)<sup>1</sup>  
(Supreme Court of California. May 31, 1898.)

#### EXECUTION—DISCRETION OF COURT.

Allowing execution on judgment of foreclosure more than five years after entry is within the sound discretion of the court, under Code Civ. Proc. § 685, as amended in 1895, providing that "in all cases the judgment may be enforced or carried into execution" after lapse of five years from entry, "by leave of court, on motion, or by judgment for that purpose, founded on supplemental pleadings."

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county.

Action by Sam Wheeler against Horace A. Eldred and others. From order denying plaintiff's motion, he appeals. Affirmed.

Henley & Costello, for appellant. J. A. Cooper and J. H. Seawell, for respondents.

BRITT, C. In this action a judgment of foreclosure, directing the sale of certain mortgaged lands, was entered in favor of the plaintiff on April 23, 1890. The period of five years allowed by the statute for issuing process as of course on the judgment having expired, and no sale having been made, the plaintiff noticed a motion in January, 1896, for leave to carry the judgment into execution, pursuant to section 685, Code Civ. Proc. It is provided in said section, as amended in the year 1895, that "in all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose founded upon supplemental pleadings," etc. The court denied the motion.

Several interesting questions are raised in argument touching the effect, and even the validity, of said amended section of the Code. Only one of them need be now examined. Plaintiff does not contend that the denial of his motion was, in view of the evidence before the court at the hearing, an abuse of discretion, if the court can exercise discretion in such cases; but he claims that, under the statute, the court had no discretion to refuse his application. In our judgment, this position cannot be maintained. By statute in New York, "after the lapse of five years from the entry of a final judgment, execution can be issued thereupon \* \* \* (2) where an order is made by the court granting leave to issue the execution." Code Civ. Proc. N. Y. § 1377. And it is there held by the

<sup>1</sup> Rehearing denied.

court of appeals that the effect of this provision, in a case within its terms, is to render the allowance of a writ of possession on a judgment for the recovery of lands a matter "resting wholly in the discretion of the court." *Van Rensselaer v. Wright*, 121 N. Y. 626, 25 N. E. 3. See *Bank v. Eden*, 17 Johns. 106, which asserts discretion in the court whether it would allow a scire facias on a judgment of more than 20 years' standing. Also, as to the discretionary power of a court of equity to refuse, upon circumstances, to carry a former decree into execution when by reason of neglect to enforce the same, or for other cause, it becomes necessary to file a bill for that purpose, see *Attorney General v. Day*, 1 Ves. Sr. 218; *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, 11 Sup. Ct. 402. Aside from authority, it seems to us manifestly politic, at least in actions where title to real property is involved, that the court should not be bound to allow the enforcement of the judgment after lapse of five years; otherwise, the judgment becomes a perpetual incumbrance by mere neglect of the owner thereof to execute it. We think, therefore, that the provision of said section 685 that "the judgment may be enforced by leave of the court," is permissive as regards the power given to the court in actions like the present, and that the court must determine, in the exercise of a sound discretion, whether the dormant judgment shall be enforced. The order appealed from should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

6 Cal. Unrep. 14

RUBENS v. MEAD. (L. A. 337.)

(Supreme Court of California. May 31, 1898.)

BROKER—FRAUDULENT REPRESENTATION TO PRINCIPAL—CONTINUANCE.

1. A broker who fraudulently represented to the principal, whose money he was loaning, that the security was good, is liable, though the principal was in a position to have examined the security.

2. The recovery in action by principal against broker, for fraudulently representing that the worthless property on which loan was made was good security, is not affected by the question whether he shared the money with, or delivered any part of it to, the pretended borrower.

3. There is no error in denying continuance because of defendant's sickness; there having been a previous continuance on this ground, on stipulation that there should be no further postponement on that ground, and it not appearing that defendant's presence would have been of any avail.

Department 1. Appeal from superior court, Los Angeles county.

Action by Sarah V. Rubens against Mary N. Mead, executrix. Judgment for plaintiff. Defendant appeals. Affirmed.

W. Rose and C. Edgerton, for appellant.  
W. D. Gould and J. D. Pope, for respondent.

HARRISON, J. The defendant's testator, Alexander J. Mead, was engaged in the business of loaning money upon real-estate security for others who might intrust such business to him, and advising them in reference thereto, and was employed by the plaintiff for that purpose. Under his advice, and upon his representations as to the value and condition of the land offered as security, the plaintiff made certain loans of money, for which he took in her name the promissory notes and mortgages of the borrowers. The land so offered was of no value, and the loans were not repaid. The plaintiff brought this action to recover the amount of money so loaned, upon the ground, as alleged in her complaint, that, at the time the loans were made, Mead knew that the land was worthless, and that the representations made by him and his advice to her were made and given with the intention and purpose on his part to defraud her of the money. The court found that the allegations of the complaint were true, and rendered judgment in favor of the plaintiff, from which the defendant has appealed, upon the ground that the decision is not sustained by the evidence.

We are of the opinion that there was sufficient evidence before the court to sustain its decision. The appellant questions its sufficiency only in reference to one of the loans,—the one made to Harris,—and urges that the statements of Mead were only matters of opinion, and that, as the plaintiff had full opportunity to test their correctness by examining the land for herself, she could not hold him liable for any erroneous opinion. Mead, however, was the agent of the plaintiff, and was not dealing with her as a contracting party, and the rules applicable to statements made by a vendor of the quality of the article offered by him have no application. The plaintiff was entitled to rely upon the statements of Mead. He was bound to act with the utmost good faith towards her, and is not at liberty to say that she would not have been defrauded if she had been more vigilant, and had been suspicious of his good faith. It was sufficiently shown that the land was worthless, and the evidence justified the court in finding that Mead knew this fact, and fraudulently represented to the plaintiff that it was a good security for the loan. When he visited her for the purpose of inducing her to make the loan, he told her that the security was thoroughly good, and that he knew that it was. It is true that he had previously told the plaintiff's daughter that he had not seen the land; but he also told her that he had himself owned the land, and had just sold it to Harris, and that he considered it a desirable loan. Harris said to her that he was unable to show her the land, but referred her to



one Gardemeyer, who appears to have had relations with Mead in some respect. Mead did not pretend to have much knowledge of Harris,—only that he thought him a straightforward business man,—but impressed upon the plaintiff that the security of the land was all that she needed to be concerned about.

As the cause of action against Mead is not for the money which he received from the plaintiff, but for fraudulently inducing her to part with it, it is immaterial whether he shared it with Harris, or delivered it all to him. He stated that he had "just sold" the land to Harris, and manifested to the plaintiff a great desire that she should make the loan; and, as the money was loaned to Harris through him, it was presumptively delivered to him as a part of the scheme to defraud the plaintiff. Harris made no appearance after the loan had been made, and could not be found by the plaintiff.

The court did not err in refusing to grant a continuance on the ground of the defendant's illness. The cause had been once continued upon this ground, upon the stipulation that no further request for a postponement on that ground should be made; and it was not shown that her presence would be of any avail, or that she knew of any fact bearing upon the case. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

121 Cal. 99

CRANE v. CRANE. (L. A. 346.)

(Supreme Court of California. May 31, 1898.)

STIPULATION—TIME TO ANSWER—DEFAULT JUDGMENT.

1. Stipulation allowing "a week ending Saturday, July 4th," in which to file answers, permits of its being filed on the following Monday.

2. Stipulation allowing extra time to answer does not have to be of record to authorize setting aside of default entered before expiration of such time.

3. Default judgment entered before expiration of time to answer will be set aside, though the only answer filed, which was subsequent to entry of default, was improperly signed by defendant, instead of by his attorney, who had appeared, and had not been displaced; as, but for the default, proper answer might have been filed.

Commissioners' decision. Department 2. Appeal from superior court, Riverside county.

Action by Maria C. Crane against John N. Crane. From default judgment and order denying motion to set it aside, defendant appeals. Reversed.

Collier & Evans, for appellant. J. W. McIntyre, for respondent.

BRITT, C. Suit for divorce, division of common property, etc. The question on ap-

peal relates to the action of the court below in denying defendant's motion to set aside a default entered against him, and to vacate the judgment subsequently rendered on the ex parte application of plaintiff. Said motion was made in due season, and on the grounds of surprise and excusable neglect, and that the default was entered before plaintiff was entitled thereto. Defendant appeared in the action by attorney, and his demurrer to the complaint was overruled. Afterwards, on June 27, 1896, the attorney for plaintiff, as appears from his affidavit used in opposition to defendant's said motion, "entered into a verbal stipulation with the attorney for defendant, giving him a further week, ending Saturday, July 4, 1896, in which to answer." On Monday, July 6th, an answer prepared and signed by defendant in person was served on the attorney for plaintiff, and filed with the clerk of the court; but after service of such answer on him, and before the filing thereof, the plaintiff's attorney caused the entry of the default. The course taken by the attorney for plaintiff seems to have been the result of the understanding on his part that an answer should not be filed after July 4th. It is only fair to him to say that he makes no point on the fact that his stipulation was not in writing; but as he agreed with opposing counsel that the latter should have a week ending Saturday, July 4th, in which to answer, and as both that day and the day following were legal holidays, it is clear that the effect of the agreement was to extend the time for answering to July 6th, inclusive; and the default entered on that day was premature. Code Civ. Proc. § 13; *Blackwood v. Packing Co.*, 71 Cal. 461, 12 Pac. 493. This was so although the stipulation was not made a matter of record. It was yet sufficient to repel the imputation of negligence on the part of defendant. *Huart v. Goyeneche*, 56 Cal. 429; *Johnson v. Sweeney*, 95 Cal. 304, 30 Pac. 540. Defendant's conduct in presenting an answer signed by himself personally was irregular, the attorneys by whom he had previously appeared not having been displaced in any manner (*Board v. Younger*, 29 Cal. 147); but the circumstance is of little importance in the case, for the entry of default, if rightful, precluded the filing of any answer at all. Had the default not been entered, non constat but that an answer free from any legal objection would have been duly filed. The judgment and order appealed from should be reversed, and the cause remanded, with instructions to the court below to set aside the default, and allow an answer properly signed to be filed within a reasonable time.

We concur: CHIPMAN, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause is remanded, with instructions to the



court below to set aside the default, and allow an answer properly signed to be filed within a reasonable time.

(21 Cal. 102)

MEYER et al. v. CITY OF SAN DIEGO et al.  
(L. A. 331.)<sup>1</sup>

(Supreme Court of California. May 31, 1898.)  
DISQUALIFICATION OF JUDGE FOR INTEREST—TAX-PAYER.

In an action against a city to set aside, as illegal and void, its contract for waterworks, and to enjoin the issuance of bonds therefor, where it appeared that the issuance of the bonds would necessitate a special tax for 40 years, and directly affect the value of all realty subject to it, the trial judge is disqualified, by virtue of his owning land in such city and paying taxes thereon, since he is "interested" in the action, within Code Civ. Proc. § 170.

Harrison and Van Fleet, JJ., dissenting.

In bank. Appeal from superior court, San Diego county.

Consolidated actions by Albert Meyer and the San Diego Water Company against the city of San Diego and others. R. Nicolls and others intervened as plaintiffs. From an order refusing plaintiffs' and interveners' motion for a change of venue, they appeal. Reversed.

L. L. Boone, for appellants. Works & Works, W. H. Fuller, Trippet & Neale, Gibson & Titus, H. E. Doolittle, and T. L. Lewis, for respondents.

HENSHAW, J. The plaintiff instituted an action against the city of San Diego, and against the Southern California Mountain Water Company, for the twofold purpose (1) of setting aside as illegal and void a contract between the city and the water company defendant, involving an expenditure of \$1,500,000 of the moneys of the city to be obtained by the sale of its bonds; and (2) to enjoin the issuance and sale of the bonds to carry out the contract.

The bond issue had been voted at a special election called under an ordinance submitting to the electors the proposition of incurring a bonded debt of \$1,500,000 "for the acquisition by said city, for the use of said city and of its inhabitants, of and from the Southern California Mountain Water Company, of a water right, reservoir sites, a meter-house site, and rights of way, and for the construction by said city of waterworks for the use of said city and its inhabitants." The controlling acts under which the election was held and the bonds voted are the statutes relating to the issuance of municipal bonds for public improvements. St. 1889, p. 399; St. 1891, p. 132; and St. 1893, p. 61. These acts prescribe, not only the mode by which such indebtedness may be incurred, but ordain as well the limit of indebtedness, the character of the bonds, the rate of interest, and the place of payment. They also enjoin upon the municipal authorities the duty of levying and collecting a special annual

tax sufficient to pay interest, and provide a sinking fund for the ultimate redemption of the bonds.

Plaintiff is a taxpayer of the city. Other taxpayers were allowed to intervene in the cause. The San Diego Water Company had instituted a similar suit against these defendants, and the actions were consolidated.

Before the trial there was presented a motion for a change of venue, upon the ground of the disqualification of Judge Torrance, in whose department the action was pending. Grounds identical with those urged as disqualifying Judge Torrance were asserted to exist in the case of the other judges of the superior court of the county. The affidavits used at the hearing show that the judge was the owner of real property situated and taxed in the city of San Diego for municipal purposes, and taxable for the payment of a bonded indebtedness such as that the validity of which is a question in the case. It also was made to appear that the issuance of the bonds in controversy and the carrying out of the contract between the city and the defendant water company would necessitate a special tax for 40 years, and directly affect the value of all real property subject to it. Upon the other hand, a determination that the contract and proceedings were illegal would result in a decree enjoining the issuance of the bonds, and relieve all property within the municipality from the burden of the bond-redemption tax. The trial judge concluded that he was not disqualified, refused to grant the motion, and retained the action. From this ruling and order the San Diego Water Company and certain interveners prosecute their appeals.

By section 170 of the Code of Civil Procedure it is provided that no justice, judge, or justice of the peace shall sit or act in any action or proceeding to which he is a party or in which he is interested. This is but an expression of the ancient maxim that no man ought to be a judge in his own cause,—a maxim which appeals so strongly to the sense of justice that it is said by Lord Coke to be a natural right, so inflexible that an act of parliament seeking to subvert it would be declared void. Co. Litt. § 212. It is a principle which finds expression in the constitutions of many of our states, which declare the right of a citizen to be tried by judges as free and impartial as the lot of humanity will permit. It is a principle whose strict observance is dictated both by natural justice and an enlightened public policy; for it is not enough that a judicial decision be sound. It is of next importance that the tribunal rendering it be free from the charge of interest or the taint of partiality, else public confidence will be destroyed and judicial usefulness gravely impaired.

But what is the "interest" which will disqualify? for it is manifest that just bounds must be set to the meaning of the word, since, if a judge be not disqualified, it is as much

<sup>1</sup> Rehearing denied.

his duty to retain the action as it is to remove it when the recusal is well founded. *Heinlen v. Heilbron*, 97 Cal. 101, 31 Pac. 838.

In the oft-quoted case of *Hesketh v. Brad-dock*, 3 Burrows, 1856, the interest imputed to the jurors, and to the officer who returned them, rested upon the fact that they were members of the municipal corporation which was seeking to recover a penalty due. The whole penalty was but five pounds, yet the proceeding was quashed by the court of king's bench, Lord Mansfield saying: "The law has so watchful an eye to the pure and unbiased administration of justice that it will never trust the passions of mankind in the decisions of any matter of right. \* \* \* There is no principle in the law more settled than this: that any degree, even the smallest degree, of interest in the question depending, is a decisive objection to a witness, and much more so to a juror, or to the officer by whom the juror is returned. If, therefore, the sheriff, a juror, or a witness be in any sort interested in the matter to be tried, the law considers him as under an influence which may warp his integrity or pervert his judgment, and therefore will not trust him. The minuteness of the interest won't relax the objection, for the degrees cannot be measured. No line can be drawn but that of a total exclusion of all degrees whatsoever." But this, it should be noted, is rather a declaration of the principle than a definition of the disqualifying interest; and while in terms this case does not include the judge as coming within the principle of disqualification, it is not to be doubted that it applies with equal strength, and with more reason, to such an officer. *Dimes v. Canal Co.*, 16 Eng. Law & Eq. 63. The disability of a witness to testify because of interest induced great hardship and led to many absurdities. Thus, one was not debarred from being a witness if it was determined that his interest was equally balanced, nor was the heir apparent to an estate incompetent to testify in support of the claim of his ancestor, though his expectation of inheriting might be immediate and well-nigh certain. Again, the interest of a parent in a child, or of the child in the parent, was not a disqualifying interest, but only such as to affect the credibility of the witness. The injustice and hardship of the rule as to witnesses soon became so apparent that by statute it was entirely abrogated, and now no interest disqualifies a witness, its sole effect being to impair his credit.

In the case of jurors, however, who are judges of the fact, and of the magistrates, judges, and justices, who are judges of the law, and frequently both of the law and facts, there has been far less relaxation of the principle; and this, if for no other reason, because the courts themselves, in their desire to preserve the administration of justice free from the taint of unfairness, have inclined to a strict enforcement of the principle, and also because there are well-defined limits to the power of the legis-

lature, should it ever seek to overthrow so salutary a rule. Thus, in *North Bloomfield Min. Co. v. Keyser*, 58 Cal. 315, this court, citing section 170 of the Code of Civil Procedure, declares that the provision should not receive a technical or strict construction, but rather one that is broad and liberal; and quotes with approval the language of the supreme court of Michigan in *Stockwell v. Board*, 22 Mich. 350, to the following effect: "The court ought not to be astute to discover refined and subtle distinctions to save a case from the operation of the maxim when the principle embodied bespeaks the propriety of its application. The immediate rights of the litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance." And in *Heilbron v. Campbell*, 23 Pac. 122, it is said again by this court: "It should be the duty and desire of every judge to avoid the very appearance of bias, prejudice, or partiality, and to this end he should decline to sit \* \* \* in any case in which his interest in the subject-matter of the action is such as would naturally influence him either one way or the other.

Upon the latter proposition, that of the power of the legislature to modify or abrogate the rule, statutes have been passed and upheld by the courts which remove the disqualification of jurors and of judges who are merely corporators of a municipal corporation and taxpayers therein, which corporation is a party interested. These statutes have been countenanced by the courts upon the ground that the interest of the juror or judge is so remote, trifling, and insignificant that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of the individual. These statutes, it is to be remembered, however, are in derogation of the common-law rule, and it will always be a judicial question, as to any particular statute, whether or not, by its terms or in its effect, it violates this fundamental principle of judicial decision. Thus, Judge Cooley: "But, except in cases resting upon such reasons, we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people of the state when framing their constitution may possibly establish so great an anomaly, if they see fit; but, if the legislature is intrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority." Cooley, *Const. Lim.* (6th Ed.) p. 508. The only other exception to the operation of the maxim is that which arises in the nature of the government of the state, and has its existence in absolute necessity. Thus, to illustrate, where the legality of a



bonded indebtedness of the state comes before its tribunals, they must act, or the right remain forever without the possibility of its remedy. In such cases, however, the judges are as fair and impartial as the lot of humanity doth permit, and trial before such is all that the constitution, or Lord Coke's *jus nature*, can preserve to any man.

It has been pointed out that in most of the states the common-law rule disqualifying a juror for interest by reason of the fact that he is a corporator of the city or town which is a party to the suit has been changed by statute, and that these statutes have been upheld by the courts upon the ground of the remoteness and contingency of the interest. In our own state, section 602 of the Code of Civil Procedure declares the grounds upon which challenges for cause may be taken; and subdivision 5 provides, as a ground of challenge, "interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation." Nothing herein expressly removes the disqualification of the judge, which, alike with that of the juror, existed at common law. But, if the interest of a juror so situated is too remote to disqualify him as a trier of fact, equally, it may be argued, would a like interest be insufficient to disqualify a judge; and thus, without express statutory enactment upon the question, the conduct of judges in trying actions, where the sole ground of their disqualification is the fact that they are corporators and taxpayers of the municipal corporation which is a party thereto, has always been countenanced and upheld. Yet here it may be remarked that the state is not without some statutory enactments upon the question. Many may be found conferring upon municipal courts and the judges therein jurisdiction of petty offenses for the violation of ordinances and for the collection of revenues under such ordinances. It has never been, and at this day may not be, seriously questioned that a judge of such municipal court is not disqualified by reason of interest merely because of the fact that he is a member and taxpayer of the municipal corporation, either in civil cases where its ordinances are under consideration, or in criminal cases where the penalties, fines, and forfeitures for the violation of such ordinances accrue to the municipal treasury.

In a very great number of the cases which have come under review in the consideration of this question, nearly all have to do with the interest of the judge or juror as a member of such public corporation, and in these, where the ancient rule has not been modified by statute, that rule is for the most part observed in all its strictness. Of these cases there may be cited as instructive upon the question: *State v. Stuart*, 23 Me. 112; *State v. Woodward*, 34 Me. 293; *Com. v. Ryan*, 5 Mass. 90; *Pearce v. Atwood*, 13

Mass. 324; *Trustees v. Bailey*, 10 Fla. 213; *Moses v. Julian*, 45 N. H. 52; *Inhabitants of North Hampton v. Smith*, 11 Metc. (Mass.) 390; *Foreman v. Town of Mariana*, 43 Ark. 324; *Peck v. Freeholders of Essex*, 21 N. J. Law, 656; *Sauls v. Freeman*, 24 Fla. 209, 4 South. 525; *Com. v. Reed*, 1 Gray, 472; *Ellis v. Smith*, 42 Ala. 349; *Fine v. Public Schools*, 30 Mo. 166; *Stockwell v. Board*, 22 Mich. 341; *Fiske v. Paine* (R. I.) 28 Atl. 1026; *Dimes v. Canal Co.*, 16 Eng. Law & Eq. 63; *Oakley v. Aspinwall*, 3 N. Y. 547.

In *Inhabitants of North Hampton v. Smith*, 11 Metc. (Mass.) 390, Chief Justice Shaw, with his usual clearness, has defined this disqualifying interest. He says: "(1) We think it is not to be a mere possible, contingent interest, not an interest in the question or general subject to which the matter requiring adjudication relates, but one that is visible, demonstrable, and capable of precise proof. \* \* \* It must, therefore, depend upon facts capable of being precisely averred and proved, and thus put in issue and tried. (2) It must be a pecuniary or proprietary interest,—a relation by which, as debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings,—in contradistinction to an interest of feeling or sympathy or bias, which would disqualify a juror. [It may be here remarked, to prevent misunderstanding, that, by an amendment to section 170 of the Code of Civil Procedure, bias or prejudice upon the part of the judge is now made a ground of disqualification, and a reason for the removal of a cause.] (3) It must be certain, and not merely possible or contingent. It must be direct and personal, though such a personal interest may result from a relation which the judge holds, as the member of a town, parish, or other corporation, where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings."

Thus, the interest which one has in a public question, merely because he is a member of the civic body to be affected by the question, is not the interest which the law has in mind. In the case from which we have just quoted, the judge in probate was not held to be disqualified because in a will before him there was a bequest of money to trustees to be devoted to the use and benefit of indigent persons in certain towns, of one of which the judge was an inhabitant. So, in *Foreman v. Town of Mariana*, supra, the judge, who was an inhabitant of the town, was not for that reason held to be disqualified to sit in and determine upon proceedings for the annexation of territory to the town, although an election had been called to pass upon the question of annexation, and the judge had voted thereat. And so, in *Sauls v. Freeman*, 24 Fla. 209, 4 South. 525, the fact that the circuit judge, with other registered voters of the county, had signed a petition addressed to the county commis-



sioners, asking for a change of the county site, did not disqualify him for interest from sitting in a mandamus proceeding to compel the commissioners to call an election upon the question. In these and like cases the so-called "interest" of the judge is found to be remote, doubtful, and speculative, in no way certain in fact, nor susceptible of precise measurement.

But, upon the other hand, where, in any litigation, there is any certain, definable, pecuniary, or proprietary interest or relation which will be directly affected by the judgment that may be rendered, in every such case, without exception, so far as an exhaustive examination of the authorities goes, the disqualification of the judge is held to exist. Has the judge any pecuniary or personal right or privilege directly affected by or immediately dependent upon the result of the case? As that question is answered, so is answered the question of his disqualification for the interest which we have been considering. In *Hellbron v. Campbell*, 23 Pac. 122, the action was between divers claimants to a tract of land to which the judge himself asserted title. The judge was not a party to the suit, nor would the judgment rendered be binding between him and the other litigants. Yet this court in bank held the interest to be disqualifying, and properly so; for, though generally speaking, an interest in the legal question, as distinguished from a pecuniary interest in the result of the case, is no valid ground of disqualification, there is to this the well-settled exception that where the judge has a lawsuit pending or impending with another person, which rests upon a like state of facts, or upon the same point of law as that pending before him, this is a valid ground of recusation. *Davis v. Allen*, 11 Pick. 466; *Moses v. Julian*, 45 N. H. 52.

In *Mining Co. v. Keyser*, 58 Cal. 315, the action was by the city of Marysville to restrain the mining company from prosecuting its hydraulic work, because the effect of its mining operations was to injure the lands of the corporation. The judge owned land, not within the municipality, but similarly situated, and equally affected by the mining operations complained of. In an action for an injunction by the city against the mining company it was held that the judge had such a direct and immediate interest in the result of the action as to disqualify him.

Even more immediate and direct is the interest of the judge in the case at bar than that which appeared in the *North Bloomfield Min. Co. Case*. The disqualification does not spring from the fact that the judge is a citizen, inhabitant, and taxpayer of the city of San Diego, nor yet from the fact that the municipality is a party litigant in the action. It arises from the circumstance that he owns property within the city which may or may not be liable for the burden of a special tax for the period of 40 years,

as he shall decide. The validity of this tax is directly called in question. The judge himself, under the circumstances shown, could have instituted as plaintiff this identical action. "The rule is well settled that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others." *Story*, Eq. Pl. §§ 97, 98; 1 *Freem. Judgm.* § 178; *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308; *Gamble v. City of San Diego*, 79 Fed. 487. He would have been entitled to intervene as well as those who in fact have intervened. The judgment which he renders in the case will be binding upon his rights and his property. His interest is in the outcome of the litigation, and it is a direct, measurable, pecuniary interest.

The distinction between this case and that of *City of Oakland v. Oakland Water-Front Co.*, 118 Cal. 249, 50 Pac. 268, is readily to be observed. Here, as has been said and shown, the judge is to decide directly whether or not property which he owns shall be made subject to the burden of a special tax. In the *Oakland Water-Front Case* the city sought to recover lands which had been granted to it by the state under certain trusts. Even if the city succeeded, it was at least doubtful whether the control of these lands would result in profit or loss to its finances. It was still more doubtful whether their management would affect the tax rate of the city in the slightest degree. The judge had no other interest in the litigation than that which he possessed in common with other taxpayers, and which arose from the fact that he was an inhabitant and taxpayer of the city. It was not a direct, measurable, or pecuniary interest in the litigation or its outcome. The interest was remote, contingent, and speculative. It might thus be fairly stated: "If the city recovered the property, and if it successfully managed or sold it, the result might be to lessen the rate of taxation, and thus, under all these contingencies, to reduce in some slight, indeterminate, and undeterminable extent the tax rate upon the judge's property. Clearly, such a remote and contingent interest is readily to be distinguished from that in the case at bar, where the judge, in a cause directly involving the legality of a tax imposed and to be imposed upon his land, does by his ipse dixit declare whether the burden shall remain or be removed.

In *City of Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960, the question of the interest of the judge under circumstances identical with those of the case at bar was presented, and the court reached the conclusion here declared. The same principle was invoked and the same ruling made in *Wetzel v. State*, 5 Tex. Civ. App. 17, 23 S. W. 825, and again in *State v. City of Cisco* (Tex. Civ. App.) 33 S. W. 244.

It is urged that the case of *Wade v. Travla*

Co., 72 Fed. 985, is authority against this position. This is in a measure true. It was an action in the circuit court of the Western division of Texas, and the question of the disqualification of a federal judge by reason of his pecuniary interest, under facts similar to those here presented, was considered by the court. Its decision upon the proposition is in the following language: "Authorities examined by the court leave the question in some doubt, and, for the purpose of having it definitely determined by an appellate tribunal, we have concluded to hold that that disqualification on the part of the district judge does not exist, and we suggest to counsel the propriety of preserving proper exceptions in order that the point may be conclusively settled by the court of appeals." It may be conceded that so far as it goes this case is against the conclusion which we have reached; but it should be said in this connection that it is the only case of its kind, and, as appears from the language of the learned judge, he decided as he did only in order that the question might be definitively laid at rest by the appellate tribunal.

As it is uncontradicted in this record that the same disqualification which existed in the case of Judge Torrance existed as to the other judges of the superior court of the county, it follows from what has been said that the motion for change of venue should have been granted. The order is therefore reversed.

We concur: BEATTY, C. J.; GAROUTTE, J.; TEMPLE, J.

McFARLAND, J. I concur in the judgment of reversal. I also concur generally in the opinion of Mr. Justice HENSHAW, except that I desire to a little more pointedly emphasize the distinction between the case at bar and a case where a city in which the judge is a taxpayer is a party, and where there is merely a possibility that a judgment against the city might result in an increased levy of taxes, and a judgment in favor of the city might bring about a reduction of taxation. In the latter case—and in others that could be mentioned, where a similar principle applies—the interest is too shadowy, indirect, remote, and contingent to be within the rule that a man cannot be a judge in his own case. See *City of Dallas v. Peacock*, 33 S. W. 220; *City of Oakland v. Oakland Water-Front Co.* (Cal.) 50 Pac. 268, and cases there cited. But in the case at bar the interest of the judge was not indirect, remote, or contingent; it directly involved the immediate imposition of a special annual tax upon his property to continue for 40 years.

VAN FLEET, J. I dissent. The case is not, to my mind, distinguishable in principle from that decided in *City of Oakland v. Oakland Water-Front Co.*, 118 Cal. 249, 50 Pac.

268, where it was held that the trial judge was not disqualified. The interest of Judge Torrance in the subject of litigation is not different in kind, however much it may differ in degree, from that possessed by the trial judge in that case. In my judgment, the principle announced in the opinion of the court is one susceptible of indefinite extension, to the great detriment of the practical administration of justice, and the application of which to the facts of this case is, I think, opposed by the weight of modern authority.

I dissent: HARRISON, J.

6 Cal. Unrep. 17

STUFFLEBEEM et al. v. HICKMAN et al.

(Sac. 410.)

(Supreme Court of California. May 31, 1898.)

TRESPASS—CLAIMANTS UNDER LESSEE.

Owner of land who leases it with understanding that the lessee, if he cannot keep stock of strangers off, shall charge them for the use thereof, cannot maintain trespass against one who, on his cattle intruding thereon, arranges with the lessee to use the land for his stock for the season for a certain amount; and it is immaterial whether the money so collected belonged to the tenant or landowner.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by J. H. Stufflebeem and others against A. W. Hickman and others. Judgments for defendants. Plaintiffs appeal. Affirmed.

Chas. G. Lamberson, for appellants. Geo. G. Murry, for respondents.

SEARLS, C. This action was brought in a justice's court to recover damages for trespass upon real property, by entry thereon with cattle, horses, and other stock, and depasturing the land from May 1, 1893, to November 27, 1893. The cause was, upon the coming in of a sworn answer showing that the trial would involve the issue of possession to the locus in quo, transferred to the superior court for trial. A jury trial was had and a verdict rendered in favor of defendants, upon which judgment was entered for costs. Plaintiffs appeal from the judgment, and from an order denying their motion for a new trial. Defendants A. W. Hickman and Henry Mentz answered jointly, and, among other things, admitted the ownership by plaintiffs of the two sections of land described in the complaint, to wit, sections 27 and 33 in township 20 S., range 29 E., Mt. D. B. and M., county of Tulare, state of California. They denied, however, that plaintiffs were in the possession thereof, or entitled to the possession thereof, during the period when the alleged trespasses were charged to have occurred. On the contrary,



they averred that plaintiffs leased said lands to one John McKiernan, who was in possession thereof by virtue of said lease during all of said time; that said McKiernan sublet the same to them, etc. In other words, they claimed to have been lawfully in possession as subtenants under John McKiernan, who was lawfully there.

The only question in the case worthy of comment relates to the sufficiency of the evidence to support the verdict. The testimony was somewhat brief, and by no means conclusive; but, such as it was, giving full credence to that of the defendants, as the jury doubtless did, and as in the case of a conflict we are bound to do, in favor of the verdict, we think it sufficient to support the conclusion reached by the jury. The testimony of J. M. McKiernan was in substance that in 1893 he considered he had a verbal lease of the land from plaintiffs; that "he made the lease with John Stufflebeem, one of plaintiffs." He says: "I told John Stufflebeem that I wanted to gather my cattle, and wanted a place to put them, and that I would keep the stock off his land if he would let me use it. He said, if I did not come back on him for pay, all right. I said if I could not keep the stock off the land, I would make them pay for it." It further appeared that the stock of these defendants and of one Hubbs did intrude upon the land, and that thereupon McKiernan arranged with these defendants for them to use the land for their stock for the season, in consideration of twenty dollars, which they paid, and pastured their stock thereon from the early spring until, say, July, when they took it away. A similar arrangement was made and a like payment had from Hubbs. It also appeared that McKiernan was to repair the fence, which he claimed he did. That McKiernan was in possession, and that he sublet to defendants, was not seriously disputed. The conduct of plaintiffs in the premises also lends strength to the theory of defendants. For nearly three years after these transactions, the sole claim of plaintiffs seems to have been that they were entitled to have from McKiernan the \$40 which he had received from the subtenants. Failing to recover this, the present action of trespass was brought.

The case of *Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570, is relied upon by plaintiffs as in point, and as conclusive in their favor. In that case it was apparent that the defendant had clearly violated the terms under which he was permitted to depasture the land. In this case, we think, the jury was justified in finding from the evidence and conduct of the parties that it was understood that, if McKiernan could not keep the stock of strangers off the land, he was to charge them for the use thereof. Whether or not the plaintiffs were entitled to the moneys thus collected by McKiernan is a question not necessary to be determined in

this action. We recommend that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

6 Cal. Unrep. 19

FARMERS' & MERCHANTS' BANK OF  
STOCKTON v. RICHARDS et al.

(Sac. 251.)

(Supreme Court of California. May 31, 1898.)

FRAUD AS DEFENSE.

1. No defense to note is shown by answer alleging that, by false representations of plaintiff's officers, defendant was induced to make the note in payment of others previously given for money borrowed by him from plaintiff; no damage being shown.

2. Fraudulent representations, to be defense to note, must be such as to cause defendant to execute the note.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; J. K. Law, Judge.

Action by the Farmers' & Merchants' Bank of Stockton against L. A. Richards and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Van R. Paterson and Jas. A. Louttit, for appellants. Budd & Thompson and Nicol & Orr, for respondent.

BRITT, C. Plaintiff, a corporation, sued in this action on a promissory note for the sum of \$2,703, dated October 6, 1894, made by defendants in plaintiff's favor, and secured by pledge of certain shares of stock, the property of defendant Richards. Judgment was for plaintiff, directing the sale of the stock, and against defendants, personally, for the deficiency, if any, to remain after applying the proceeds of sale to the amount due on the note, etc. The question here is on the propriety of an order of the court below sustaining a demurrer to defendants' answer.

It was alleged in the answer, in substance, among other things, that, at and prior to the date of the note, D. S. Rosenbaum, P. B. Fraser, and D. A. Guernsey were officers of the plaintiff, and were the general managers of its affairs; that the same three persons were co-partners of defendant Richards in the business of farming; that at said date such co-partnership was indebted to said Richards in a sum exceeding \$8,000, as his said co-partners and also the plaintiff well knew; that with the intent to procure the execution of said note, and of defrauding said Richards, his co-partners, the said Guernsey, Rosenbaum, and Fraser, falsely represented to him that he had no credits to his account with said co-partnership as one of the members thereof, but was indebted to the same; that Richards, believing such



representations to be true, and having no knowledge of the true state of the partnership accounts, "made and executed the promissory note set forth in the complaint herein on the 6th day of October, 1894, in payment of other notes theretofore given by the defendant Richards to plaintiff for money borrowed by him from plaintiff"; that he would not have executed the note but for the said false representations; and that the other defendant, Loughhead, signed the note merely as surety for Richards. It was further averred that said note is held by plaintiff in trust for the sole benefit of Guernsey, Rosenbaum, and Fraser, "for the fraudulent purposes hereinabove alleged." In the last analysis the answer stated no more than that, by the alleged false representations of plaintiff's officers, defendant Richards was induced to make the note in suit in payment of other notes previously given for money borrowed by him from plaintiff. How Richards was injured by this novation is not made to appear. His later obligation is not shown to have been more onerous than the former ones. Fraud without injury gives, in general, neither ground of action nor defense. Again, why should the information that Richards was indebted to the partnership of Guernsey, Rosenbaum, Fraser & Richards have constrained him to execute the note to plaintiff? The relation of cause and effect between the alleged false representation and the execution of the note to plaintiff does not appear from the nature of the alleged transactions, or from any other averments of the answer. That such relation existed was essential to the defense. *Kerr, Fraud & M. (Bump's Ed.)* p. 74; *Byard v. Holmes*, 34 N. J. Law, 296. The allegation that plaintiff holds the note in trust for Richards' co-partners, construed with reference to other parts of the answer, is but a statement of matter of law unsupported by averments of fact. The judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(121 Cal. 33)

SCADDEN FLAT GOLD-MIN. CO. v. SCADDEN et al. (Sac. 366.)<sup>1</sup>

(Supreme Court of California. May 31, 1898.)

JUDGES—DISQUALIFICATION—CORPORATIONS—VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—PLEADING—DEFENSES—RESULTING TRUSTS—LIMITATIONS—LACHES—RECEIVERS.

1. A judge who at one time owned stock in a corporation, but who has disposed of it, is not disqualified from trying an action brought by the corporation to compel a transfer to it of real estate.

2. An allegation in a complaint by a corporation to compel a transfer to it of real estate, that the owners "agreed and contracted that

they would sell and deliver to the plaintiff all the real property aforesaid," in consideration of the delivery to them "by plaintiff of forty thousand shares of its capital stock," is sustained by evidence that the owners made the contract with the promoters of the corporation, and that the corporation accepted the contract.

3. A mining corporation brought suit to compel a transfer of mining property to it in accordance with a contract with the owner, and an heir of the owner and a holder of stock in the corporation answered that the majority of plaintiff's stock was held by the owner of an adjoining mine, and that he did not intend to use the property in controversy for mining purposes, but intended to drain the adjoining mine upon it. *Held*, that this was not a defense.

4. An agreement to sell and convey to a corporation certain real property for an agreed quantity of corporate stock, which stock was delivered, but which conveyance was never executed, constitutes a resulting trust.

5. The statute of limitations, as a bar to the enforcement of a contract to convey property, does not begin to run as long as the purchaser is in possession of the property.

6. Where a vendee goes into possession before the conveyance is executed, and subsequently conveys by deed to the vendor a specified portion of the property, reserving the right to use it for mining purposes, which deed is recorded by the vendor, the occupancy by the vendor of the lot conveyed is not adverse to the title of the vendee to the original tract, so as to set in motion the statute limiting the vendee's cause of action for specific performance.

7. Where the promoters of a corporation contract for the purchase of land for the corporation, which contract is ratified by the corporation by paying the agreed price and entering into and continuing in possession, mere neglect to convey or to demand or compel the conveyance will not bar the right to compel it.

8. Under Code Civ. Proc. § 564, authorizing the court in which an action is pending to appoint a receiver "after judgment, to carry the judgment into effect," in an action to compel the transfer of real property, where defendants are numerous, and some of them are minors, a receiver may be appointed to take the legal title of the property, and make the conveyance.

Commissioners' decision. Department 1. Appeal from superior court, Nevada county.

Action by the Scadden Flat Gold-Mining Company against Elizabeth Scadden, administratrix, etc., and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Thos. S. Ford and G. E. Riley, for appellants. Fred Searls and Lindley & Eickhoff, for respondent.

HAYNES, C. In 1878, Henry Scadden, Thomas Scadden, and Richard Roberts were the owners of the Scadden Flat Quartz Mine, near Grass Valley, in Nevada county, the interest of each being an undivided one-third. In August of that year, a corporation was formed under the name of "Scadden Flat Gold-Mining Company," each of said owners and A. B. Brady and John Tremberth being named in the articles of incorporation as the directors to serve for the first year. It is alleged in the complaint, and found as a fact by the court, that in September, 1878, said Henry Scadden, Thomas Scadden, and Richard Roberts agreed and contracted with

<sup>1</sup> Rehearing denied.

said corporation to sell and convey to it the said mining property, and put it in possession thereof, in consideration of the transfer and delivery to them and their order, by the corporation, of 40,000 shares of its capital stock, the whole number of shares being 60,000; the remaining 20,000 shares to be sold for the benefit of the corporation. Of the 40,000 shares 5 shares each were to be issued to Brady and Tremberth, to qualify them as directors, leaving to each of the Scaddens and Roberts, respectively, 13,330 shares; and said shares were issued to said persons respectively, and the corporation went into possession of the property. The remaining 20,000 shares were sold to sundry purchasers, and the corporation realized therefrom \$15,000, which was invested in machinery and other improvements upon the property. Active operations were conducted by the corporation upon the mining property for a year or more, during which time over \$40,000 were expended in work in the mine and in the erection of a mill. The board of directors met frequently, and directed the operations of the corporation, which were conducted by the superintendent, Roberts, who reported to the board, of which Henry and Thomas Scadden were members, one of them being president. Prior to the formation of the corporation, Henry and Thomas Scadden had each mortgaged his respective interest in the mining property, Henry to secure \$4,400, and Thomas for \$1,500, which incumbrances existed at the time the corporation was organized. A deed was prepared for the purpose of conveying said mining property to the corporation, but Roberts refused to execute it until the property should be released from said mortgages. On September 11, 1878, 8,000 shares of stock were issued to Henry Scadden, and these shares were afterwards transferred to his mortgagee, and the mortgage was released; and Thomas Scadden also used 6,666 shares of his stock to release the mortgage upon his interest, and the remainder of the stock to which each was entitled was also issued during the same month. The deed, however, was not executed by either of the Scaddens at any time, nor by Roberts until long afterwards. Work was prosecuted by the corporation for a year or more, and was then suspended. The mill was leased to other parties for some months, and not long afterwards was destroyed by fire. Meetings of the board were held from time to time after work ceased until March 3, 1881; but none were held thereafter until September 11, 1895, about which time Roberts conveyed his one-third interest in the property to the corporation. Henry and Thomas Scadden both died, intestate, before the commencement of this action, and the defendants are their personal representatives and heirs at law, and the object of the action is to secure a transfer of the legal title to said two-thirds interest

in said mining property to the plaintiff. Other facts, so far as material, will be noticed as we proceed. The findings made by the court are very full, and, it is conceded, support the judgment. The grounds upon which appellants contend for reversal will be noticed in the order in which they are presented.

1. "The judge of the court below was disqualified from trying the case." All that appears in the transcript upon this point is as follows: "Mr. Ford (Counsel for Defendants): We offer to show by Judge Caldwell that, immediately prior to the commencement of the action, stock was purchased from him by the Hague syndicate, and that it had no value from 1880 to 1895." "The Court: I sold the stock. I don't know whether the sale was to Mr. Hague, for I let Mr. Searls have the stock. I do not know what its value was during those years. I only know what I paid and received for it." From this it is argued that the judge was interested in the result of the action. No objection was made to the court proceeding with the trial, nor was the question raised in any manner in the court below. It may be said, however, that it clearly appears that the judge had no interest in the action. He had disposed of all the interest he ever had in the property. The interest which disqualifies is a direct and immediate interest in the result of the action. *Mining Co. v. Keyser*, 58 Cal. 315; *City of Oakland v. Oakland Water-Front Co.*, 118 Cal. 249, 50 Pac. 268.

2. It is insisted that the complaint alleges an express contract for the sale of the property by the Scadden brothers and Roberts to the corporation, and that this allegation is not sustained by the evidence. The allegation is that said owners "entered into and made an agreement and contract," by which they "agreed and contracted that they would sell and convey and deliver to the plaintiff all the real property aforesaid and the possession thereof in consideration of the delivery to them and their order, by plaintiff, of forty thousand shares of its capital stock; and plaintiff agreed" to deliver said stock in consideration of the sale, conveyance, and delivery of the property to it; and the court found that this allegation was true. Mr. Brady, the secretary of the corporation, testified that Thomas Scadden, Henry Scadden, and Richard Roberts made an agreement, prior to the formation of the corporation, to convey the property to the corporation when formed, and to receive stock therefor, as hereinbefore stated; that they received the stock; that a deed was prepared, but was not executed; that Roberts refused to sign it until the mortgages upon the other interests should be removed; and that the corporation worked the mine. The minute book of the corporation, attested by Henry Scadden as president, and Mr. Brady as secretary, shows an instruction to



the secretary to reserve 20,000 shares to be sold at 75 cents per share; that H. Scadden asked consent to have 8,000 shares issued to him, to be placed as security with L. R. Webster on the mortgage held by Webster, and this was done. "Thomas Scadden, having sold one-half of his interest in the above company, asked permission to have said stock issued to J. T. Morgan." The corporation also sold the 20,000 shares of treasury stock, built a mill, made assessments upon the stock, and managed and operated the property as owner. These facts show that in some manner the corporation was informed of the previous agreement and purpose of the owners of the property, and by its acts, if not otherwise, accepted the proposition of the owners, and such acceptance completed the contract between the former owners and the corporation; and the corporation, having issued and delivered all the stock, and taken possession of the property and operated it, complied with the conditions of the contract upon its part, and became the owner of the property; and Henry and Thomas Scadden and Roberts were thereafter simply trustees of the legal title for the corporation. "The promoters are not the corporation, and their contracts cannot be its contracts. This is so, though the promoters become at the creation of the corporation its only stockholders, directors, and officers. After it comes into existence and operation, it may, by adopting arrangements thus made for it in advance, make them its contract precisely as it might make similar contracts had no previous engagements been entered into. There can be no difference between its making a contract by adopting an agreement originally made for it in advance by its promoters and its making an entirely new contract." *Battelle v. Pavement Co.*, 37 Minn. 89, 33 N. W. 327. The supreme court of Massachusetts said: "A corporation may be bound to fulfill a contract made in its name and behalf, in anticipation of its existence, by afterwards accepting the benefits of the contract, as it may acquire a right to enforce such a contract against the other party by his acceptance of performance by the corporation." *Match Co. v. Hapgood*, 141 Mass. 145, 7 N. E. 22. See, also, *Chater v. Refining Co.*, 19 Cal. 219, 247. The contract alleged in the complaint is fully sustained by the evidence.

3. Appellants' third point is not clear. It is thus stated: "There can be no conveyance of the property described in the judgment." The complaint describes the property by metes and bounds, giving courses and distances, and the judgment follows the description in the complaint. Upon the trial the plaintiff read in evidence an unexecuted deed, made at or about the date of the incorporation (and which was shown to have been prepared by the clerk of the secretary) as part of the transaction, and tending to

show that a conveyance of the property to the corporation was part of the contract. The property by name, and as to all the courses but one, was identical with that described in the complaint. There was a difference of four-tenths of an acre in the area. But the answer expressly admitted "that on September —, 1878, Henry and Thomas Scadden and Richard Roberts were owners in and possessed of the ground in controversy"; and the ground in controversy is that described in the complaint; and, if the plaintiff is entitled to recover, it must recover the ground so described.

4. It is further contended that the plaintiff is not entitled to relief because it refuses to do equity. A special defense was pleaded, to the effect that one Hague had acquired a majority of the stock in the plaintiff corporation; that he was the owner of an adjoining mine; that it was his purpose to use the mine here in controversy for the purpose of draining his mine, and not for the purpose of working the Scadden Mine; and that this would work an injustice to one of the defendants, who is a stockholder in the Scadden Flat Mine. This constitutes no defense to this action. No controversy concerning the relations between the corporation and its stockholders as to the use that is or may be made of the property by the corporation arises in this case. If the rights of the defendant Jacob U. Scadden, as a stockholder, shall be violated by the corporation, he can bring an appropriate action. It constitutes no reason why he, as one of the holders of the naked legal title in trust for the corporation, should not be required to convey that title to it.

5. It is also contended that this action is barred by the statute of limitations, or by unreasonable delay in bringing this suit. Appellants contend that the evidence shows nothing more than a constructive trust; that such a trust is born of fraud, and presupposes an adverse claim from its beginning; and that section 343, Code Civ. Proc., which prescribes a four-years limitation, applies; and that, for the purpose of avoiding that section of the Code, an express trust is set forth in the complaint. In this, appellants are mistaken. The complaint alleges an agreement to sell and convey the property to the corporation for a certain quantity of stock, that the stock was delivered, but the conveyance was not executed. This constitutes a resulting trust, and differs from a constructive trust in that the latter is forced upon the conscience of the trustee against his will, and generally to prevent the consummation of a fraud, while an express trust differs from a resulting trust only in the manner in which it is proven; but, when proven, a resulting trust is enforced in the same manner as an express trust. *Love v. Watkins*, 40 Cal. 547, 568. That a purchaser who has paid the purchase price may be barred of an action against the seller to en-



force the trust resulting from such transaction is not doubted; but the statute will not begin to run so long as the purchaser is in possession, for, if it would (as was stated in *Love v. Watkins*, supra), "these curious results must follow: That the equitable owner of land is barred of his right while holding possession according to his right, and without an adverse claim or possession; and a person out of possession acquires title to real estate by the statute of limitations against a person in possession holding adversely. \* \* \* And I have never yet met with a case, whatever the character of the trust, where the statute has been held to bar the rights of the beneficiary in favor of the trustee, when the beneficiary has continued in possession according to his right, and no adverse claim made by the trustee. Such a case would be at variance with the fundamental idea of statutes of limitation that possession draws to it, or rather extinguishes, all adverse claims and titles."

The court found that the plaintiff, in September, 1878, entered into full possession of the property, and has held and retained possession of it from that time, and has never been dispossessed, and has every year since 1878 paid the taxes assessed thereon. It is contended that the finding that plaintiff has been in possession ever since 1878 is not justified by the evidence. There is some conflict in the evidence upon this point, but I think there is sufficient to sustain the finding. In the finding that plaintiff has had possession ever since 1878 there is an exception of a small portion of the surface, a lot of about 130 by 220 feet, which was conveyed by the corporation to Thomas Scadden on May 6, 1889; the deed conveying only the right to the surface, and reserving all rights for mining purposes. This deed was recorded at the request of Thomas Scadden a few days thereafter. The occupation of this lot, which was fully described, was under the title created by it, and could not be adverse, but, on the contrary, was an acknowledgment of the ownership and right of the corporation. After the mill was burned, but little work was done in the mine. Mr. Morgan testified that in recent years the mine was worked by some parties whose names he did not remember; that a man named Pierce worked as a tributer, and paid a percentage to the corporation; that the witness had the shaft repaired five or six years ago. There was also evidence that some of the Scadden boys worked there occasionally for short spaces of time when not employed elsewhere, and accounted to their father; but the court found that plaintiff had no actual notice thereof, and that the work done was so limited that plaintiff could not be presumed to have had knowledge of it. But there is no evidence of any repudiation of the rights of the corporation by word or act brought home to it. In

*Luco v. De Toro*, 91 Cal. 416, 417, 27 Pac. 1082, it was said: "Time begins to run against a trust only from the time it is openly disavowed by the trustee, and the adverse claim is clearly and unequivocally made known to the cestui que trust. \* \* \* Full performance by Hartman created an indefeasible estate in equity, which could not be defeated or divested by Olivera without positive and unequivocal repudiation of the trust relation, and notice of such repudiation to the beneficiary." Mere neglect of the trustee to convey, or of the cestui que trust to demand or compel the conveyance, as in this case, is not sufficient to bar the right of the purchaser to compel a conveyance.

6. It is urged that "the defendants could not be compelled to grant land to the corporation to perform acts ultra vires." This point relates to the use of the mine to drain other mines, and has been sufficiently noticed under No. 4.

7. It is contended that plaintiff never had possession beyond the mill and shaft. This point does not merit serious consideration. The evidence shows an agreement to convey the Scadden Flat Mine to the corporation. It had been patented. Henry Scadden and Thomas Scadden had each mortgaged their interests in the property. They had issued to themselves stock in said corporation in accordance with the agreement. Portions of this stock they transferred to the mortgagees, and procured the release of the mortgages. One-third of the entire stock, representing one-third of the entire property, by their own act as directors, or with their concurrence, was sold to third parties, and the proceeds used by the corporation to improve the property. The corporation at once took the management of the property. There is no evidence that either of the Scaddens thereafter had possession of any part of the property except a portion of the surface conveyed by the corporation to Thomas Scadden in 1889, nearly 11 years after the corporation was formed and the management and control of the property assumed by it. They dealt with the stock as representing the entire property, and with the corporation as owner of the entire property, and placed no restriction upon the possession given whereby any part of the property was excluded.

The court, owing to the difficulty of compelling the defendants, who were numerous, and many of whom were minors, to execute a conveyance to the plaintiff, appointed a receiver, in whom the legal title was vested by the decree, to make the conveyance; and this, it is argued, was erroneous. Section 564, Code Civ. Proc., authorizes the court to appoint a receiver, "(3) after judgment, to carry the judgment into effect," and appellants suppose the appointment of a receiver was made thereunder. This provision is very comprehensive, and we see no reason why the mode here adopted is not

proper. Where the means to carry into effect the jurisdiction of the court is not specifically pointed out by the code or statute, "any suitable process or mode of proceeding may be adopted which may be conformable to the spirit of this code." Code Civ. Proc. § 187. A person to execute conveyances ordered by a court of equity is frequently appointed, and is usually designated a "commissioner"; but we think it immaterial whether he be called a "commissioner" or a "receiver," since his powers and duties are fixed by the decree, and need not be inferred from the name or title of the officer.

The value of the work done by Jacob U. Scadden was immaterial, as was also his belief that his father owned the mine, and the court did not err in so ruling. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

6 Cal. Unrep. 21

ROSENTHAL et al. v. PERKINS et al.  
(Sac. 346.)

(Supreme Court of California. May 31, 1898.)

ATTACHMENT — REDELIVERY BOND — RELEASE OF SURETIES—ASSIGNMENTS FOR CREDITORS.

Code Civ. Proc. § 555, provides for the release of attached property on the giving of a bond for redelivery to the proper officer, if judgment be for plaintiff. Laws 1880, c. 87, § 17, makes an assignment within one month after the attachment operate as a dissolution thereof, and section 45 permits a plaintiff who had a valid lien of attachment on property released under a redelivery bond to prosecute the case to final judgment in order to fix liability of sureties. *Held*, that section 45 does not apply to attachments within one month preceding the assignment, the sureties being released by dissolution of the attachment.

Commissioners' decision. Department 1. Appeal from superior court, Madera county; W. M. Conley, Judge.

Action by N. Rosenthal and L. Kutner, partners, against R. E. Perkins and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants appealed. Reversed.

L. L. Cory and Wm. T. Searles, for appellants. Francis A. Fee, for respondents.

HAYNES, C. On August 18, 1893, the plaintiffs in this action commenced an action in justice's court against one James Brusie to recover the sum of \$269.82, and procured a writ of attachment to issue, and the same was levied on personal property of the defendant, Brusie. On August 21st Brusie executed a redelivery bond, upon which the defendants in this action were sureties. The said bond or undertaking was conditioned as required by section 555,

Code Civ. Proc., and upon its execution the constable released the property. The foregoing facts were formally and sufficiently alleged in the complaint, and the plaintiffs then proceeded to allege that afterwards, on the 6th day of September, 1893, Brusie, upon his own petition, was, by an order of the superior court of Madera county duly given and made, adjudged an insolvent debtor; that afterwards said superior court made an order permitting the said suit of the plaintiffs against Brusie to be proceeded with "for the purpose of fixing the liability of the said sureties, defendants herein, upon said bond or undertaking given for the release of said attached property, and for no other purpose"; that on September 25, 1893, judgment was rendered by the justice of the peace against Brusie for the sum of \$317.32, including interest and costs; that afterwards plaintiffs demanded of Brusie and of his assignee in insolvency, and of each of the said sureties, "the return of the property attached in accordance with the conditions of said undertaking, or that they pay the value thereof"; but that each of them refused to comply with such demand, and prayed judgment for said sum of \$317.32, with interest and costs. A demurrer to the complaint was overruled, and the defendants answered, alleging substantially the same facts concerning Brusie's insolvency which were alleged in the complaint. Defendant Perkins pleaded his discharge in insolvency. The cause was tried by the court, findings were filed following the allegations of the complaint, and judgment was entered thereon for the plaintiffs. The defendants appeal from the judgment, and from an order denying a new trial.

The question presented in this case is whether the adjudication of Brusie's insolvency within 30 days after the attachment was issued, and after the redelivery bond was executed, and the property released from the attachment thereunder, operated to relieve the sureties thereon from liability. That the adjudication of insolvency did have that effect, I think, is clear. Section 17 of the insolvency act of 1880, then in force, provides that the "assignment shall relate back to the commencement of the proceedings in insolvency, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings. Such assignment shall operate to vest in the assignee all the estate of the insolvent debtor not exempt by law from execution." Laws 1880, c. 87. It has been held in other jurisdictions that the dissolution of the attachment discharges the obligation of the sureties in a redelivery bond. See Drake, *Attachm.* §§ 341b, 341c, and cases there cited. Whether that is true here in cases where the



attachment is dissolved upon motion of the defendant upon the ground that it was improperly or irregularly issued, we need not inquire, though all the cases cited by Drake under said sections were cases of bankruptcy and cases of like character, where the redelivery became impossible by operation of law; and in that class of cases I think the author's conclusion is sound, and the case before us is of that class. This is apparent upon the face of section 555, Code Civ. Proc., under which the bond here in suit was given, and from the condition of the bond itself, which is "that, in case the said plaintiff recover judgment in said action, the defendant will, on demand, redeliver such attached property so released to the proper officer, to be applied to the payment of the judgment, or will pay," etc. The attachment having been absolutely dissolved by the adjudication of insolvency, and as no writ of execution could issue upon the judgment, there was no "proper officer" to whom the defendant could deliver the property, and hence the demand required the defendant to do a thing which by operation of law had become impossible, and the failure to do it could give no right of action upon the bond. The demand may be made by the plaintiff in the action as well as by the officer, but it is necessary that there should be an officer clothed with authority to receive the property and sell it. *Brownlee v. Riffenburg*, 95 Cal. 447, 30 Pac. 587. This the officer could not do without an execution.

Besides, section 552, Code Civ. Proc., provides: "If the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section 540 or section 555, or he may proceed, as in other cases, upon return of an execution"; and in *Brownlee v. Riffenburg*, 95 Cal. 448, 449, 30 Pac. 588, it is said this section "in effect declares that unless or until an execution is issued and returned, no such prosecution shall be had"; that is, that said section makes the issuance and return of an execution a condition precedent to the right to commence an action upon the bond. This is the general rule, and applies in all cases except the one which will be presently noticed. Respondents cite the last clause of section 45 of the insolvent act, which reads: "Provided, that where a valid lien or attachment has been acquired or secured in any such action, and an undertaking has been offered and accepted in lieu of such lien or attachment, the case may be prosecuted to final judgment for the purpose of fixing the liability of the sureties upon such undertaking; but execution against the insolvent upon such judgment shall be stayed." It is contended that this provision authorizes this action against the sureties. It will be observed, however, that section 17 of the act operates to dissolve only those attachments "made within one month next preceding the commencement of insolvency proceedings." Attachments made more than one month before

insolvency proceedings are commenced are not affected, and therefore are not dissolved, but remain valid for all purposes. In such case the property attached is not released by operation of law, and the attaching creditor has all the rights and remedies he would have had if the defendant in the action had not been adjudged an insolvent, save and except that of an execution against him where the attached property has been released by giving a redelivery bond; and in such case the allegation that more than one month after the attachment was made the debtor was adjudged insolvent, would relieve the plaintiff from alleging that an execution had been issued and returned unsatisfied. In this case the sureties on the bond, not being liable thereon, could not prove a claim against the insolvent under section 41 of the act, as supposed by respondent. The questions in this case must be determined under our own statutes and decisions, and it is therefore not necessary to review the cases cited from other jurisdictions. As the complaint cannot be amended so as to state a cause of action, the judgment and order appealed from should be reversed, with directions to dismiss the action.

We concur: CHIPMAN, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, with directions to dismiss the action.

6 Cal. Unrep. 25

ABBOTT v. '76 LAND & WATER CO.

(Sac. 310.)

(Supreme Court of California. May 31, 1898.)

CONTRACT—ACCEPTANCE—OPTION.

There is no contract authorizing action for damages by one given option to buy within certain time, where he does not give notice of acceptance of offer, though the offer is withdrawn before expiration of the time.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county.

Action by M. O. Abbott, substituted for Joseph Marriott, against the '76 Land & Water Company. Judgment for defendant. Plaintiff appeals. Affirmed.

O. L. Abbott, for appellant. Daggett & Adams, for respondent.

HAYNES, C. A demurrer to plaintiff's second amended complaint was sustained without leave to amend, and judgment of dismissal was entered, and the plaintiff appeals.

The complaint is very long, but for the purposes of this opinion the facts alleged may be stated as follows: The defendant is a corporation owning large quantities of land and certain water rights, canals, and ditches, by means of which much of its



lands, including the 640-acre tract in controversy, may be irrigated. For several years prior to October 1, 1886, the defendant leased portions of the lands to different persons under cropping contracts, and these contracts contained a clause giving the cropper the right to purchase the land described in the contract, for a price and upon terms therein stated, at any time before the expiration of the lease. The price fixed in these contracts included a water right of 40 inches of water for each 40 acres. The defendant also advertised that it would let its lands upon these terms, and also had adopted a resolution to that effect. Joseph Marriott had occupied the land here in question for several years prior to October 1, 1886, under leases or contracts containing the option to purchase above stated; but the lease for the year commencing October 1, 1886, did not contain such option. In May, 1887, the land commenced to increase in value, and by October 1st its value had about doubled. In July, 1887, the defendant announced that it withdrew all its lands from sale under these options. It is further alleged that about September 25, 1897, Marriott elected to purchase the land in question, claiming that under the usages and resolutions of defendant he had the right to purchase, but did not notify or inform the defendant of his election, nor tender or offer to pay the purchase money, but would have done so if he had not believed the statements of defendant withdrawing its land from sale; that he was not aware that his right to purchase could be enforced notwithstanding the withdrawal until a few weeks before this suit was commenced; that he was always able, ready, and willing to pay, and now offers to pay, the sum at which said land was scheduled, viz. \$17,800; that in July, 1890, defendant sold the water right incident to said land for \$64,000, and has had said money on interest at 6 per cent. per annum; that because of said representations he surrendered possession of the land, the annual rents and profits of which were \$1,600. The prayer is that defendant be required to convey the land, that it be charged with the \$64,000 received for the water right, and interest thereon, and with the rents and profits, from all which he offers to deduct the price of the land, and accept a judgment for "a balance of trust fund amounting to \$80,220." The present plaintiff, having succeeded in some way to Marriott's rights, was substituted as plaintiff.

Placing the most favorable construction possible upon the complaint, and assuming that the previous usages, customs, and resolutions of the defendant are to be considered as incorporated in Marriott's lease made in October, 1886, and assuming further that defendant could not take away his right of purchase by its withdrawal of the option and announced determination not to sell or convey, still there was no contract

of sale created between the parties. The acceptance of the offer must be communicated to the party making the offer, or there is no contract. The withdrawal of the option, or the announcement that it would not sell or convey the property, could not relieve Marriott from the necessity of communicating his acceptance of the offer, though it might possibly obviate the necessity of a tender of the purchase money, or an offer to pay it, if he had taken the necessary step to create a contract by notifying the defendant, before the expiration of the lease, of his acceptance of the offer. The allegations of the complaint in this regard amount simply to this: that Marriott mentally concluded that, if the defendant had not refused to sell, he would buy; that for seven or eight years he acquiesced and gave no voice to his desire to purchase, when he was advised that he could have compelled the defendant to sell and convey, and still could do so with the added advantage of being relieved from any payment on account of the purchase, and of recovering \$80,220 with which to start business on the ranch. The most remarkable feature of the case is that he should have been so advised. The demurrer was properly sustained without leave to amend, and the judgment of dismissal should be affirmed.

We concur: SEARLS, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

6 Cal. Unrep. 27  
TODHUNTER et al. v. ARMSTRONG. (Sac. 316.)

(Supreme Court of California. May 31, 1898.)  
MASTER AND SERVANT—CREATION OF A LIEN—  
DEFENSE IN EJECTMENT.

1. One who takes charge of another's ranch, with the understanding that he is to receive for his services a certain sum per month, and, after paying from the gross proceeds the operating expenses, including his own salary, and deducting what was due for supplies and equipments furnished by him, to return the balance to the owner, and who does not agree to bear a part of any loss which may occur, is merely a hired man, and not a tenant.

2. A verbal understanding that he was to remain in possession of the property, and have a lien thereon till he was paid, is no defense to the owner's action for recovery of possession.

Commissioners' decision. Department 1. Appeal from superior court, Glenn county.

Action by George F. Todhunter and others against W. S. Armstrong. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Affirmed.

J. C. Ball, for appellant. S. Millington, R. E. Hopkins, and Hiram W. Johnson, for respondents.

BELCHER, C. Plaintiffs commenced this action in January, 1896, to recover possession

of a tract of land in Glenn county, called the "Willows Rancho," alleging that they were the owners of the said land in fee, and entitled to the possession thereof, and that defendant in September, 1895, entered into and took possession of the said land without any right thereto, and without the consent of plaintiffs, and had wrongfully withheld the possession thereof from the plaintiffs. Defendant answered, and filed a lengthy cross complaint, in which he set up facts which it is claimed entitled him to retain possession of the said property. The following facts, among others, are alleged in the cross complaint: Long before February, 1891, and up to the time of his death, in January, 1893, W. B. Todhunter, the father of plaintiffs, was the owner of the land described in the complaint, and other lands situate in Yolo and Sacramento counties, and also a large amount of personal property. He had employed defendant for many years, and there existed between them great confidence and trust. He resided in Yolo county, and in February, 1891, entered into an agreement with defendant, by which it was mutually agreed that defendant should remove to and take full charge of the said Willows rancho. He was to take with him certain horses, harness, wagons, and farming implements, of the value of \$535, which he then owned, and was to use the same, together with such implements and teams as Todhunter should furnish, in the cultivation and improvement of said land; to employ all necessary help, and furnish board for the men employed; to purchase such machinery and articles as might be needed, from time to time, on the rancho; and to sell the surplus produce, and out of the proceeds defray expenses, and upon final settlement turn over the residue to Todhunter or his heirs. For his services and the use of his said property defendant was to retain out of the proceeds of the sales for himself \$50 per month, and 50 cents a day for the board of each person employed on the ranch and boarded by him, and upon final settlement was to be paid \$535, the value of the property furnished by him, and a small sum due from Todhunter to him at the time the agreement was made. No time was fixed when said venture should terminate, but it was understood and mutually agreed that defendant was to remain in possession of said property and have a lien thereon until he was settled with and paid. Under this agreement the defendant, on February 20, 1891, took possession of the said property, and continued in possession thereof until Todhunter died; and after his death the agreement was maintained by his heirs and representatives until this suit was brought. Both Todhunter and defendant performed all the conditions of the said agreement to be by them respectively performed, but no complete accounting or settlement was had between them prior to his death, or has since been had between the representatives of his estate and

defendant. In September, 1893, the plaintiff George T. Todhunter was duly appointed by the superior court of Yolo county administrator with the will annexed of his father's estate; and in June, 1894, as such administrator, he filed in court an account of his administration, to which he attached a statement of the account of the defendant, therefore rendered to him for allowance and payment, and asked to have the same heard and considered by the court in connection with his said account. Thereafter the matter came on regularly for trial before the court, and was submitted for decision, and "the court duly made and filed its decision, whereby there was found to be due and owing from the estate to the said Armstrong the sum of \$1,732 for transactions had under said agreement between" certain dates named, and no part of this sum had been paid. In September, 1895, George F. Todhunter, as such administrator, procured and induced the court to make and enter of record its decree and judgment, distributing the estate of said decedent to his heirs and devisees, and discharging said administrator. The distribution was made in accordance with a written agreement made and entered into by all the heirs entitled to share in the estate, and upon the representation that there were still outstanding claims against the estate, but that all the claimants consented that a decree be entered distributing the estate in the manner provided in said agreement. The creditors of the estate, and particularly this defendant, did not in fact consent that any decree of distribution be then entered, and the representation that they did so was false, and made for the purpose of defrauding them and preventing the collection of their claims against the estate. By the decree there was distributed to the plaintiffs herein the land here in controversy, together with a large amount of other real and personal property, and it was expressly provided that all the indebtedness of the estate, except a certain mortgage on lands in Yolo county, should be assumed and paid by them. The prayer was that the plaintiffs take nothing by the action, and that defendant have judgment against them for the sums alleged to be due him, and that he have a lien, coupled with possession, on the land described in the complaint for the payment of such judgment. The plaintiffs answered the cross complaint, denying most of its material averments.

The case was tried by the court without a jury, and the findings and judgment were in favor of the plaintiffs. From that judgment and an order denying a new trial, defendant appeals.

At the trial the plaintiffs introduced in evidence the said decree of distribution, and proved that 15 days before the action was commenced they served on defendant a written demand for the possession of the said premises. The defendant was then called as a witness in his own behalf, and



testified that since the 20th day of February, 1891, he had continuously resided on the land in suit; had cultivated and improved the property, raised, harvested, and disposed of the crops each year, and such parts of the crops as were not used on the ranch, for the ranch, had been sold and accounted for; that he had full control of the property, and paid the taxes and accounted for everything raised thereon; and that he went upon the property, and took the control and management thereof, under and by virtue of an agreement made with W. B. Todhunter. He was then asked to state fully what that agreement was. Plaintiffs objected to the question, and to the admission of any evidence as to the terms of the contract under which defendant claimed the right to hold possession, unless the contract was in writing; and the objection was sustained.

There is no pretense that the agreement sought to be proved was in writing; and, as pleadings are construed most strongly against the pleader, it must be assumed that the terms of the agreement, as set out in the cross complaint, are as favorable to defendant as the facts would justify.

It is claimed for appellant that by the agreement the relation of landlord and tenant was created between the parties; that appellant became a tenant at will, and as such was occupying and holding the property when this suit was brought; that his tenancy could only be terminated by a written notice, given by the landlord, to remove from the premises within a period of not less than one month, to be specified in the notice; and hence that this action could not be maintained, no such notice having been given. Civ. Code, §§ 789, 790; Code Civ. Proc. §§ 1161, 1162. Whether appellant was a tenant of the property or not is the controlling question in the case; for if he was not a tenant, but only a general manager or superintendent, then the rulings of the court below on the admission of evidence, and the findings of the court based upon the evidence admitted, were all justified and proper. We fail to see how the agreement set out can be said to have created any relation of landlord and tenant between the contracting parties. It is true appellant was to, and did, have the full control and management of the farm, but for his services in so doing he was to receive only a salary of \$50 per month. After paying from the gross products of the place the expenses of operating it, he was to receive no part of the residuum, and was to bear no part of the loss, if any loss should occur. In short, he was, in our opinion, simply a laborer or hired man, and was subject to be discharged at any time. Numerous authorities are cited by appellant relating to tenancy and partnership, but, as no tenancy or partnership is shown to have existed, they are not in point, and need not be specially noticed.

Some stress is laid on the words, "It was

understood and mutually agreed that defendant was to remain in possession of said property and have a lien thereon until he was settled with and paid." But such an oral agreement would not create a lien, and, if it did, would not constitute a defense to an action brought to recover possession of the property.

After a careful consideration of the case, we conclude that there is no valid ground for a reversal, and that whatever right appellant may have to recover the amount alleged to be due him must be asserted against respondents under the condition attached to the decree of distribution, that they should assume and pay all outstanding and unsecured debts of the estate. We advise that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(121 Cal. 131)

PLASS v. PLASS et al. (S. F. 782.)<sup>1</sup>

(Supreme Court of California. June 3, 1898.)

TENANCY IN COMMON—OUSTER—EJECTMENT—WHO MAY MAINTAIN—COMMUNITY ESTATE—NONSUIT.

1. A denial in the answer of plaintiff's title and right of entry, in an action by a tenant in common against his co-tenant to be admitted into possession, is equivalent to an ouster as of the date of the commencement of the action.

2. One claiming land as heir at law or devisee cannot maintain ejectment against the executors of deceased.

3. One claiming as tenant in common under St. 1850, p. 254, § 11, which provides that, on the death of a spouse, one half of the community property shall go to the survivor, and the other half to the descendants of the deceased, may adjudicate his right to be let into possession in ejectment.

4. Where the evidence supports a complaint good against a general demurrer, a motion for nonsuit should be overruled.

Commissioners' decision. Department 2. Appeal from superior court, Napa county.

Action by Charles Plass against Catherine Plass, executrix, and Phillip Plass, executor, of the last will of Charles W. Plass, deceased. There was a judgment for defendants, and plaintiff appeals. Reversed.

F. E. Johnston and John T. York, for appellant. Percy S. King, M. M. Estee, and Chas. A. Shurtleff, for respondents.

CHIPMAN, C. Action in ejectment. The trial was by the court, and at the conclusion of plaintiff's testimony the court granted a motion for nonsuit, and gave judgment for defendants, from which plaintiff appeals, and comes here upon bill of exceptions.

The evidence was that plaintiff is the son of defendants' testator; that plaintiff's mother, the testator's first wife, died July

<sup>1</sup> Rehearing denied.



7, 1859; the defendant Catherine Plass is plaintiff's stepmother, and the other defendant is his brother. Plaintiff testified as follows: "I was born in the state of New York on November 9, 1847, and subsequently came with my father and mother to California. My father had been here before that time. We went to reside on the tract of land first described in the complaint, and my father lived there continuously until he died, in 1895." The land referred to was acquired by plaintiff's father by purchase, October 11, 1856. The other land described in the complaint was deeded to plaintiff's father, July 3, 1863, four years after his mother died. A deceased sister of plaintiff died April 3, 1865, being then the wife of one N. C. Brooks, leaving one son who survived her, but is now dead. Brooks conveyed to one G. A. Lamont his interest in the demanded premises, December 14, 1895, and Lamont conveyed the same to plaintiff, January 17, 1896. What interest, if any, Brooks had in the premises does not appear. Petition for the probate of the will of defendants' testator was in evidence, in which the demanded premises were claimed to be part of the estate of deceased; also order admitting will to probate, with proof thereof. It also appeared that defendants entered upon their duties as executors, and were, when the action was commenced and tried, acting as such under said will. The will devised the property to the surviving wife of deceased and the brother of the testator, "to hold the same in common and undivided" during their natural life, and at their death to go to the testator's sons, Charles Plass, Jr. (plaintiff), and Phillip Plass (one of defendants). A rental value was proved, which, with the foregoing, comprises all the evidence.

It is well settled that, in an action by a tenant in common against his co-tenant to be admitted into the possession, a denial in the answer of the plaintiff's title and right of entry is equivalent to an ouster as of the date of the commencement of the action. *Miller v. Myers*, 46 Cal. 535; *Phelan v. Smith*, 100 Cal. 158, 34 Pac. 667. The ouster is therefore admitted by the pleadings.

If plaintiff has any title or right of possession, it must be by virtue of the statute of 1850 (St. 1850, p. 254, § 11), as a "descendant" of his deceased mother, who died while that act was in force, or as an heir at law or devisee of his father. Clearly, he can claim no right of action by ejectment, in the latter capacity, against the executors. *Meeks v. Hahn*, 20 Cal. 620; *Chapman v. Hollister*, 42 Cal. 462; *Meeks v. Kirby*, 47 Cal. 168; *Harper v. Strutz*, 53 Cal. 655. Can the action be maintained upon the facts disclosed?

Appellant claims, as we understand counsel, that the demanded premises were community property, having been acquired during the marriage of plaintiff's father and

mother, and that by her death, in 1859, plaintiff took an interest in the property under the act of 1850, which reads: "Upon the dissolution of the community by the death of either husband or wife, one half of the common property shall go to the survivor, and the other half to the descendants of the deceased husband or wife, subject to the debts of the deceased." The right of possession is claimed under this law.

It was held in *Broad v. Broad*, 40 Cal. 493, that the words "shall go" in the act mean "shall vest," and apply equally to the descendant of the deceased husband or wife, as the survivor, and that upon the death of the mother the children of the marriage became tenants in common with the father. That was an action for the partition of the premises, and the direction in remanding the case was to render judgment that each of the two plaintiffs (children of the mother) is the owner in fee of the undivided quarter, and the defendant is the owner in fee of the undivided one-half, of the premises. *Broad v. Murray*, 44 Cal. 228, was a similar action, and was decided upon the authority of *Broad v. Broad*, affirming the principles enunciated in that case. *Johnston v. Bush*, 49 Cal. 198, was a case in ejectment brought by the descendants of the deceased mother to recover the undivided one-half of the premises, claiming to be tenants in common with the grantee of the father under the act of 1850. Defendant had judgment, and the cause was remanded for a new trial, affirming *Broad v. Broad*, supra. *Cook v. Norman*, 50 Cal. 633, was an action in ejectment by the children of the deceased mother to recover an undivided one-fourth of the premises. After the death of his wife, Cook, surviving husband, sold the premises in good faith, but it did not appear whether the sale was necessary to pay the community debts or whether the proceeds were so applied. It was found by the trial court that when the community was dissolved by the death of the wife there was a large amount of outstanding community indebtedness. It was held here that it was competent for the husband to convey the community estate to satisfy debts of the community, and that a purchaser in good faith from the surviving husband is not bound to show, in support of his title, that the sale to him in point of fact was necessary to provide payment of the community debts; that the husband had power to sell as survivor of the community the same as during its existence. It was said, however, referring to *Broad v. Broad* and *Broad v. Murray*, supra: "It is not doubted, as against the husband, the interest of the children of the community is to be taken as vested, and entitling them to have an accounting or partition, or other appropriate relief."

As to the property acquired by plaintiff's testator after the death of plaintiff's mother, the judgment of the court was clearly correct, as it is in course of administration, and plaintiff can claim an interest only through his testator. As to the property acquired in the life-

time of plaintiff's mother, we think it sufficiently appeared to be community property in which at her death he had some interest, subject, however, to the debts of the community. The construction given to the act of 1850 was stated in *Johnston v. Savings Union*, 75 Cal. 134, 16 Pac. 753, to have been that the descendants of the wife took subject to the payment of the community debts; that no probate administration of the estate of the deceased wife was necessary; but that the control of the property was in the husband, as survivor of the marital partnership, for the purposes of settling up its affairs. In *Packard v. Arelanes*, 17 Cal. 525, the court said: "No special remedy exists for the enforcement of the claims of creditors, or the protection of persons interested in the preservation of the property; but the general powers of the courts are sufficient to furnish any relief necessary for these purposes." In that case the wife died first. The husband continued in possession of the property, made a will, and died, and executors were duly appointed. Soon thereafter letters of administration were taken out on the estate of the deceased wife, and the administrator presented claims against the estate of the husband, and obtained a large judgment on report of the referee. The trial court set aside the report, and its judgment was affirmed here, leaving the estate of the husband to be administered under the will. There is no evidence in the present case whether or not the plaintiff's testator settled up the affairs of the community in his lifetime. The property acquired during the community being common property and subject as such to his control, when he died it passed into the possession and control of his executors, subject to the debts of the community. The probate court now has jurisdiction of the estate and the property. But the particular interest claimed by plaintiff in the property is adverse to the estate, and the probate court has no jurisdiction to determine the rights of those claiming adversely to the estate. In *re Burdick*, 112 Cal. 387, 44 Pac. 734. In that case it was said to be the duty of the court, where serious questions arise as to such claims, to delay final decree until such claims can be determined in another forum. *Burgel v. Prisser*, 89 Cal. 70, 26 Pac. 787, was an action in ejectment where one-half the land was inherited from the father, and two-thirds of the other half from the mother, whose estate was being administered upon, and it was held that the heirs could not, pending the administration of the mother's estate, recover in ejectment the portion inherited from her as against her administrator, who is entitled to the possession of the whole estate. But it was said: "If the judgment had merely determined that plaintiffs were tenants in common, and should be let into possession with defendant, there could have been no objection." And it was further held that it was proper for the court, before which the ejectment suit is tried, to ascertain and settle the respective interests of the parties. While plaintiff was not enti-

tled to judgment, as prayed, for exclusive possession, we cannot see why his rights could not be determined in this action. If he acquired any right or title through the death of his mother distinct from and adverse to the right or interest of his father in the same property, he should have been permitted to show it in this action. Therefore the nonsuit should not have been granted. The grounds on which it was asked were: (1) Plaintiff had not shown possession or right of possession or ouster; (2) that he had not shown any title, even indirectly; (3) that the estate is in process of administration, and defendants are executors, and ejectment would not lie against them. We think, if all the facts shown had appeared in the complaint, it would have been good against a general demurrer, and in such case the motion should be overruled. *Warner v. Darrow*, 91 Cal. 309, 27 Pac. 737. The judgment should be reversed, and the cause remanded for further proceedings.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for further proceedings.

121 Cal. 165

WOODBURY v. NEVADA SOUTHERN RY. CO. (L. A. 383.)

(Supreme Court of California. June 7, 1898.)

#### SUBSTITUTION OF ATTORNEYS.

Under Code Civ. Proc. § 284, giving a party a right to change his attorney of record, the court is justified in ordering the change on request of the party.

Department 1. Appeal from superior court, Los Angeles county.

Action by Woodbury against the Nevada Southern Railway Company. An appeal is taken from an order for substitution of attorneys for defendant, and from a refusal to set aside said order. Affirmed.

H. C. Dillon, for appellant. A. B. Hotchkiss, for respondent.

PER CURIAM. The Nevada Southern Railway Company, the defendant in the above-entitled action, made its application to the superior court for the substitution of M. W. Conkling as its attorney of record therein in the place of A. B. Hotchkiss, and the court made its order for such substitution. From this order, and from a subsequent order refusing to set it aside, the present appeal has been taken.

Whether the request for the substitution of attorneys that was presented to the superior court was made by the defendant was a question of fact for that court to determine, and its conclusion that it did make the request will not be reviewed here upon the suggestion of the displaced attorney that

the court did not properly consider the evidence before it. The right of a party to change his attorney of record is conferred by section 284, Code Civ. Proc., and it is only necessary for him to prefer his request for such change in order to justify the court in making an order therefor. *People v. Norton*, 16 Cal. 436; *Lee v. Superior Court of San Joaquin Co.*, 112 Cal. 354, 44 Pac. 666. The orders are affirmed.

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121 Cal. 223

MODESTO BANK v. OWENS et al. (Sac.  
255.)

(Supreme Court of California. June 16, 1898.)

NOTICE OF APPEAL—PROOF OF SERVICE—CHATTEL  
MORTGAGE—AFFIDAVIT—MORTGAGE OF  
CROPS — FORECLOSURE.

1. While proof of service of a notice of appeal must be made, it is not essential that it be attached to the notice.

2. Where a chattel mortgage is given to a firm, the statute requiring an affidavit to be made by all the parties is sufficiently complied with, as to the firm, by an affidavit of one of the partners "of and for the firm, \* \* \* the mortgagee in said mortgage named."

3. A mortgage of land, together with all rents, issues, and profits thereof, will not create a lien on a crop subsequently raised, where it is not executed in the manner required for the execution of chattel mortgages, and will not affect a subsequent mortgagee of the crop.

4. A mortgagee of a crop is not required to foreclose his lien in order to prevent its seizure under a mortgage of the land.

Department 2. Appeal from superior court, Stanislaus county.

Action by the Modesto Bank against W. C. Owens and others. From a decree in favor of plaintiff, defendants appeal. Reversed.

Nicol & Orr, for appellants. Maddox & Stonesifer, for respondent.

TEMPLE, J. This is an action to foreclose a mortgage. August 24, 1892, defendant W. C. Owens made to plaintiff a mortgage upon certain lands to secure an indebtedness due it. After a description of the land, the mortgage contained the following words: "Together with, all and singular, the tenements, hereditaments, and appurtenances thereunto belonging, and the rents, issues, and profits thereof." It was not executed as the Code requires chattel mortgages to be executed. In the fall of 1894, Owens seeded the land to wheat. Defendants Haslacher & Kahn contracted to furnish money to enable Owens to put in the crop their advancements to be secured by a crop mortgage. Of this contract, plaintiff was fully advised before the crop was put in. The wheat was put in under the contract, and the crop mortgage given, executed in due form. Haslacher & Kahn appeared, and made their defense in the action. The court, upon the bringing of the action, appointed a receiver, who took the crop into possession. The court found the facts as to the crop mortgage, and that

the indebtedness to Haslacher & Kahn had not been paid. As matter of law, it was found that the proceeds of the sale of the crop should be applied to the payment of any deficiency due the plaintiff after the sale of the real estate, and the residue, if any, should be brought into court, to abide the further order of the court. The decree is in accordance with this finding, and it is from this part of the decree that this appeal is taken. It is made to appear (perhaps somewhat irregularly) that subsequent to the judgment the receiver harvested and sold the grain, and that the proceeds are now held to await the result of this appeal, there being a deficiency judgment. The mortgage involved in this case, and the judgment entered, are in all material respects like those considered in *Simpson v. Ferguson*, 112 Cal. 180, 40 Pac. 104, and 44 Pac. 484. Indeed, the decision rendered in that case seems as apt and appropriate to the main question involved here as it was to that case. This case was tried before that decision was made, or, in all probability, a different conclusion would have been reached. The counsel for respondent recognize this, but still make a commendable, though desperate, attempt to maintain their judgment. The new points are highly technical, but will be briefly noted:

1. The notice of appeal was filed June 28, 1895, and there is not attached to it any evidence of service. About two weeks thereafter an affidavit was filed, showing service. The contention is that section 950 of the Code of Civil Procedure does not make this affidavit a part of the record, although in fact brought up, and there is therefore no proof of service, and the jurisdiction of this court is not made to appear. Section 950 does not expressly require or authorize the appellant to bring up proof of the service. If unauthorized, it would no more constitute a part of the record when attached to the notice of appeal than it would when not so attached. It has always been supposed that proof of service should appear in the transcript; but, if no law or rule authorizes its being made a part of the record to be certified to this court, then such is not required, and the fact of its absence constitutes no ground for a dismissal. That such proof is not attached to the notice is of no consequence. It has repeatedly been held that proof of the service of the notice must be made, and the proof of the fact found in the transcript has always been considered sufficient.

2. It is contended that the chattel mortgage of Haslacher & Kahn is void because it was not accompanied by the affidavit of all the parties thereto. The mortgage names "Haslacher & Kahn" as parties of the second part. The affidavit was made by Louis Kahn, "of and for the firm of Haslacher & Kahn, the mortgagee in said mortgage named." The complaint avers that Haslacher and Kahn are partners, and that their firm name is Haslacher & Kahn. It is said that the stat-

ute requires the affidavit to be made by "all the parties thereto," and does not authorize any one to make it on behalf of another. If this be true, a corporation can never be a party to a chattel mortgage, for an oath cannot be administered to a corporation. Nor can an agent act for either party in giving or receiving such a mortgage. For some purposes a partnership is regarded as an entity. In *re Dennery*, 89 Cal. 101, 26 Pac. 639. Many corporations, savings banks, and others, have taken such mortgages and they have been upheld. To hold otherwise would be "to stick in the bark."

3. It is said that Haslacher & Kahn had notice of plaintiff's mortgage, and therefore were not incumbrancers in good faith. The plaintiff's mortgage did not cover the crop, but constituted a lien upon the land only, and therefore it did not matter whether they knew it or not. No amount of notice could make it a chattel mortgage. As I understand *Simpson v. Ferguson*, it is there held that such a mortgage does not constitute a lien upon the growing crops, even as against the mortgagor.

4. There is no point in the claim that Haslacher & Kahn cannot be heard because they did not ask to have their mortgage foreclosed. They were not required to foreclose at all, and at any rate the time had not arrived when the answer was filed when they could take the crop in satisfaction of their debt. They had an interest in the crop, and had a right to contend that plaintiff had no lien upon it. As plaintiff had no such lien, he could not foreclose as to it; and there was no occasion for Haslacher & Kahn to ask for such relief, even had they been entitled to it. The judgment is reversed, and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.

121 Cal. 160  
PEOPLE v. PLYLER. (Cr. 359.)

(Supreme Court of California. June 6, 1898.)

CRIMINAL LAW—SEPARATE TRIALS—WITNESSES—  
VARIANCE—NAMES—INSTRUCTIONS—CREDI-  
BILITY OF WITNESSES—CONTINUANCE.

1. Separate informations requiring separate trials may be filed against defendants complained of as being joint offenders.

2. The state has a right to call as a witness a person charged with the same offense as that of defendant, and it is immaterial that he refused to testify on the ground that his evidence might incriminate him.

3. An information charging that the offense was committed on Charles Harris, and evidence that his true name was Isaac Crossley, does not constitute a variance, where he testified that the former name was the one he had always been known by in the community.

4. Giving an instruction that "a witness who has willfully sworn falsely in one part of his testimony is to be distrusted in others" in lieu of one that, "if any witness examined before you has willfully sworn falsely as to any material matter, it is your duty to distrust his entire evidence," was error, since the former omits

the element that the testimony must be on a material matter, and the latter follows the Code provisions (Code Civ. Proc. § 2061, subd. 3).

5. A refusal to grant defendant a continuance was an abuse of discretion warranting a reversal where it appeared that the wife of defendant, who had been subpoenaed, was a material witness, and the only person who could and would testify to facts showing his innocence, and that she was temporarily sick, as shown by physicians' certificates, so that her attendance would endanger her life,—all of which was not contradicted; nor was the error cured by a statement by the state in open court that they had authentic information that she was no longer ill, but about on the streets, and the court's offer to issue an attachment for her, which neither side then requested.

Department 2. Appeal from superior court, Santa Cruz county.

George F. Plyler was convicted of mayhem, and he appeals. Reversed.

D. W. Burchard, L. O'Neal, W. A. Maguire, and H. C. Moore, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. Defendant, convicted of mayhem, appeals from the judgment and from the order denying him a new trial.

1. Complaint was laid before a magistrate jointly charging defendant and others with the offense. The defendant and one Schoedde were together held over for trial. In due time the district attorney filed separate informations against them. This precluded a joint trial, and defendant insists that it was error. The argument advanced is that after the defendants had been jointly held for trial the district attorney had no power other than to file a joint information against them. The defendants were of right entitled to a joint trial, and each to the aid and assistance of the other in his defense. This right was denied them by the course which the prosecuting officer adopted. It is further said that the law gives to defendants jointly charged the privilege of separate trials (Pen. Code, § 1098), but secures no such right to the people. It is true that the law, contemplating the embarrassments which may arise to defendants upon joint trials, and the desire which one may have to make a defense not acceptable to his co-defendant, has humanely accorded the privilege of separate trials. But that is aside from the vital question. Is it mandatory upon the district attorney, under the indicated circumstances, to file a joint information? We are not advised of any law so declaring. It is within his discretion to inform against them either jointly or severally. The state may determine whether it will proceed against defendants accused of the commission of a single crime, either jointly (with the privilege to each of them of securing a separate trial) or separately, as was done in this instance. Unquestionably, a grand jury may so return indictments, and the same course should be and is open to the district attorney.

2. Schoedde, over whom at the time of Plyler's trial was pending an information for the same offense, was called to the witness stand by the prosecution, and declined to answer questions put to him, upon the ground that his answers would tend to criminate him. The court sustained him in his position, and no evidence was elicited from him. It is urged that this was error, tending to prejudice defendant's case before the jury. Either the district attorney was of exceptionally sanguine temperament, or his hope of eliciting any valuable testimony from a witness situated as was Schoedde must have been extremely slight. Still, error cannot be predicated upon his futile effort, even though it was followed by all the injurious effects which defendant portrays; for Schoedde still was a competent witness for the prosecution, and he could refuse to testify only by the exercise of the privilege of which he availed himself. *Ex parte Stice*, 70 Cal. 51, 11 Pac. 459. It was not error, therefore, to call him to the witness stand, whatever may have been the resulting consequences to defendant.

3. The complaint charged the offense to have been committed upon the person of Charles Harris, and the information followed the complaint. At the preliminary examination the complaining witness swore that his name was Charles Harris, and not Isaac Crossley. Upon the trial he testified that he had been known as Charles Harris in the city of Santa Cruz during all of the six years of his residence there, and had been known by no other name; but that his true name was Isaac Crossley. He explained that he swore falsely as to his name to shield his family, and save them from knowledge of the outrage of which he was the victim, for the mayhem was castration. In the case of *People v. Christian*, 101 Cal. 471, 35 Pac. 1043, the complaint charged, and the defendant was held to answer for, an assault committed upon George Magin. The information alleged an assault upon George Massino. The variance being urged, upon the ground that the defendant was tried for an offense upon which he had never been examined, the point was held well taken. But that case cannot avail defendant. This complaint and information alike charged a crime committed upon Charles Harris. Harris testified that such was the name by which he had always been known in the community. Here was no variance. There was an absolute identity in names and person, and the fact, disclosed upon the trial for the first time, that the complaining witness' true name was something different, did not constitute a variance, and could not have injured defendant in the slightest degree.

4. Defendant proposed the following instruction: "If any witness examined before you has willfully sworn falsely as to any material matter, it is your duty to distrust his entire



evidence." This instruction was modified by the court, and thus given: "A witness who has willfully sworn falsely in one part of his testimony is to be distrusted in others." As given, the instruction closely approximates to the language of subdivision 3 of section 2061 of the Code of Civil Procedure. The subdivision is but a brief paraphrase of the terse maxim, "Falsus in uno, falsus in omnibus." The code provision, like the Latin maxim, is not a complete exposition of the law. Well understood by jurists, it would be misleading to the nonprofessional mind. It requires construction and amplification. This it has received. *People v. Sprague*, 53 Cal. 491; *People v. Soto*, 59 Cal. 367. The proposed instruction is an accurate exposition of its meaning, and should have been given. The charge delivered by the court omits the very important element that the willful false testimony must be upon a material matter.

5. This disposes of all of appellant's objections necessary to be considered in contemplation of a new trial, which must be ordered for the following reason: Defendant pleaded upon July 27th. His trial was set to commence upon Monday, about three weeks later. Upon the morning of that day his counsel moved the court for a continuance, based upon an affidavit of defendant that his wife was under subpoena, and was a material witness for the defense; that by her he expected to prove, and that she would testify of her own knowledge, that defendant did not commit, participate, aid, or abet in the commission of the alleged offense, and that he had no knowledge of the commission of it, or of any offense, upon the person of Harris, until after the crime had been perpetrated; further, that she was the only witness by whom he could prove any of these facts; that she was taken sick of a miscarriage two or three days before the date set for trial, and was at the time in such a precarious condition of health as made it impossible for her to attend the trial; that he could not safely proceed in her absence; that by a month from that date she would have recovered her health, and be able to appear and testify. This affidavit was accompanied by the certificate of two physicians to the effect that they had examined the witness upon the Saturday preceding the day set for trial, and found her much prostrated, suffering from the indicated sickness, and completely incapacitated from making any exertion. Her attendance at court would be dangerous to her life. It was offered to procure affidavits covering the ground of the certificates, but no objection was urged to the form of their presentation. In addition to this, one of defendant's counsel testified in corroboration of the matters contained in the affidavit. This was the first continuance asked by defendant. The time—a month—was not unreasonable. There was no counter showing, yet the motion was denied. The reason for the refusal is not assigned, and none can be perceived. If the defendant could offer such evidence, and it was credited, it

meant his complete vindication. There is no doubt, then, of its materiality. The court could not, with propriety, have discredited the affidavit. It was supported by the oath of defendant's counsel, who swore that to his own knowledge defendant's wife would give the testimony outlined. That the court abused its discretion in refusing to grant the motion is a conclusion which cannot be escaped. For far less has this court ordered new trials. *People v. Dodge*, 28 Cal. 445; *People v. McCrory*, 41 Cal. 458; *People v. Brown*, 46 Cal. 102. During the trial of the case the district attorney made the following statement to the court: "I have received information, which I believe to be authentic, that the witness [Mrs. Plyler] is no longer ill, if she ever was, and is up and about the streets of San José, and that, if the defense desire her attendance, they have time to procure her now." Counsel for defense answered that, though she had been subpoenaed by the defense, their information was that she was still too ill to be produced in court. The judge expressed his willingness to issue an attachment for the witness at demand of either side, and, neither party requesting it, there the matter dropped. This could not cure the error. If the district attorney was justified in his belief that the witness was malingering, or had recovered from her illness, he should have caused her to be produced in court, and thus have saved the case from the injury worked by the court's refusal to grant the continuance. The defense, holding the conviction that the witness was still very sick, properly declined to ask for an attachment. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; TEMPLE, J.

121 Cal. 210  
DAVIS v. STATE. (Sac. 280.)

(Supreme Court of California. June 15, 1898.)

STATES—LIABILITY FOR INTEREST ON BONDS.

St. 1893, p. 57, authorizing suits against the state on disputed claims, is simply a waiver of the state's prerogative not to be sued; and therefore, while a holder of Indian War bonds is entitled to recover from the state the face value of interest coupons attached thereto under Act 1851, Act 1893 does not allow a recovery of interest on such coupons.

Department 2. Appeal from superior court, Sacramento county.

Action by Samuel Davis against the state. From a judgment in favor of plaintiff for only a portion of the relief asked, he appeals. Affirmed.

J. D. Thornton and Freeman & Bates, for appellant. Atty. Gen. Fitzgerald, for the State.

McFARLAND, J. This is an action to recover the amount due upon certain interest coupons which were attached to bonds issued by the state of California under an act passed

February 15, 1851, "together with legal interest thereon from the respective dates of maturity of said coupons." The court below rendered judgment for the amount of the coupons, as shown by their face, but refused to give judgment for interest upon said coupons, as prayed for by plaintiff. Plaintiff appeals from the judgment.

The coupons sued on were attached to certain bonds which are generally known as the "Indian War Bonds." The facts with respect to said bonds are fully stated in the opinions of this court in the cases of *Sawyer v. Colgan*, 102 Cal. 283, 36 Pac. 580, and *Molineux v. State*, 109 Cal. 378, 42 Pac. 34, and there need be no further statement of them here. See, also, St. 1851, p. 520. Appellant contends that the court below erred in not giving judgment for interest on the coupons from the date of their maturity, and this is the only alleged error for which a reversal is asked. The question here raised by appellant was before this court in the two cases above cited, and was determined against his present contention. When *Sawyer v. Colgan*, supra, was decided, there was in existence no statute or law allowing the state to be sued; and in that case the plaintiff brought mandamus against Colgan, the state controller, to compel him to draw his warrants for certain bonds and coupons issued under the said act of 1851, with interest upon the same from the dates of their maturity; but this court held that "the state is not liable to pay interest on its debts unless its consent to do so has been manifested by an act of the legislature or some lawful contract of its executive officers. *U. S. v. North Carolina*, 136 U. S. 211, 10 Sup. Ct. 920; *Carr v. State*, 127 Ind. 204, 26 N. E. 778." This was a direct adjudication that interest upon the coupons sued for in the case at bar cannot be recovered against the state. Afterwards, on February 28, 1893, the legislature passed an act allowing itself to be sued (St. 1893, p. 57); and appellant contends that some new right is given him, with respect to interest on these coupons, by said last-mentioned act. Shortly after this act went into effect, one Molineux commenced an action against the state upon certain coupons detached from said Indian War bonds of 1851, identical in character with those sued on here, and sought to recover interest upon the coupons from their respective dates of maturity. That case was therefore identical in every respect with the case at bar. The court below rendered judgment in favor of Molineux, for the coupons and interest, as there prayed for; but on appeal this court modified the judgment of the lower court by disallowing the interest, and held that no right to recover interest on said coupons had been created by the said act of February 28, 1893. *Molineux v. State*, supra.

The authorities above cited definitely determine the point made by appellant adverse-

ly to his contention. This, counsel for appellant concede; but in several briefs and in oral arguments they have strenuously, elaborately, and ably argued that those cases—and particularly *Molineux v. State*—were wrongly decided, and should be overruled. We do not deem it necessary to review their learned arguments, and to again enter upon a discussion of the question involved. It is sufficient to say that, after full consideration of their views, we are satisfied with the conclusion heretofore reached. It may be added, however, that counsel seem to treat the act of February 28, 1893, as an admission that the state is liable for interest on the coupons, and a legislative declaration that the state will pay it, and that, in our opinion, this view of that act is entirely unwarranted. Counsel say, in one of their briefs, that the act "was passed in part, at least, to pay this debt, and others like it." But there is no special reference in the act to the claim here sued on, nor is there any reference to any particular demand whatever. The act is a general one. The title is "An act to authorize suits against the state, and regulating the procedure therein." It is not its purpose to admit the validity of any asserted demand, and to require the controller to draw his warrant for its amount, which would be the natural form of an act for such a purpose. On the contrary, it relates to disputed claims,—claims "not allowed by the state board of examiners,"—and authorizes persons asserting such claims "to bring suits thereon against the state in any of the courts," etc., and expressly declares that "it shall be the duty of the attorney general to defend all such suits." The act is a mere waiver, within certain bounds, of the state's sovereign prerogative not to be sued. It says to one whose claim has been rejected by the board, "If you still think that you have a legal claim against me, I authorize you to sue me and I will abide by whatever the court shall decide." The act only put the appellant in the same position, with respect to his asserted claim, which he would have occupied at any time during the last 40 years, if during that time there had been an existing general act allowing the state to be sued; but, if such had been the case, while he could have sued for interest on the coupons, he could not have recovered, because, as we have seen, such interest does not constitute a cause of action against the state. It clearly was not the intent of the act to increase the liability of the state on the coupons in question; or, indeed, to give any new right, other than the right to sue, to any claimant whomsoever. There never was any question about the liability of the state to pay the face of the coupons, for that was expressly provided for by the act of 1851. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.



121 Cal 213

DORSEY et al. v. NEWCOMER et al. (Sac. 395.)

(Supreme Court of California. June 15, 1898.)

## MINING PARTNERSHIPS—ASSETS.

Property of a mining partnership existing only by reason of Civ. Code, § 2511, providing that a mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it actually engage in working the same, does not include mining ground not actually worked, and not used in connection with the ground worked, nor purchased by partnership funds.

Department 2. Appeal from superior court, Tuolumne county.

Action by Thomas B. Dorsey and others against J. T. Newcomer and others. From a judgment for plaintiffs, defendants appeal. Reversed.

J. B. Robinson, J. B. Curtin, and Byron Waters, for appellants. F. W. Street, for respondents.

TEMPLE, J. This action was brought to obtain an accounting in a mining partnership, a dissolution of the co-partnership, the payment of the partnership debts, and distribution of any surplus funds remaining. In the complaint it is alleged that on the 10th day of June, 1895, Caleb Dorsey and J. T. Newcomer were the owners of 10 designated mining claims, with quartz mill, tools, etc. Caleb Dorsey owned an undivided three-fourths interest, and Newcomer the remaining one-fourth. A conveyance from Caleb Dorsey to plaintiffs Thomas B. Dorsey, Edward W. Dorsey, and E. Snyder Dorsey of a part of his interest February 5, 1896, is averred, and also that Caleb Dorsey died April 21, 1896, and plaintiff E. L. Ewing is administratrix of his estate. It is then charged that debts were incurred in working, operating, and developing said mines and mining property. The findings of the court are generally in accordance with the complaint, but it is found as follows: "That plaintiffs or their grantors or predecessors and defendants have not, at any of the times in the complaint mentioned, engaged in working upon, or extracting any mineral from, any of the said mining claims, other than the Snell claim or mine, and all the mining work in which they joined or did during the time that they were co-owners in the said mines and mining claims was done upon said Snell mine and mining claim; that said Snell mine and mining claim is not adjacent to any of the other mines or mining claims described in the complaint, but is situated wholly separate from, and does not, on any side thereof touch upon or adjoin, any other of said mines or mining claims." Notwithstanding this absolute finding that the alleged partners were not at any time engaged in working any of the mining claims except the Snell claim, and that all the work done by them as co-part-

ners was done upon said claim, in finding 6 the court finds that Caleb Dorsey and J. T. Newcomer had done work upon all the claims; that Caleb Dorsey and all the parties plaintiff and defendant had been working the Snell quartz mine and the True Business mine. In finding 7 it appears that the partnership had forfeited all mines except the Snell and True Business and the Horse Shoe, which last is wholly included in the Snell. In the decree it is ordered that the Snell mine, the True Business mine, and a certain quartz mill be sold to pay the debts of the partnership.

The partnership, if one existed, was not formed by an actual agreement between the partners to form one, or to do business as partners. It exists by reason of the law as expressed in section 2511, Civ. Code: "A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it actually engage in working the same." It is not always easy to determine what constitutes the partnership property of a mining partnership. The statute provides that the mining ground owned and worked by partners in mining, whether purchased by the partnership or not, is partnership property. It does not follow that property other than the ground owned and worked may not also be partnership property. No doubt, other property acquired by the partnership for the purpose of aiding in working the mining claim, such as a mill or mill site, would also be property of the partnership. So other mining ground acquired for the purpose of working with the mining ground already being worked, and so situated that it can be worked with the original claim as parts of one mine, would be partnership property. And, generally, it may be admitted that property acquired by the partnership by the use of partnership funds, as distinguished from the individuals constituting the firm, may be so regarded. But the statute evidently distinguishes between ground owned or acquired for the purpose of working, and ground actually worked. It is only the last that in general can be regarded as partnership property, when not acquired by the partnership, or by the use of its funds. The findings as to the actual working of any claims other than the Snell are, at the best, contradictory. Such findings would not sustain a judgment which must be based upon the proposition that they were actually worked by the partnership. If it can be said that there is a finding to the effect that, if the Snell mine could be placed upon a paying basis, the parties intended then to develop the True Business, that is not enough. An agreement that upon the happening of some contingent, future event, they would work a mining claim, tends rather to show that they have never worked it. The finding as to the forfeiture of some of the mining claims is clearly outside of the issues in the



case. If the partnership was actually working those claims, no partner could assert title, to the prejudice of the creditors of the partnership. But there was no issue upon the subject. Neither in the complaint, nor in any other pleading, were facts constituting a forfeiture pleaded. No issue was tendered or made upon this subject. The plaintiffs do not contend that, under the evidence or findings, work in mining was done upon any of the claims which are declared to have been forfeited. They therefore did not belong to the partnership, and whether they had been forfeited or not was immaterial.

Inasmuch as the findings contradict each other in respects which are material in determining the relief which should be awarded, a new trial must be had. The judgment is reversed, and a new trial ordered.

We concur: HENSHAW, J.; McFARLAND, J.

121 Cal. 221

PEOPLE v. VIDAL. (Cr. 343.)

(Supreme Court of California. June 16, 1898.)

LARCENY—POSSESSION—EVIDENCE—OTHER CRIMES.

1. Accused was arrested in possession of a mare, driving her harnessed to a buggy, and leading another horse, two or three days after the theft, and at a place 30 miles from the pasture from which she was stolen. When arrested he spoke of the horses as his own, and claimed to be taking them to pasture, but denied his identity, claiming to be his brother, and had very recently shaved his mustache. His account of his whereabouts was inconsistent with the testimony of witnesses who had seen him. *Held*, that the evidence sufficiently corroborated the inculpatory possession of recently stolen property to warrant a submission to the jury.

2. A city marshal called by the state to prove the flight of accused was permitted to testify that he had been looking for accused for about two weeks before the crime in question was committed, and from other parts of his testimony it appeared that he wanted to and did arrest him for a different crime than that charged, and wholly disconnected from it. *Held*, that the admission of such testimony was error.

Department 2. Appeal from superior court, San Luis Obispo county.

Francisco Vidal was convicted of grand larceny, and from the judgment and from an order denying a new trial he appealed. Reversed.

Graves & Graves, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. The defendant, convicted of grand larceny, appeals from the judgment and from the order denying him a new trial.

It is first contended that, as matter of law, the evidence on behalf of the people is insufficient to sustain the verdict and judgment, for that defendant was convicted upon the uncorroborated circumstance that he was found in the possession of a mare recently stolen. *People v. Swinford*, 57 Cal. 86; *Same v. Velarde*, 59 Cal. 463. The tes-

timony tended to show that the stolen animal was the property of George Walker; that she, with other animals, was running in an inclosed pasture; that her owner had seen her on August 30th or 31st. On September 1st she was gone. The gate of the pasture was locked, but it could be opened by lifting the gate from its socket and swinging it outward. The defendant was arrested at Santa Margarita, at 10 o'clock of the night of September 2d. Santa Margarita is about 30 miles from the place where the mare was taken. Defendant was driving her harnessed to a buggy, and leading another horse. When arrested he spoke of the horses as his own, asked what was going to be done with "his rig," and declared that it had been his intention to take it to Mr. Boronda's ranch and put the horses in pasture. At the time of his arrest he denied his identity, and asserted that he was not Francisco Vidal, but his brother. He had very recently shaved his mustache. He explained his movements and whereabouts for the preceding two days, and his account was inconsistent with the evidence of witnesses who had seen him, and who were familiar with the localities which he declared he had visited. This is a fair résumé of the evidence offered on behalf of the people.

It is urged that these circumstances are not corroborative of the single inculpatory fact of the possession of recently stolen property. The defendant offered no evidence, so that the case stands upon these facts alone. Though the corroborating evidence is not very strong, still we think it sufficient to authorize the submission of the case to the jury.

The witness Cook, who aided in making the arrest of defendant, had testified that he first learned that the horses had been stolen upon September 1st. He was then asked: "How long prior to that time had you been looking for this man, if at all?" An objection was interposed to the question, and the district attorney stated that his object was to show the flight of the defendant. The court overruled the objection, and the witness answered: "I had been looking for him for about two weeks." A motion was then made to strike out the answer, and it was denied. As the witness had testified that he was looking for the defendant for two weeks before he knew of the larceny of the horse, it is manifest that he was in search of him for some reason entirely disconnected with the charge. The witness was the city marshal of San Luis Obispo. From other parts of his testimony, elicited upon direct examination under objection of defendant, it is made to appear that he was looking for defendant, with Sheriff Matthews of Salinas City, to arrest him upon another separate and distinct criminal charge, and in fact he was arrested upon that charge, and not for the larceny of the horse. Under pretense that the evidence to be ad-

duced was to show the flight of the defendant charged with the particular crime under investigation as evidence of his guilt, the court permitted testimony to go before the jury to the injury of defendant, involving a charge against him of a separate and distinct crime in no way connected with the one before the court. The injury worked to defendant by this is apparent, and because of it the judgment and order are reversed, and the cause remanded for a new trial.

We concur: McFARLAND, J.; TEMPLE, J.

121 Cal. 216

AVAKIAN et al. v. NOBLE et al. (Sac. 152.)  
(Supreme Court of California. June 15, 1898.)

APPEAL—OBJECTIONS NOT RAISED BELOW—TRESPASS OF AGENT—LIABILITY OF PRINCIPAL.

1. Where a case has been tried on the theory that vindictive damages might be recovered, an objection that the complaint does not warrant such damages cannot be made for the first time on appeal.

2. Defendant's agent seized by force a quantity of raisins belonging to plaintiff, under a mortgage which did not cover them. He represented one of his draymen to be an officer, and, during the loading, held and assaulted plaintiff. Defendant, with knowledge of these facts, kept the raisins. *Held* that, by accepting the benefits of the agent's acts, defendant ratified and adopted them, and was liable therefor.

In bank. Appeal from superior court, Fresno county.

Action by H. Avakian and others against George B. Noble and others. From a judgment in favor of plaintiffs, and an order denying a new trial, defendants appeal. Affirmed.

L. L. Cory, for appellants. Sayle & Caldwell, for respondents.

VAN FLEET, J. Action to recover damages for a trespass committed by defendants, in seizing and carrying away from plaintiff's possession a quantity of raisins. The substantive averments of the complaint are that while plaintiff was the owner and in possession, and entitled to possession, of a certain lot of raisins, of the value of \$300, the defendants "unlawfully, oppressively, and with force and arms," took and carried them away, to plaintiff's damage in the sum of \$2,300. The verdict was for plaintiff for the sum of \$525; and from a judgment entered thereon, and an order denying them a new trial, defendants appeal.

1. The first point made is that the verdict was in excess of what plaintiff was entitled to recover under his complaint; that, being for a sum above the value of the raisins, as alleged, it is manifest that the jury, in addition to the actual damage suffered, awarded something by way of smart money or punitive damages for the wrong committed, while the facts stated do not authorize an award of punitive or exemplary damages. It is

quite obvious from the averments of the complaint that the purpose of the pleader was to allege facts bringing the case within section 3294 of the Civil Code, which provides: "In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant." It may be conceded that, as against a special demurrer for uncertainty or ambiguity, the complaint would be bad, and that plaintiff would have been required to allege in a more specific manner the circumstances showing oppression or malice in the doing of the act complained of, in order to entitle him to damages in excess of the actual value of the property taken. *Mallory v. Thomas*, 98 Cal. 644, 33 Pac. 757; *Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56. But defendants interposed no such demurrer, and after verdict the intendments are in favor of the sufficiency of the pleading. The circumstances of the trespass are alleged in very general terms, it is true; but it appears from the record that the trial proceeded upon the theory that the complaint was sufficient to bring the case within the principles stated in the above provision of the Code, and that in accordance with that theory evidence was admitted, without objection, showing the circumstances of aggravation under which the property was taken. In such a case the objection now made comes too late, and the complaint must be held sufficient to sustain the judgment.

2. The circumstances of the taking, as the evidence tended to disclose, were, in substance, these: The defendants, who were in the raisin-packing business in the city of Fresno, held a chattel mortgage, in the name of one of the firm, upon the plaintiff's crop of raisins for the season of 1894. In November of that year they sent one Tripp to plaintiff's place, to find if he had delivered to them all the raisins included in their mortgage, which covered the product of plaintiff's own vines. Tripp found the lot of raisins in controversy packed in sweat boxes on plaintiff's premises, and at once demanded of the latter that he deliver them at defendants' warehouse. He was informed by plaintiff that the raisins were not covered by the mortgage, but were a lot plaintiff had purchased from one Sanborn. Tripp insisted upon the delivery of the grapes to defendants, and, upon plaintiff's refusal to comply with his demand, went to Fresno, procured a dray and two men, and, returning to plaintiff's place, directed his men to load the raisins and deliver them to defendants. Plaintiff undertook to prevent this, when Tripp, representing that one of his assistants was a deputy sheriff, and that they intended taking the raisins at all events, forcibly seized plaintiff and held him while the raisins were loaded and carted away to defendants' warehouse. In the



struggle, plaintiff was thrown down, and somewhat bruised and injured. Defendants knew on the day of the taking that Tripp had had trouble in getting the raisins, and that he was arrested for the assault on plaintiff, and subsequently paid a fine; and plaintiff on that day or the next went to defendants, and informed them of the acts committed by Tripp, and also that the raisins were not covered by the mortgage, and demanded their return. The demand was refused, and this action was brought. It is not denied that the manner of the taking was exceedingly stronghanded and outrageous, nor that, if defendants were responsible for the acts of Tripp, they would be liable in punitive damages; but defendants contend that the evidence is insufficient to sustain the implied finding of the jury that they authorized the malicious or violent acts of their agent in the premises. This contention is wholly untenable. It is not necessary to inquire whether the evidence was sufficient to justify an inference that the course pursued by Tripp was in pursuance of previous directions or authorization by defendants, since the evidence, while somewhat conflicting, clearly warranted the jury in finding that, with a full knowledge of all the circumstances attending the seizure of the raisins, they adopted and ratified the acts of Tripp, by retaining and accepting the fruits thereof. Ratification under such circumstances is equivalent to express precedent authority.

3. There is complaint of error in the giving and refusing of instructions, but we discover none. Reading the instructions as a whole, they fully and fairly presented the law to the jury, and left no room for misapprehension on the part of the latter. We find no error in the record, and the judgment and order are affirmed.

We concur: HARRISON, J.; HENSHAW, J.; TEMPLE, J.; McFARLAND, J.; GAROUTTE, J.

121 Cal. 186

FIREBAUGH v. BURBANK et al. (L. A. 329.)  
(Supreme Court of California. June 10, 1898.)

TRIAL—FINDINGS—PLEADING—AMENDMENT—EXECUTORS—COMPENSATION—CONTRACTS—VALIDITY—RIGHTS OF WIDOW.

1. If findings within the issues are sufficient to uphold the judgment, it will not be reversed because there are also findings outside of the issues.

2. Expense incurred by distributees, who are also executors, in defending a decree of distribution, cannot be made a charge against the estate.

3. The widow of a deceased executor has no claim against the estate for services rendered by the executor in the administration of the estate.

4. Under Code Civ. Proc. § 1618, making void all contracts between an heir and an executor for higher compensation than that allowed by law, an agreement by the heir to compensate the executor for extraordinary services, or for attorney's fees in addition to that fixed by the court, is void.

5. The waiver of the right to apply for an allowance will not validate an agreement by an heir to pay an executor a higher compensation than allowed by law.

6. Under Code Civ. Proc. § 470, providing that where the variance is not material the court may order an immediate amendment, the court may at the close of the trial order an amendment to conform to the proofs, where the opposite party is not misled or prejudiced thereby.

Department 1. Appeal from superior court, Los Angeles county.

Action by H. C. Firebaugh against Blanche M. Burbank and others. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

Henning & Bowen, for appellant. R. A. Redman and J. D. Pope, for respondents.

HARRISON, J. By the complaint herein the plaintiff seeks to recover upon a written contract made to him by the defendants November 4, 1895, for the payment of \$9,500, in installments of \$500, payable on the 10th day of each month thereafter. In the answer originally filed, the defendants pleaded want of consideration for the execution of the instrument, and that it was made as a donation or gift; and, by amendments thereto subsequently filed, they pleaded that it was obtained by the plaintiff by duress and fraud, and also that it was illegal, and therefore void. The cause was tried by the court, and findings of fact were made in accordance with the answer, and judgment rendered in favor of the defendants, from which the present appeal has been taken.

There was evidence before the court from which it was authorized to make its findings of fact, and the correctness of the judgment must depend upon the sufficiency of these findings to support the judgment. If the findings of fact that are within the issues presented by the pleadings are sufficient to uphold the judgment, it will not be set aside because there are also findings outside of these issues. These latter findings are to be disregarded, as immaterial. The question therefore presented is whether the findings of fact sustain the judgment.

The instrument upon which the action is brought was executed under the following circumstances: By the last will and testament of William Walkerly, deceased, the testator had made two of his nephews his executors, and had given to them the bulk of his estate in trust for certain purposes. Distribution of the estate was made in accordance with the terms of the will November 27, 1893; but upon the appeal therefrom by the widow the supreme court reversed the decree, and, under its opinion rendered upon the reversal (108 Cal. 627, 41 Pac. 772), she became entitled to the entire estate; and, after the remittitur had been filed in the superior court, the hearing for a distribution was set for November 4, 1895. By the reversal of the decree the testator's provision for the nephews had become nugatory, and



Bacon, one of the nephews and executors, having died pending the appeal, the testator's widow, who in the meantime had married Mr. Burbank, her co-defendant, formed a purpose to make some provision for the widow of Bacon, and also for the other nephew; and, this purpose having been brought to the knowledge of the plaintiff, he insisted that he was entitled to compensation—fixed by him at the sum of \$10,000—for certain services which he had rendered the estate, and that he should be included in the provision which she intended to make. Considerable negotiation was had upon the subject, the plaintiff also claiming that the surviving executor was entitled to compensation for extraordinary services in caring for the estate,—the entire amount claimed in their behalf being \$30,000; and Mrs. Burbank was led to believe that the distribution of the estate would be delayed unless she assented to his demand. She was therefore induced to consent that the sum of \$21,000, including the surrender to Barker, the surviving executor, of his note for \$1,000, be given for the use of the three. The plaintiff insisted that the money which she intended to give should be paid through him, and accordingly a check for the sum of \$10,500 was drawn by Barker upon the funds of the estate, then under his control, and given to the plaintiff, and the agreement set forth in the complaint was executed by the defendants. It is not claimed on this appeal that the plaintiff had any claim against the defendants, except such as he was entitled to assert by reason of his claim against the estate. The agreement of the defendants with the plaintiff stands in the same position, and is to be considered with the same effect, as if it had been made with the surviving executor. The plaintiff was but the agent of the executors, and the agreement with him was made in behalf of the surviving executor. He was their attorney, and had no claim against the estate of Walkerly, except for services rendered them in behalf of the estate, and to such an amount as should be allowed therefor by the court to the executors. The executors were not, however, authorized to create a charge against the estate for the purpose of defending the decree of distribution against the appeal therefrom. The estate had been distributed to them as trustees, and the defense of the decree was to be made by them as such distributees, and not as executors, and the expense incurred thereby could not be made a charge against the estate. *Marey's Estate*, 65 Cal. 287, 3 Pac. 896. After the death of her husband, Mrs. Bacon could have had no claim against the estate or against the defendants for services rendered in the administration of the estate.

In the decree of distribution of November 27, 1893, the court allowed the sum of \$3,500 for the services of the plaintiff to the executors up to the date of that decree, and

refused to make to the executors any allowance for extraordinary services in the administration of the estate. The appeal by the widow from this decree suspended its execution, and until the determination of that appeal the executors were not only precluded from distributing the estate in accordance with its terms, but were required to retain the property in their care and custody. Upon the reversal of the decree, and until a decree of distribution should be rendered in accordance with the opinion of the supreme court, their relation to the estate was the same as it was immediately prior to its entry, in November, 1893. For whatever services they might require the aid of an attorney during this period, the court was to allow them in the settlement of any supplemental account they might present; and they were also entitled to commissions upon any additional property of the estate which might during this interval come into their custody, and be accounted for by them. If they should be required to render any extraordinary services during this time, the court could, upon their making claim therefor, allow them such sum as it might deem just and reasonable. A mere change of the character of the property, such as the collection of outstanding claims that had been distributed in kind, or, as in the present case, the collection of policies of insurance for property destroyed by fire, would not entitle them to commissions upon the amounts so collected, since the property of the estate would thereby be only changed in form, but not increased in value, and no additional estate would be accounted for. But, before the court could make any allowance from the estate, the surviving executor was required to present his account, and to show to the satisfaction of the court that it was necessary to employ an attorney in the suits or proceedings for which the expenses of his services are claimed, and that the amount of such fees is reasonable, and was a necessary expense in the care and management of the estate. *Code Civ. Proc.* § 1616. The executor is not entitled to any "further allowance" in addition to the commissions fixed by statute unless he shall show that he has rendered some extraordinary services, and shall make a claim therefor, and it shall appear to the court that such claim is just and reasonable. *Delaney's Estate*, 110 Cal. 563, 42 Pac. 981. He is the officer of the court who is intrusted with the custody of the estate for the purpose of administration pending its transmission from the ancestor to the heir, and his relation to the court, as well as to the heir, is of a fiduciary nature; and it is the policy of the law that the court shall have a supervisory control of all his acts and transactions, and of all claims which he may have against the estate, and that he shall not directly or indirectly make any profit out of the estate, or appropriate to himself any of its property without the

sanction of the court. The provision in section 1618, Code Civ. Proc., making void all contracts for higher compensation between an heir and an executor, is not limited to contracts made directly between the executor and the heir, but includes all contracts or agreements by which the executor will receive, either directly or indirectly, any greater compensation than has been fixed by the statute, or any compensation other than such as may be previously ascertained and determined by the court, and applies to every contract which has for one of its objects the payment of such greater compensation, as well as to those which are made solely for such payment. A contract made in violation of this provision is against the policy of the law, and is therefore unlawful; and, when the object of a contract is unlawful in part, the entire contract is void, unless the lawful portion thereof is severable from that which is unlawful. An agreement by the heir to compensate the executor for extraordinary services, or for the expenses incurred in employing attorneys other than such as may have been previously fixed by the court, is as fully within the prohibition of the statute as an agreement to give him a greater rate of commission than is fixed by the statute. The relation between them is that of a trustee and his beneficiary, and the law presumes that such an agreement by the heir has been obtained through the undue influence of the executor, and will not enforce it against the heir.

The agreement upon which the present action is brought is a part of the transaction between Mrs. Burbank, the heir to the estate of Walkerly, and Barker, the surviving executor of his will, for the payment of the sum of \$21,000 for commissions and extra services claimed by the executor for the administration of the estate subsequent to November 27, 1893, of which the executor was to receive \$8,000 for himself and \$8,000 for the plaintiff, in compensation for services rendered as his attorney in the management of the estate. There is no mode of ascertaining by the terms of this contract what portion thereof was intended for commissions, or the amount which the executor was entitled to receive as commissions. The account which was filed by him upon the hearing of the distribution was settled and allowed by the court, and no claim for commissions was included therein. No application for an allowance for extraordinary services was made to the court, nor any claim for the expense of attorneys' fees; and, as we have seen above, in the absence of any allowance therefor by the court the executor was not entitled to any compensation for such services or expenses, and an agreement by the heir to pay him therefor is void. The claim by the plaintiff that the waiver on the part of the executor to apply for such allowance was a sufficient consideration for the agreement cannot be sustained. If the object of

a contract is unlawful, the contract is void, irrespective of the consideration upon which it is made. Even if it be conceded that such waiver would uphold an agreement to pay the legal amount of commissions to which the executor would be entitled, the proposition is inapplicable to the present case. Barker testified at the trial that the object of the agreement set forth in the complaint was to compensate him for commissions and extra services; and as the amount of the estate which he had received subsequent to the former decree, aside from the policies of insurance, was less than \$50,000, the money which was received by him at the time the instrument was executed was largely in excess of the compensation fixed by statute.

During the trial, evidence was offered and received on behalf of defendants, to which the plaintiff objected on the ground that it was immaterial and irrelevant to any issue before the court; and at the close of the trial, and after argument by counsel, the court announced that it would direct findings and judgment in favor of the defendants, but stated that it would be necessary to amend the answer in order that it might conform to the proofs. An amendment to their answer was accordingly filed by the defendants, and thereafter the plaintiff made a motion to reopen the case for the purpose of receiving additional evidence in his behalf under the issues raised thereby, and also demurred to the amendment upon the ground that it stated no defense to his cause of action. After argument thereon the court denied the motion, and overruled the demurrer. The defendants had the right to present by their answer any matter which would constitute a defense to the cause of action set forth in the complaint, and the court was authorized to permit them to plead such matter by amending their answer, even after the trial had commenced. If, without such amendment, evidence was received at the trial which did not constitute a material variance, the court could either find the fact in accordance with the evidence, or it could direct the pleadings to be amended to conform thereto. Code Civ. Proc. § 470. When this evidence was offered, the plaintiff did not claim that he was misled by its introduction, or in any way prevented from maintaining his cause of action upon its merits. Nor did he upon his motion to reopen the cause, or afterwards upon his motion for a new trial, make it appear to the court that he was prejudiced thereby, or in any way prevented from introducing evidence, or that he was able to present any evidence that would tend to overcome this testimony. The evidence thus introduced, and the findings made thereon, are therefore to be regarded as if the defendants had amended their answer presenting these issues prior to entering upon the trial, or even prior to the introduction of any testimony. A similar observation is to be made upon the introduction of certain depositions



which were taken before the first amendment to the answer was filed. If the matter contained in these depositions was relevant to the issues before the court when the cause was submitted for decision, it was properly considered by the court in making its decision. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

121 Cal. 194

SPAULDING v. HOWARD et al. (No. 12,497.)

(Supreme Court of California. June 11, 1898.)

MORTGAGES—FORECLOSURE—LIMITATIONS—FINDINGS—OFFICERS—PRESUMPTIONS—APPEAL—REVIEW.

1. Under Code Civ. Proc. § 726, providing that in foreclosure suits a decree may direct a sale of the property by the sheriff, etc., the proceedings to sell are analogous to, but not necessarily the same as, in sales on execution, under sections 682 and 684, requiring that the writ of execution shall bear the seal of the court, and be subscribed by the clerk; and hence the omission of the clerk's signature from the order of sale in foreclosure is not necessarily fatal to its validity.

2. Under Code Civ. Proc. § 1963, subd. 15, establishing a rebuttal presumption that an official duty was regularly performed, a finding that "an order of sale was duly issued" raises a presumption that, if the signature of the clerk of the court was essential to its validity, it had been subscribed.

3. The presumption, under Code Civ. Proc. § 1963, subd. 15, that an official duty has been regularly performed, must be rebutted, if at all, on trial.

4. Where the assignee of a recorded mortgage began a foreclosure suit, and omitted to make the mortgagees in a second recorded mortgage parties, and, eight years after the accrual of his right of action against them, made such second mortgagees parties, they having successfully foreclosed the original mortgagor's equity of redemption, free of the first mortgage, without knowledge, actual or constructive, of the assignment, it was proper to find as a fact, and not as a conclusion of law, that by Code Civ. Proc. §§ 312, 335, 337, barring mortgages in four years, whatever interest said assignee had in the premises was barred.

5. In the absence of any record showing that there were double findings, the presumption is that the court based the judgment on those appearing in the judgment roll alone, ignoring any others.

6. A court may change or modify findings before judgment without ordering a new trial.

7. Where there are two sets of findings made at different times before judgment, and either or both will support the judgment, the changes in the original findings are not error.

Commissioners' decision. Department 2. Appeal from superior court, Lake county.

Action by John Spaulding against J. W. Howard and others. There was a judgment for plaintiff against defendant Howard, and a judgment in favor of the other defendants, and plaintiff appealed. Affirmed.

Mr. Nichols and Fox & Kellogg, for appellant. F. E. Baker, for respondents.

CHIPMAN, C. Action to foreclose a mortgage brought originally by Alvinza Hayward

(for whom plaintiff John Spaulding, as assignee of Hayward, was substituted) against J. W. Howard, one of the defendants, mortgagor. Succinctly stated, the facts are: That said J. W. Howard, on August 8, 1872, executed his note for \$405.48 to one Joseph Hewitt, payable August 8, 1874, and secured by mortgage on lands in Lake county. The note and mortgage were assigned by Hewitt to Hayward, November 4, 1875, long after maturity. The assignment was in writing, and was acknowledged, but was not recorded. On December 9, 1876, Howard executed his note to defendants Ely and Griffin for \$1,700, secured by mortgage on the same and other lands. This note was due 12 months after date. Howard's wife joined in the mortgage, which was recorded December 29, 1876. On February 12, 1878, Ely and Griffin commenced action to foreclose their mortgage in the late district court of the Sixth district, in and for Yolo county. In their action Howard and his wife and Hewitt (Hayward's assignor) were made defendants. Summons was duly issued and served; and on July 18, 1878, the court entered its decree of foreclosure, finding that the apparent lien of Hewitt had been discharged, and was subject to that of Ely and Griffin. A copy of the decree was duly docketed and recorded in Lake county on June 1, 1880. On April 8, 1882, an order of sale was duly issued, and the land sold under the foreclosure decree; and Ely and Griffin became the purchasers, and, no redemption having been made, the sheriff's deed was duly issued to them December 1, 1882. On August 7, 1878, Hayward, assignee of Hewitt, brought this foreclosure suit against the mortgagor, Howard, alone, in the late district court of the Seventh judicial district in and for Lake county, and on April 1, 1879, filed his pendens. Summons was published on the original complaint, and decree entered April 9, 1879, foreclosing the mortgage; and the land was sold pursuant to the decree, March 20, 1880, to one William Kohl. On July 9, 1884, without vacating the judgment, plaintiff Hayward caused an alias summons to issue against Howard; and on July 14, 1884, he procured an order vacating the decree, and permitting the action to be prosecuted, as though no decree had been entered. The alleged reason for this proceeding was that the decree was inadvertently entered, and that the court had not obtained jurisdiction of defendant Howard. This alias summons was published without affidavit or order for service by publication other than the ones first made and filed. On May 5, 1884, Hayward obtained an order allowing him to file a supplemental complaint, and to make Ely and Griffin parties defendant, who appeared and answered Plaintiff Spaulding, on September 30, 1880, purchased whatever interest Kohl took at the sale to him; and, by stipulation, Spaulding was substituted for Hayward as plaintiff, and entitled to whatever rights Hay-



ward might be found to have. The court gave personal judgment against Howard for the amount due on his note given to Hewitt, and, as to the other defendants, that plaintiff take nothing by his action. Plaintiff appeals on the judgment roll alone.

It is contended that the findings do not sustain the decree:

(a) Because no valid order of sale was issued under the foreclosure of Ely and Griffin, it being claimed that the writ must be not only issued under the seal of the court, but also subscribed by the clerk; citing Code Civ. Proc. §§ 682, 684. The findings are that the court ordered the land included in the Ely and Griffin mortgage to be sold by the sheriff of Lake county, in which county it was found that their decree had been duly docketed and recorded; that "an order of sale was duly issued out of the superior court of Yolo county, under seal of said court, upon said judgment and decree, and reciting the same, directed to the sheriff of said Lake county, commanding him," etc. The sheriff, under the Code of Civil Procedure, proceeds with the sale by virtue of the decree and such direction as the court may give. Section 726. The proceeding follows by analogy sales upon execution, but not necessarily so. The power to sell comes from the statute and the decree. However, the court found that an order of sale was duly issued upon the decree; and, if the law required it to be certified or attested by the clerk, it will be presumed that this was done. Code Civ. Proc. § 1963, subd. 15. If plaintiff desired to dispute this presumption when the defendants offered their decree in evidence, he should then have made the objection, and brought the question here by bill of exceptions or statement.

(b) The point is made that the conclusions of law and fact must be separately stated; that the conclusion in regard to the statute of limitations is in the findings of fact; that there is nothing in the conclusions of law to the effect that the action is barred; and this being a conclusion of law, and not of fact, plaintiff should have had a decree against all the defendants,—citing *Caulfield v. Sanders*, 17 Cal. 571; *Schroeder v. Jahns*, 27 Cal. 278, 279; *Paulson v. Nunan*, 64 Cal. 290, 30 Pac. 845. Defendants Ely and Griffin pleaded the statute of limitations. Plaintiff's right of action against Ely and Griffin accrued to his assignor December 29, 1876, when the second mortgage was recorded, as his note was then long past due. But defendants Ely and Griffin were not made parties to this action until December 9, 1884, eight years after plaintiff's cause of action accrued against them. Of course, Ely's and Griffin's rights were not affected by the assignment of Hewitt to Hayward, of which they had no knowl-

edge, actual or constructive. The commencement of the action by Hayward did not stop the running of the statute in favor of Ely and Griffin. *Jeffers v. Cook*, 58 Cal. 150. In the foreclosure by Ely and Griffin they made all persons parties defendant in whose favor any interest appeared of record, and this was all that was required of them. Code Civ. Proc. § 726. Hewitt's interest in the land was thus extinguished, and he was estopped. *Hutchings v. Ebeler*, 46 Cal. 559. Hayward was in no better position with his unrecorded assignment (Code Civ. Proc. § 726); and Spaulding took only Hayward's rights. The court found that "any cause of action which Hayward, or plaintiff Spaulding, as his successor in interest herein, ever had against said Ely and Griffin, or against either of them, is barred by the provisions of sections 312, 335, and 337 of the Code of Civil Procedure." The court properly, we think, found as a fact, and not as a conclusion of law, that the action was barred.

(c) It is complained that the decree was rendered on findings made May 9, 1887, but that other findings were made February 8, 1886, and were never set aside or any motion made for a new trial, and this is alleged to be error; citing *Prince v. Lynch*, 38 Cal. 528. Appellant gives no explanation, by bill of exceptions or otherwise, how there came to be two sets of findings; nor does he point out wherein his rights were injuriously affected by the second set of findings. These earlier findings do not appear as a part of the judgment roll, and the judgment does not in any wise rest upon them. We do not see how we can take any notice of them, even if they would have the effect to change the judgment, which they would not, as they are substantially the same as the later ones. In the absence of some proper record showing that there were double findings, we must presume that the court based its judgment alone on the findings in the judgment roll, and that the first findings were properly ignored by the court. *Prince v. Lynch*, *supra*, is not in point, for there the court changed the findings after judgment. But the court may change or modify findings before judgment without ordering a new trial. It was held in *Smith v. Taylor*, 82 Cal. 533, 23 Pac. 217, that this may be done; and where there are two sets of findings, and either or both will support the judgment, changes in the findings before judgment are not error. See, also, *Hayes v. Wetherbee*, 60 Cal. 396. The judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(121 Cal. 167)

**STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS v. GLENS FALLS INS. CO. OF NEW YORK. (Sac. 262.)**

(Supreme Court of California. June 10, 1898.)

**PLEADING—COMPLAINT—DEMURRER—VARIANCE—WAIVER—APPEAL—REVIEW—HARMLESS ERROR—INSURANCE—ADJUSTMENT—AGENCY—STATUTE OF FRAUDS—EVIDENCE.**

1. Under Code Civ. Proc. § 430, subd. 7, providing that a complaint may be demurred to for ambiguity, unintelligibility, or uncertainty, a demurrer will not lie on the ground that a complaint contains contradictory counts.

2. A cause of action arising out of one transaction may be separately stated in counts inconsistent with each other.

3. An objection that the reply fails to deny material allegations of the answer cannot be made for the first time on appeal.

4. Under Code Civ. Proc. §§ 469-471, providing that no variance is material unless the adverse party is prejudiced thereby, an allegation in a complaint that defendant agreed to pay a loss incurred by fire on a certain date is supported by a finding that defendant agreed to pay the loss in 60 days after the filing of proofs of loss, and that they were filed 60 days preceding the date alleged as the date of payment.

5. An objection that there is a fatal variance between the complaint and the proof cannot be made for the first time after judgment.

6. The parties to an insurance policy in suit appointed appraisers to adjust the loss on the buildings, and they appraised it at a fixed sum. Other appraisers were appointed to adjust the loss on the contents, who had several meetings with agents of the insurance companies interested. After one meeting, the chairman stated to the arbitrators that the companies (defendant being one of them, and represented at the meeting) had agreed to a certain sum to be paid for the total loss on buildings and contents, and that they should make their award accordingly. One of the arbitrators testified to having informed the agents just before this that he had authority to settle the loss. Insurers' counsel was present, and inquired minutely about the loss. The arbitrators then made out an award for the sum so agreed on, choosing a third person umpire, who signed the award with them. The other arbitrator testified that the chairman had informed them their proposition was accepted, and that they should make out proof of loss and get their money. *Held*, that the evidence supported a finding that defendant agreed to pay its proportionate share of the award.

7. The record of a former trial will not be examined on the question whether the findings made after a new trial are supported by the evidence.

8. Under Civ. Code, § 1698, providing that a contract in writing can be altered only by an agreement in writing or an executed oral contract, an agreement to settle a loss under an insurance policy, though founded on the policy, is a new agreement, and need not be in writing.

9. In an action on an agreement by insurer to pay a specified sum in settlement of a loss, it appeared that plaintiff's bookkeeper had refused to show the insurance companies the books containing records of the destroyed property. An employé of plaintiff testified that on the succeeding day they were shown the books by him and the bookkeeper. Another witness testified that, after this, one of defendant's agents had in his pocket a paper belonging to plaintiff, showing the value of a portion of the destroyed property, and stated that he had received it from plaintiff. *Held*, that a finding that plaintiff had not concealed the books and records from defendant was sustained.

10. The agent of other insurance companies who acts for defendant company in settling a loss, signing the agreement for arbitration, and the adjuster's report, and receiving proofs of loss on behalf of all interested companies, is such an agent of defendant as to render his declarations admissible against it.

11. Where a witness in an action on an insurance policy testified that certain machines burned were worthless, it is harmless error not to allow him to state his reasons for his opinion.

12. In an action for an amount agreed to be paid by insurer for burned machinery, evidence that other machines of the same pattern are worthless is inadmissible to prove that plaintiff misrepresented the value of the burned machinery to defendant's adjusters.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by the Stockton Combined Harvester & Agricultural Works against the Glens Falls Insurance Company of New York. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Van Ness & Redman, for appellant. Nicoll & Orr and J. C. Campbell, for respondent.

**CHIPMAN, C.** This is an action to recover for insurance on the property of plaintiff destroyed by fire. The cause was tried by the court without a jury, and plaintiff had judgment, from which, and from the order denying motion for a new trial, this appeal is prosecuted upon bill of exceptions. The case was once before tried, and appealed to this court, and is reported in 98 Cal. 557, 33 Pac. 633.

Submitted upon the brief in this case, upon the same record, are also two other cases, to wit, Stockton Combined Harvester & Agricultural Works v. Hartford Fire Ins. Co. (No. 261) 53 Pac. 1129, and Same Plaintiff v. Hamburg-Magdeburg Fire Ins. Co. (No. 259) Id. Upon substantially the same record is one other case, to wit, Stockton Combined Harvester & Agricultural Works v. American Fire Ins. Co. (No. 260) 53 Pac. 573, but in which one point is urged by appellant not open to it in the other cases. The total insurance upon the property was \$127,000. The aggregate amount claimed by plaintiff from all the defendants is \$90,000. The pleadings are verified. The complaint contains three counts. The third was stricken out on motion. The first count alleges that plaintiff presented its proofs of loss immediately after the fire, which occurred August 19, 1888, in accordance with the terms of the policies, but that plaintiff and the insurers were unable to agree upon the amount of the loss, and thereupon all parties submitted the question of loss to the arbitrament of certain arbitrators, as the policies provided might be done, viz. to James Brown and A. A. Snyder on the building, and to Fred Arnold and Alex. Neilson on all the other property; that said Brown and Snyder, after investigation,



reported to the parties that the loss submitted to them was \$22,360 on the building; that said decision and award has been accepted by the parties, and has never been questioned or disapproved; that the said Arnold and Neilson, being unable to agree as to the amount of the loss submitted to them, thereupon, under the terms of the submission, selected one A. A. Snyder as an umpire; that these three, after due investigation, decided and reported to the parties that the loss submitted to them was \$67,640 in the aggregate; that thereupon the insurers agreed with plaintiff, "as an adjustment of the entire of its said loss and damage, to pay to said plaintiff the sum of ninety thousand dollars," and that the loss was adjusted at that sum, of which the proportionate share of this defendant was \$1,859.25, which defendant promised to pay; that the value of the entire insured property destroyed was greatly in excess of the said awards. The second count differs from the first only in alleging that, upon the disagreement of the arbitrators Arnold and Neilson, defendant and the other insurers "instructed and directed the said arbitrators Arnold and Neilson, as aforesaid, to appoint and select one A. A. Snyder as an umpire to ascertain and agree upon the amount of the said loss and damage, \* \* \* and to adjust the same, and were instructed and directed \* \* \* to fix and determine the said loss and damage at such sum that the same, in addition to the said loss and damage ascertained, fixed, and determined by said arbitrators, Brown and Snyder, as aforesaid, should equal the sum of ninety thousand dollars upon the entire of the said property insured by all of plaintiff's insurers." The complaint then sets forth the several sums apportioned against the different properties insured, and the acceptance and acquiescence of the insurers in the awards thus made, and their agreement to pay, etc.

1. Appellant urges its demurrer to the complaint on the ground of ambiguity and uncertainty, basing its objection upon the inconsistency and contradiction in the two counts in this: that in one it is claimed that the awards were the result of due investigation and decision, while in the other the awards were alleged to be the result of consent and agreement without investigation,—citing *Bell v. Brown*, 22 Cal. 671. There is no merit in this point. It is not claimed that there is ambiguity or uncertainty in either count considered alone, but the claim is that the first count is rendered ambiguous and uncertain by reason of allegations found in the second count, and vice versa. We do not think that a demurrer, under section 430, subd. 7, Code Civ. Proc., to a particular count on either of the grounds therein mentioned, to wit, ambiguity, unintelligibility, or uncertainty, can be aided by reference to another count or separate cause of action found in the complaint. There is no sug-

gestion that the causes of action separately stated in the two counts may not be united, nor is it suggested that either count fails to state a cause of action. Besides, we see no reason why a cause of action arising out of the same transaction may not be separately stated in different ways, even though they are inconsistent with each other. The defendant is permitted to plead inconsistent defenses (Id. § 441); and there can be no good reason why the same rule should not apply to different counts of a complaint as well as to the answer.

2. Appellant claims that judgment should have been ordered for defendant upon the pleadings. Defendant answered in part by cross complaint, and the claim now is that certain of its allegations were admitted by a failure to deny them. We nowhere can find in the transcript and our attention is not called to any motion for judgment upon the pleadings at the trial. No objection was made to the introduction of evidence on such ground. Defendant introduced evidence in support of the allegations now claimed to be admitted by the pleadings. It nowhere appears that the attention of the trial court was called to these alleged admissions, and it appears that both parties tried the case as if all the allegations of the cross complaint were denied. We do not think appellant can be heard here for the first time upon the point raised. *Klopper v. Levy*, 98 Cal. 525, 33 Pac. 444; *Loftus v. Fischer*, 106 Cal. 616, 39 Pac. 1064.

3. The point is urged by appellant that there is a fatal variance between the promise as alleged and as found. The complaint was filed after December 31, 1888. It alleged that the defendant "promised and agreed to pay to plaintiff herein said sum of eighteen hundred and fifty-nine and  $\frac{25}{100}$  dollars on or before December 31, 1888, as and for its proportionate amount of said loss." The promise as found by the court was as follows: "That said defendant, at the time of the settlement and adjustment aforesaid, promised to pay to said plaintiff herein, and said plaintiff promised and agreed to accept from it, the said sum of \$1,859.25 in full settlement of and for defendant's proportionate amount of said loss, such payment to be made to plaintiff within sixty days from the time when formal proofs of loss, prepared in accordance with said settlement and adjustment, should be received by defendant. That such formal proofs of loss were prepared by said plaintiff, and presented to said defendant on the 31st day of October, 1888." The position of appellant is that the promise alleged is to pay absolutely and unconditionally within a specified time, while the promise found is to pay within a specified time after the happening of another event, to wit, the receipt by defendant of proofs of loss, to be prepared in accordance with the alleged settle-



ment; that in the one case the promise would certainly mature at the expiration of the 31st day of December, 1888; in the other it might not mature until after an indefinite period, and possibly never. Appellant cites numerous cases from our Reports where variances have been held to be fatal. The Code of Civil Procedure (sections 469-471) has prescribed the rules as to variances; and section 475 directs the court to disregard any error or defect in the pleadings and proceedings which does not affect the substantial rights of the parties, and it forbids the reversal of a judgment by reason of such an error. The complaint alleged a settlement and a promise to pay at a definite time, to wit, December 31, 1888. The finding is to the like effect, with the addition that it stated a condition, to wit, that certain proofs of loss were to be prepared and served, and it was found that they were so served October 31, 1888. In the point as to time when the loss was payable, the two dates concur. The pleading and findings concur in the essential fact that a settlement was made, and that there was an agreement to pay. We do not think the omission to plead the fact that payment was to follow proofs was such a material element as could in any way have misled defendant or deprived it of full preparation to make its defense. The pleading and the finding both identify the transaction which is the basis of the action. Furthermore, the objection comes too late. No objection was made to the evidence, and no motion was made for a nonsuit on this ground at the trial, and plaintiff was deprived of an opportunity to amend. The complaint was sufficient to support the judgment as rendered, and so were the findings. There was much evidence introduced by both parties relating to the proofs made of the loss. The rule was stated in this court as early as *Marshall v. Ferguson*, 23 Cal. 66, and has been repeated many times since, and as late as *Horn v. Hamilton*, 89 Cal. 276, 26 Pac. 833. See *Davis v. Baugh*, 59 Cal. 568; *Eversdon v. Mayhew*, 85 Cal. 1, 21 Pac. 431, and 24 Pac. 382; *Yik Hon v. Spring Valley Waterworks*, 65 Cal. 619, 4 Pac. 666, and cases there cited; *Pom. Rem.* § 555.

4. It is claimed that the evidence does not sustain either the promise pleaded or the promise found; and it is claimed that the promise which plaintiff was bound to prove was a several express promise upon the part of defendant. The allegations of the complaint, we think, show, as do also the findings, that the defendant and the other insurers agreed to an adjustment of the entire loss at the sum of \$90,000, which they agreed to pay plaintiff in full settlement of the damage, and plaintiff agreed to accept the same, and that, as part of the agreement, each company or insurer was to pay its proportionate amount of this agreed to-

tal sum. The evidence is quite voluminous, and is contained in volumes 2 and 3 of the transcript, comprising over 2,500 folios. Obviously, we can give but a brief outline of the testimony. It appeared that, shortly after the fire, numerous adjusters representing the different insurers went to Stockton to adjust the loss. Plaintiff presented its claim, representing the loss to be \$142,037, and demanded payment of the full insurance of \$127,000. This sum was deemed excessive by the insurers, whereupon Brown and Snyder were appointed to appraise, and did appraise, the loss on the buildings; and, as to the propriety and regularity of this appraisal, there seems to be no controversy. Arnold, for plaintiff, and Neilson, for the insurers, were appointed, together with such umpire as they might agree upon, to appraise the other insured property, which consisted of combined harvesters, complete and incomplete, and of various patterns, machinery of all kinds used in a factory for the construction of farm implements and harvesters, engines, boilers, etc. These latter arbitrators being unable to agree upon an award while at Stockton, or to agree upon an umpire, they came to San Francisco, and on October 18, 1888, had an interview, at a joint meeting, with the agents of all the insurers, the object being to endeavor to arrive at a basis of settlement. At this meeting of the agents, Mr. H. R. Mann, of the firm of Mann & Wilson, was made chairman. His firm represented a large number of the insurance companies (of which there were about 60 interested). At the first meeting, Arnold and Neilson were both called before these assembled agents. Their estimates of the loss were presented and found not far apart,—Arnold's something over \$90,000, and Neilson's about \$2,000 under. The meeting adjourned the first day without results. At the meeting next day the agents reached a conclusion, and the chairman was directed to state it to Arnold, who was in waiting. He came out of the meeting, and his testimony was: "I stated to Mr. Arnold and Mr. Neilson at that time that the companies had agreed to a certain award in the neighborhood of ninety thousand dollars,—I forget the exact figures,—and for them to go ahead and make up their award. \* \* \* When I say they were authorized to make an award for a sum in the neighborhood of ninety thousand dollars, I mean that it was understood that was to be the award for the entire loss; every item under the policies, \* \* \* including the previous award on the building. \* \* \* I meant that the companies had concluded to accept the figures as an award for the arbitrators to act upon. \* \* \* The figures were named by Mr. Arnold, and I think, if I am not mistaken, that they were agreed to by Mr. Neilson, but they were named by Mr. Arnold particularly." Neilson testified as follows: "Mr.

Mann came out and told us: 'The last proposition is accepted,—the ninety thousand dollar proposition. Go on, make up the papers. Go on, and make up your papers.' He further said that "nothing was said by Mr. Mann at that time in regard to making up proofs of loss." Arnold testified that, when Mann came out of the meeting, "he said that the agony is over; to make proofs of loss, and we would get our money, or the company would get their money." He further testified that, when he was before the agents, he was detained there two hours, answering questions as to the loss and the claim of plaintiff; that he informed the agents he had authority to settle the award or loss; that the companies' counsel was present, and asked many questions; that Mr. Mann, who represented \$15,000 or \$20,000 of the loss, said, as soon as the proofs of loss were made out, they were ready to pay. Shortly after this last meeting,—that evening, or the next morning, according to Arnold's testimony,—he and Neilson went to the office of A. J. Wetzelar, who was one of the adjusters, to make out the awards or proofs of loss agreeably to the settlement. Mr. Neilson testified that they went to Wetzelar's office that afternoon, where he, the witness, had a desk, and completed their work in about two hours. He said: "In Mr. Wetzelar's office we went to work, and the first thing that struck us again here was the third-man question; and we looked upon it that we had to appoint a third man before we could fill up those papers." Snyder, who had a desk in the office, and was in some employment by the companies, and had acted with Brown in appraising the building, was agreed upon as the third man or umpire. "He agreed with us that whatever figures that Mr. Arnold and I made in making up this amount of ninety thousand dollars, that he would sign the papers, not knowing anything about it himself; but he would agree to sign whatever papers we asked him to do,—whatever figures. \* \* \*

We must have explained to Mr. Snyder about how the matter was settled by compromise. My recollection is we did." The witness then explained in detail how they proceeded to make the awards. Among other things, he said: "It didn't make any particular difference whether we put more or less on any particular quality of machines. We wanted simply to arrive at the ninety thousand dollars." He was asked on cross-examination if he had not made affidavit that he had been in the employ of the companies for 12 years, and that the companies had agreed to a full settlement and adjustment of the loss, and if that was correct. He answered: "Well, it might have been. I might have signed that; and to my mind, in a certain way, it was correct, because that was the way we looked at it." This affidavit was made by witness at the instance of one of

the companies in a series of actions brought by them to restrain the plaintiff from enforcing the awards made. It showed the award to be as follows:

On stock for.....	\$60,240
Fixed and movable machines.....	6,700
Engine and boiler .....	700
Total .....	\$67,640
Which said total when added to the award on building.....	22,360
Aggregated said sum of.....	\$90,000

"Q. It was your understanding that the entire matter was settled for ninety thousand dollars; that they agreed to pay, and the company had agreed to accept, the ninety thousand dollars? A. That was the general understanding by myself and Mr. Arnold, and everybody else that had anything to do with it." He further testified that the proposition to settle, its acceptance, and the making of the papers were all one transaction to carry out the settlement. The written agreement for submission to arbitrators with the detailed awards under it occupy about 100 folios. The agreement is dated August 30, 1888, and the schedule of loss and damage bears date October 18, 1888.

On December 31, 1888, defendant commenced an action by verified complaint to restrain the plaintiff from commencing a suit to enforce its claim against defendant. Similar action was taken by all the companies on the same day. In this complaint defendant averred, among other things, that "on October 18, 1888, the plaintiff and the other insurers covenanted and agreed with plaintiff, by way of compromise and as an adjustment of said loss (referring to the loss by fire) and damage, to pay to said defendant the sum of ninety thousand dollars; and thereupon the loss was adjusted at ninety thousand dollars, and plaintiff and said other insurers agreed to pay, and defendant agreed to accept, the said sum of ninety thousand dollars in full settlement of said loss, and the proportionate amount to be paid by plaintiff to defendant, pursuant to said settlement and adjustment, was and is the sum of \$1,859.25." Similar statements were made by each company in its pleadings. These suits were brought because of the alleged discovery of fraud and concealment on the part of the assured of facts relating to the value of the insured property by which the insurers had been misled in making the agreement and awards above set out. It appeared in evidence that plaintiff executed for the several companies proofs of loss on October 29, 1888, at Stockton, which conformed to the adjustment made by the arbitrators, and the proportionate amount due from each appeared in the separate proofs relating to each company. Attached to the proofs of loss is a report made to the companies by eight adjusters representing all the companies. These proofs reached the companies October 31, 1888, as found by the court; and, by the terms of the policies, the claims were not due or payable until 60



days after proofs of loss were furnished. It appears also from affidavits made by the plaintiff company (defendant here) in its injunction suit referred to, on motion for change of venue by defendant therein, that the "said companies consulted together and agreed with the said Arnold, acting for and in the interest of defendant [plaintiff here], to pay the defendant the said sum of ninety thousand dollars, and the said defendant agreed to accept said sum in full settlement of the loss in the complaint mentioned; that pursuant to said agreement, in said city and county, the papers in the matter of said settlement were drawn and executed, and the adjustment and promise to pay as aforesaid were made." It was perhaps not necessary, after the compromise agreement, for plaintiff to make further proof of loss, but that it did so cannot be held to affect its rights injuriously. It was perhaps also unnecessary for the arbitrators to call in an umpire after being told to make up the papers upon an agreed basis of settlement. But we cannot see that the fact of Snyder acting as umpire and signing the awards with or without knowledge of all the details could in any way change the rights of plaintiff. Nor can we see that the liability of defendant is any less certain because all parties assumed that proofs of loss must also be made under the new agreement, and that the claims would be payable 60 days after these proofs were filed. Defendant cannot be heard to complain of a procedure which was to its advantage.

Counsel for defendant say, in their printed argument: "We have no doubt that it was anticipated by all parties that, upon the coming in of the awards, proofs as required by the policies would be duly presented, and that within or at the expiration of 60 days thereafter, as stipulated in the policies, the loss would be paid. But that there was any independent promise to pay, or any intention upon the part of the companies, or any of them, or any understanding upon the part of Arnold, that there was a new agreement, or that plaintiff had acquired any right outside of the policies, is clearly not so." It is urged that at no time prior to the reversal of the original judgment against defendant did plaintiff or its counsel understand that there had been an independent several promise on the part of defendant to pay; that plaintiff's original theory was that a promise resulted, as matter of law, from the rendition and return of the awards. But it is said that this claim was overthrown in the first appeal (98 Cal. 557, 33 Pac. 633); that the finding of the court upon the first trial was that there was no such promise; and, as there was no evidence of an independent promise upon the second trial, it must follow that the action here must rest upon an implied promise resulting from the submission to arbitration to pay at the time fixed in the policies. It was held in the first appeal that, where the cause of action is upon an agreement to pay the loss after it had been ascertained by arbitra-

tors, it is distinct from a cause of action upon the policy; and where the complaint does not state a cause of action on the policy, but upon the promise to pay the appraised loss, a finding that no such promise was made is fatal to a judgment in favor of plaintiff. In the case now here the cause of action is upon the agreement, and not upon the policy; and in this second trial the court found in favor of plaintiff on the agreement. The case is here now on a different state of facts and on different findings. If the evidence sustains the findings, and the findings support the promise pleaded, we do not see that the decision in the former case can control this case. Nor do we think that the position taken by plaintiff in the first trial—in some respects inconsistent with that assumed now—should deprive it of the fruits of this action if the cause of action as now presented is sustained by the evidence and findings.

There is conflict in the evidence as to the agreement upon which plaintiff sues, but we think there is some evidence tending to establish the agreement as found. Appellant appears to have so understood the result of the meeting at San Francisco, and, on the sixteenth day after the proofs were filed with the companies, it stated the agreement in its pleadings to enjoin plaintiff substantially as it is now found by the court. The evidence is not very clear as to the point that each company separately and independently agreed for itself to pay its proportionate share of the \$90,000, but all the facts and the conduct of the parties show that it was so understood, and was not questioned until long after the awards were made and the proofs filed, and then only because of alleged discovery of fraud and concealment by plaintiff. We are asked to review the record in the first trial and the findings there made in support of appellant's contention that the evidence there was stronger than now, and yet the trial court found that there was no agreement to pay the loss outside that in the policy. We cannot do this. The law of that case upon like facts must be the law of this case. But the facts of this case must control the findings, and the court found the facts to be different in the second trial from the facts at the first trial; and by the facts as now found must we be guided.

5. It is claimed by appellant that the contract sued on, conceding that it was made, was an unexecuted parol modification of a written agreement, and hence void,—citing Civ. Code, § 1698; *Thompson v. Gerner*, 104 Cal. 168, 37 Pac. 900; *Benson v. Shotwell*, 103 Cal. 167, 37 Pac. 147; *Erenberg v. Peters*, 66 Cal. 114, 4 Pac. 1091. As we understand the opinion in the first appeal, it was there held that the action, being upon an agreement to pay upon an adjusted claim, is not upon the policy, but upon the agreement, and may be maintained. The agreement is founded upon the policy, but it was in its essential elements a substitution of an entirely new



contract so far as it went, and upon a new consideration, to wit, to accept less than the amount of insurance and less than claimed by plaintiff. We cannot see that the fact that the new agreement (which need not be in writing) rested in parol affects the question. All the parties acted upon the new agreement as valid and binding up to the day the money was payable. It was executed on the part of plaintiff and defendant in the matter of having the awards and proofs made in writing, and filed with defendant; and it is practically conceded by defendant that, but for the discovery of the alleged fraud and concealments of plaintiff, the awards would have been promptly paid. We do not think the point now raised, that the new agreement is void because not reduced to writing, is available to defendant.

6. It is urged that the evidence is insufficient to sustain the findings that the books and memoranda showing cost and value were not concealed, and that plaintiff was not guilty of fraud, and that the property destroyed was in value equal to \$90,000. As to the value the evidence is conflicting, but we think it is sufficient to support the finding. We do not deem it necessary to go into this inquiry, which occupies a large part of the transcript, for from the start plaintiff's and defendant's arbitrators very closely agreed upon the value, and as to the value of the building (\$22,360) there never was any disagreement. The question of fraud would seem to demand some notice, as it is the principal defense set up. It turned out at this trial that the alleged concealed documents were brought to light through the disclosures of one E. P. Palmer, at the time of the fire the plaintiff's bookkeeper, who it was alleged had kept the books and papers out of sight when the adjusters first visited plaintiff's office to ascertain the cost of the property destroyed; and it was claimed that defendant had no knowledge of these documents until after the agreement of October 18, 1888, and would not have made the agreement if it had received such knowledge. There is no evidence of any intentional concealment by any agent of the plaintiff except this one employé, and it appears that he was told by plaintiff to show the agents of the insurance companies everything, and that he acted wholly on his own motion in not doing so, if it be true, which is stoutly denied, that he withheld the books or concealed them. It was found by the trial court at the first trial that the defendant and the other insurers consented that the arbitrators might find the amount of plaintiff's loss to be \$90,000, because of statements made to defendant and the other insurers by plaintiff that there were no books showing cost of construction, value of certain of the insured property, and "that, if defendant and plaintiff's other insurers had known of the books in the possession of plaintiff showing cost of construction and value, they would not have given such consent." The trial court at that time apparently held that

the plaintiff was not bound by the fraudulent representations of its bookkeeper, Palmer, under the circumstances, as he had been told to show defendant all books and papers. Upon the first appeal as to Palmer's conduct and plaintiff's liability therefor this court said: "It would seem very clear from these facts that the conduct of Palmer in concealing from defendant the books and inventories referred to, and which conduct was the same in effect as a representation that there were no such books and inventories in existence, was a substantial inducement to the action of defendant in waiving its rights to have an appraisal of plaintiff's loss in accordance with the terms of its policy, and in consenting that such loss might be fixed at ninety thousand dollars without any examination or exercise of judgment upon the part of the arbitrators." It was held that Palmer was acting within the scope of his employment, and the plaintiff, as his principal, was bound by his acts and omissions in the performance of the duty intrusted to him, notwithstanding he may have disobeyed the instructions which he received. Upon the point that the books kept by Palmer were only his estimates, and were incorrect, and that defendant was not injured by their nonproduction, this court held that it was not "material to the question under consideration to determine whether any or all of the matters referred to in this finding would properly enter into the cost of the construction of the property destroyed. \* \* \* It is sufficient to say that the estimate of such cost was made by the person selected by plaintiff for that purpose; and the court finds that such estimate was made pursuant to the directions of the directors, and was entered in the books of plaintiff, and kept and retained in its business office. \* \* \* The books would have afforded some information to the defendant, and to that information it was entitled, not only under the terms of the policy issued by it, but also upon the plainest principles of right and fair dealing; and the plaintiff cannot be permitted to enforce an agreement which the court found would never have been made but for the fraud of plaintiff's agent. \* \* \*"

In the present case the court did not find, as before, that the defendant consented that the arbitrators might fix the loss at \$90,000 because of statements made to defendant that there were no books showing cost of construction and value; and consistently, because the court found that defendant was furnished the books which at the first trial plaintiff failed to show were exhibited to defendant. But we are not disposed to hold that even under the findings in this case the rule laid down in the first appeal would be different. We think defendant was entitled to such knowledge as plaintiff possessed, no matter what the motive of defendant was in consenting to the agreement. As we understand the decision in the first appeal, it is immaterial whether the concealed books in fact conveyed such accurate and complete

information as would have enabled defendant to ascertain the exact cost of the property. It was entitled to have the information, such as it was; and it seems to us that the only question now is: Did the defendant have this information before or at the time it agreed to settle and adjust the loss as alleged and found? Finding 13 is to the effect that the adjusters of defendant and the other insurers demanded of plaintiff an inspection of its books and vouchers showing the cost of construction of the agricultural implements destroyed; "that, on said demand being made, plaintiff's agent directed one Palmer, its bookkeeper, in whose custody and control all of its books and vouchers then were, to exhibit and present to the adjusters all books of said plaintiff in his possession"; that Palmer then had in his charge "certain books in which were entered lists of materials in and the component parts of certain combined harvesters manufactured by it, and which were damaged or destroyed by said fire, and also estimates made by said bookkeeper of the cost of construction of certain of said combined harvesters"; that plaintiff had no books, papers, etc., "from which could be ascertained the cost of construction or actual value of any property damaged by said fire"; that plaintiff had no books, etc., showing cost of construction or value except such as are above referred to. The finding then is that, "prior to the time of the appointment of said arbitrators and the presentation of said statement and proof of loss, all of the books containing the matters aforesaid were handed to said adjusters representing the defendant and the other insurers, and were then seen and examined by them." Finding 14 is that all the insurers, "at and prior to August 30, 1888, had been afforded by said plaintiff an inspection and examination, and had inspected and examined all books in said plaintiff's possession, or under its control, containing any statement or data or memorandum of cost or estimate of cost of the construction or value of the property damaged or destroyed by fire." These findings refer to the books and papers alleged to have been withheld by Palmer. The finding that they did not afford information sufficient to enable defendant to ascertain the exact cost or value of the property is immaterial, as was held in the first appeal. Such as they were, defendant was entitled to them; and the court found that defendant was furnished them at and prior to August 30, 1888, and prior to the statement and proof of loss, and prior to the appointment of the arbitrators. It was also found by the court that the adjusters informed the arbitrators, Arnold and Neilson, that they, the adjusters, had seen and examined the books, and that there was nothing therein from which could be obtained the cost of construction, and directed the arbitrators to seek their information elsewhere; and it was found that

the arbitrators separately investigated the loss and its amount; that the defendant and the other insurers commenced an investigation to ascertain the condition and value of the destroyed property about August 19, 1888, and continued such investigation for several weeks, and did ascertain the true value and cost of replacement of the property; and "that on October 1, 1888, they well knew, and prior thereto had well known, the condition, value, and cost of replacement of all of said property so as aforesaid destroyed by said fire." It appears from the evidence that the adjusters reached Stockton August 23d, and went at once to plaintiff's office, and called on Palmer, and asked to see the books. Palmer declined to show them without instructions from the directors. The next day, August 24th, Shippee, the manager of plaintiff company, to whom this matter of attending to the loss had been confided by plaintiff, went with the adjusters, and instructed Palmer to show them everything.

It is admitted by defendant in the brief of counsel that there was evidence tending to prove that Palmer did in fact show the insurers the books containing estimates or loss, and that they were "fairly examined by them prior to the making of the awards, thus negating the defense based upon the alleged concealment, and necessarily negating the various charges of fraud in that connection." But counsel contend that the testimony to the above effect is unworthy of belief, and cannot for that reason sustain the finding resting upon it. The evidence is conflicting,—flatly contradictory. We are cited to *Lind v. Closs*, 88 Cal. 6, 25 Pac. 972, and *In re Irvine*, 102 Cal. 606, 36 Pac. 1013, in support of the proposition that a finding will not be sustained upon the positive testimony supporting it if, in the light of other evidence, it is unworthy of belief; and it is claimed that the challenged evidence is the result of a desire to fit the facts to the law of the case as made by a previous decision,—citing *Soule v. Dawes*, 14 Cal. 249. Charles Dorr testified at great length upon the point as to Palmer having shown all the books to the adjusters. He was in the employ of plaintiff at the time of the fire, and when the adjusters went to Stockton. He was familiar with the alleged concealed books referred to in the findings, and had himself made entries in some of them, and had furnished data for many of the figures and estimates used by Palmer. He testified positively to the fact that all these books were shown to Wetzel and Dohrman, adjusters for the insurers, by Palmer, and that they were examined by the adjusters; that he himself took the books from their usual place in the desks at Palmer's request and laid them on a table; and that Palmer and the adjusters examined them together for some time. This was the same or the day following the day when Shippee took Wetzel



lar to the office. An entry in the transcript apparently made by agreement states that "none of said books show the cost of construction or value of any of the property lost or damaged by the fire. In none of such books is anything showing the material in, or the cost of construction of, any of the Shippee machines." The cases cited by appellant do not warrant us in holding the case here to be an exception to the universal rule that this court will not disturb the findings where the evidence in their support is conflicting. There is nothing inherently improbable in the evidence of Dorr, nor do we find that he made statements at any time contradictory of his evidence. Palmer testified that he did not exhibit these books to Wetzlar and Dohrman, but a witness, one L. H. Day, testified that Palmer told him (witness) "that he [Palmer] had shown to the insurance adjusters all the books and papers which he had in relation to the cost of the harvesters." There is evidence tending to show that Dohrman had in his possession shortly after the fire, which he gave to Wetzlar, a paper (defendant's Exhibit No. 2) deemed of importance by defendant, as showing the cost of the Houser machines, and one of the papers taken away by Palmer, which, as he claimed, was not shown to the adjusters. A witness, one W. B. Starbird, testified that Dohrman showed witness a paper the week after the fire showing the value of the machinery destroyed, of which the witness said: "I should say that was the paper, or a very close copy of it." He further testified: "I asked Mr. Dohrman how the fire adjustment was coming on, not knowing at the time that he was acting as an adjuster. He said it was coming on all right. I said, 'Charley, how do you get at the values?' He says, 'I have figures.' I said, 'In what way?' 'Well,' he says, 'I got them from them.' And at that time he showed me the yellow paper that I have just described." Again, being asked his best recollection as to whether the paper shown him then was the same as shown him on the witness stand, he answered, "Well, I most certainly should think it was." It appeared in cross-examination that Starbird was in Stockton at the first trial, and did not testify, and that, before the second trial, Dohrman died. He explains how he came to make known his possession of these facts at the second trial, and we see nothing improbable in the explanation. Other evidence might be cited tending in the same direction. It is contradicted, and it may be unworthy of belief. But whether so or not, and whether the contradictory evidence was any more reliable than the evidence it controverted, were matters as to which the trial judge was in much better position to determine than we possibly can be. There was evidence on which to base the findings, and they must therefore stand.

As connected with the issue of fraud, it

is urged that the findings as to the value of certain machines were not sustained by the evidence. Here, as elsewhere, was much conflict in the evidence; and we cannot say there was none in support of the findings, for there was much. We think there is evidence to sustain the finding that the property destroyed was of greater value than \$90,000. Besides, after all parties had reached an agreement as to the entire loss, after much investigation, and the insurers had directed the arbitrators to make up the awards or proofs on the basis of \$90,000 for the entire loss, assuming the building to be worth \$22,360, it was not very material just what value was attached to any given machine or article insured, except as it might bear upon the question of fraud. The companies were to share the loss in the proportion the policies each held bore to the whole loss; and it was of small consequence whether this or that item was over or under valued in the awards; and, furthermore, the companies made no complaint of the awards when submitted.

7. The bill of exceptions specifies 154 alleged erroneous rulings at the trial in admitting and excluding evidence offered. Appellant has thrown them all into seven classes, and deals with the classes.

(a) Error is claimed in admitting conversations with Charles W. Dohrman, who had died between the first and second trials, the ground being that he was not the agent of this defendant company. I think the evidence shows quite clearly that Dohrman was acting for all the companies, at least in the adjustment of the loss after the fire. He was the local agent for several of the companies at Stockton, and to him was presented the proofs of loss by plaintiff, as agent of all the companies. His name is among those of the adjusters signed to their report. His name is attached to the agreement for the submission to arbitration, in which, with others, he assumes to represent all the companies. No specific question or answer is pointed out in appellant's brief, as objected to. The objection that Dohrman was not the agent of this particular defendant is not sustained.

(b) The witness Palmer, who had been the manager and acting secretary of plaintiff up to the fire, testified, as defendant's witness, that the Shippee harvester machines were unsalable at the time of the fire, and had no value except for the material that was in them. He was then asked by defendant to state his reasons. The court sustained plaintiff's objection to this question. Ordinarily when a witness testifies to a fact involving an opinion, his reasons are sought by the other side to test the weight of the evidence. We think, however, as the witness was speaking of the value of machines, it was proper for defendant to ask him why he had estimated them to be of no value except for old material, and why they were unsalable; but



we cannot say that it was reversible error to exclude the evidence. The court was bound to consider what he testified as to value without his giving any reason for his answer.

(c) The court excluded the evidence of defendant as to the operation and value of any machines except those destroyed by the fire. Defendant endeavored to show that the destroyed machines were worthless by showing how other machines of similar pattern built by plaintiff had worked. This evidence was refused upon an objection that the salability or cost of construction or value of one machine cannot be shown by comparison with another. The witness had explained the workings of a machine he had purchased from plaintiff, and had returned to plaintiff. Subsequently, he got a No. 2 Shippee machine, and he was asked: "Did that machine prove a success or a failure?" The objection was at this point made to the evidence, and the offer of defendant was to show that this machine was similar, in fact identical, with some of the burned machines. Respondent claims that the ruling comes within the case of *Fox v. Agricultural Works*, 83 Cal. 333, 23 Pac. 295; citing, also, *Murray v. Brooks*, 41 Iowa, 47. Appellant contends that there was no other way to prove the inefficiency of the machines that were destroyed than by proof of the failure of tested machines of similar or identical pattern. We do not see that because the machines in question were burned would change the reason for the rule laid down in *Fox v. Agricultural Works*, supra. The comparison by the method proposed would be the same whether the rejected machine was in a pile of junk or standing in the field unused, or had been totally destroyed. We think the ruling was correct.

(d) Defendant objected to certain evidence offered by plaintiff, and admitted to show that the Shippee machines had a value in excess of the award, because, if a person could not get a superior machine, the Shippee machine would be a good investment upon such valuation. We do not find upon examining the folios pointed out that the witnesses made their estimates of value upon the contingency that a superior machine was not available.

(e) Some objections were made by plaintiff, and sustained by the court, to the questions of defendant relating to the market value of the machines at the time of the fire. Examination of the record shows that the questions were objected to as not proper on cross-examination, and we cannot see that the court erred in its ruling. We have examined the record where the other alleged errors are to be found, and discover no reversible ruling of the trial court.

8. It is contended that the decision is against law. The point rests upon the contention that certain allegations of the cross complaint were not denied by plaintiff, although it is conceded that the court found

against defendant in respect of all these averments. We think that some of the allegations now claimed not to have been denied were clearly denied; others, by affirmative allegations of the plaintiff inconsistent with them. As to all these allegations, the parties submitted evidence pro and con. The trial was conducted as though full denials were made. The point now made cannot be heard here for the first time. *Klopper v. Levy*, supra. The cause has been ably and exhaustively presented by counsel on both sides of the controversy. We have endeavored to consider and pass upon the salient and essential questions of law and fact called to our attention. Conscious that, in so extended a record, the difficulty in determining the exact relation of all the facts and their legal bearing upon the issues is very great, we yet believe there was evidence justifying the findings and decision of the trial court, and therefore recommend that the judgment and order be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

121 Cal. 182

STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS et al. v. AMERICAN FIRE INS. CO. (Sac. 260.)

(Supreme Court of California. June 10, 1898.)

INSURANCE — MORTGAGE CLAUSE — COMPROMISE — PLEADING — AMENDMENT — LIMITATIONS.

1. The liability of an insurance company according to a compromise of a loss with the assured, on a policy providing that any loss shall be payable to a mortgagee as her interest appears, is not affected by the fact that the mortgagee was not a party to the compromise, where she is a party to the suit, and the mortgage has been paid.

2. Where both the assured and a mortgagee to whom a loss is payable under the policy join in an action to recover on a compromise of a loss, the action is not so changed by the filing of an amended and supplemental complaint, after the payment of the mortgage, stating that fact, as to permit the application of the statute of limitations.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by the Stockton Combined Harvester & Agricultural Works and others against the American Fire Insurance Company. From a judgment in favor of plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Van Ness & Redman, for appellant. Nicoll & Orr and J. C. Campbell, for respondents.

CHIPMAN, C. This cause is submitted on substantially the same transcript as Sacramento No. 262 (*Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co.*, 53 Pac. 565). Two points are pre-

sented in this case by appellant not raised in the Glens Falls Insurance Company Case.

The policy names the plaintiff company as the insured, but stipulates for payment of loss to one Eliza R. Buckles. It is now claimed by defendant that the insurers entered into no new agreement with Mrs. Buckles, such as is relied upon by plaintiff in the other cases and also in this; that Mrs. Buckles was not a party to the submission to arbitration, and it nowhere appears that Arnold, arbitrator for plaintiff company, had authority to speak for her, or in fact did represent her. The final draft of the complaint, to which there was a supplemental complaint, and also several amendments, showed that Mrs. Buckles no longer had any interest in the policy, and that the agreements relied upon were made with the plaintiff company. The finding 4 was that on March 14, 1888, there was a subsisting mortgage upon a portion of the property of \$25,000 to plaintiff Eliza R. Buckles, and "that the loss in said policy of insurance, if any, was made payable by its terms to the said Eliza R. Buckles," and that, since the commencement of the action, it had been fully paid and discharged, and that her interest in the property had ceased, as alleged in the supplemental complaint. The agreement, as finally alleged and as found, was that defendant agreed to pay plaintiff company. Mrs. Buckles was made co-plaintiff because the loss was by the terms of the policy payable to her, but the insurance was on the company property. When she ceased to have any interest in the policy or property it was proper to so state by supplemental complaint; and we cannot see that the plaintiff company lost its rights thereby. There is no allegation of a joint agreement, between defendant and plaintiff company and Mrs. Buckles, alleged in the complaint as finally amended. The allegation of the finally amended complaint is: "That thereupon said defendant and said insurers covenanted and agreed with said plaintiff, said Stockton Combined Harvester and Agricultural Works, as an adjustment of the entire of said loss and damage, to pay to said plaintiff, the Stockton Combined Harvester & Agricultural Works; \* \* \* and said defendant and said other insurers agreed to pay, and said plaintiff agreed to accept," etc. Mrs. Buckles, however, remained a party plaintiff to the close of the action, which was not changed in any essential features by amendments to the complaint. If it was not true that defendant agreed to pay her the amount according to the compromise, it did agree to pay the harvester company; and that liability was not changed by failure to prove that Mrs. Buckles took part in the agreement. She joined

in the action, and would be estopped by the judgment in it.

2. It is claimed that the promise sued upon is barred by the statute of limitations. The original complaint appears in the bill of exceptions. The harvester company and Mrs. Buckles are the plaintiffs, and the allegations of the original complaint proceed upon the assumption that both of the plaintiffs are joint parties in interest, although it does not appear that Mrs. Buckles had any interest in any policy except this one, and as to it the policy ran to the company, "loss, if any, payable to" Mrs. Buckles. It was alleged that proofs of loss were made out by plaintiffs, and that the subsequent agreements as to arbitration were between plaintiffs and defendant, and that the still later compromise or agreement to pay \$90,000 was made with plaintiffs. The amended and supplemental complaints stated the action to be on a policy issued to the harvester company on its property, loss, if any, payable to Mrs. Buckles; that all agreements to settle and adjust and pay the loss were with the harvester company; and, finally, that Mrs. Buckles had an interest in the property or policy as mortgagee; and that this interest had ceased by payment of the mortgage. The original complaint was on the same policy as was the amended complaint. Both the original and amended complaints set up the same agreement to pay on compromise, the difference being that in the latter it was alleged that the compromise agreement was with the harvester company instead of both plaintiffs. But Mrs. Buckles' interest was still the same, and she ratified or adopted the agreement, so far as she was concerned, by joining in the action on it. The policy was payable to her, whether for the whole amount of the insurance (\$1,500), or for the less amount (\$936.57) agreed upon by the compromise. She was a proper party in all the forms of the complaint, and when her mortgage was paid, and she no longer had any interest in the policy, it was proper to so state by supplemental complaint in order that the judgment, if any, might be for the party in interest. The cause of action we do not think was changed, and hence the statute of limitations did not apply. We discover no reason why this case should be decided differently from the others; and, upon the authority of the case *Sacramento No. 262* (*Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co.*, 53 Pac. 565), the judgment and order should be affirmed.

We concur: BELCHER, C., SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

121 Cal. 292

PIGNAZ v. BURNETT et al. (S. F. 1,184.)  
(Supreme Court of California. June 27, 1898.)

APPEAL—FAILURE TO FILE TRANSCRIPT—BOND—  
DISMISSAL.

1. On appeal from a judgment, failure to file a transcript within the required time was not excused by the fact that appellant had proposed, and presented for settlement, a bill of exceptions taken to the court's rulings on motions made after judgment, which the judge had not yet settled.

2. Where there were two appeals in one action,—one from a judgment, and the other from an order refusing to set aside a writ of assistance,—and only one undertaking, which was limited to the appeal from the judgment, the appeal from the order was dismissed.

Department 1. On motion to dismiss appeals. Dismissed.

HARRISON, J. A motion to dismiss the appeal from the judgment herein, and also from the order refusing to set aside a writ of assistance, was heretofore made and denied December 2, 1897. 51 Pac. 48. The facts involved in the present motion are quite fully stated in the opinion in that case. The motion to dismiss the appeal from the judgment was then made upon the ground that the transcript had not been filed within the time prescribed by the rules of this court, and was denied for the reason that it was made to appear that a bill of exceptions used on the appeal had been proposed, and was pending for settlement before the judge who heard the cause. The motion to dismiss the appeal from the order was argued upon the ground that the appellants had not filed an undertaking on



that appeal, and was denied for the reason that the respondent had not given this, in his notice, as one of the grounds upon which he would make the motion. Upon the application of the respondent, leave was given to renew the motion in its present form, for a dismissal of the appeals upon the ground that the transcript had not been filed within the proper time, and that no undertaking had been filed upon the appeal from the order. Upon the motion to dismiss the appeal from the judgment, the respondent has presented a copy of the bill of exceptions which was proposed in behalf of the appellants, and upon which they rely to be relieved from their failure to file the transcript herein until it shall have been settled by the judge. An inspection of this document shows, however, that it is a bill of exceptions taken upon the order of the court refusing to vacate its order for the issuance of a writ of assistance, and refers entirely to proceedings taken subsequent to the entry of the judgment. It could not, therefore, be used or referred to upon the appeal from the judgment, and does not extend the time within which the transcript should be filed. See opinion upon the hearing of the former motion in this case, 51 Pac. 48. The appeal from the judgment must therefore be dismissed.

A copy of the undertaking filed on appeal in the court below has also been produced; and, as it appears therefrom that it is limited to the appeal from the judgment, and makes no reference to the appeal from the order, it is insufficient to sustain the latter appeal. The motion to dismiss the appeals is granted.

We concur: GAROUTTE, J.; VAN FLEET, J.

(121 Cal. 202)

PACIFIC BANK v. STONE. (S. F. 1,060.)  
(Supreme Court of California. June 14, 1898.)  
BANK PRESIDENT — HIRING AN ATTORNEY — EX OFFICIO POWERS.

The president of a bank has no *ex officio* power to bind it for the services of an attorney, and unless he has been empowered to hire an attorney under its by-laws, as authorized by Civ. Code, § 303, or his contract for an attorney's services was authorized by resolution of the directors, or ratified or sanctioned by their words or conduct, the bank is not liable therefor.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by the Pacific Bank against Frank M. Stone. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Sawyer & Burnett and Frank M. Stone, for appellant. Chas. A. Garter and Frederick B. Pierce, for respondent.

CHIPMAN, C. Action on promissory note for the sum of \$1,550. Plaintiff had judgment, from which, and from an order denying motion for new trial, defendant appeals on

statement of the case. Defendant pleaded a contract for professional services as attorney at law, rendered plaintiff, by which "plaintiff agreed to cancel and deliver to defendant the note set forth in the complaint, and to extinguish said indebtedness." By way of cross complaint, defendant alleged what, in effect, was a claim on quantum meruit; but he withdrew his cross complaint, and waived all claim thereon. The court found that on or about November 3, 1893, the defendant "entered into a contract with R. H. McDonald, Jr., vice president and acting president of the corporation plaintiff, whereby defendant should render professional services to plaintiff, and that, as compensation for said services, said R. H. McDonald, Jr., as vice president and acting president of the corporation plaintiff, promised and agreed that the note in controversy should be canceled and delivered to defendant"; and that defendant rendered such services to plaintiff, but said note has never been canceled or delivered to defendant. The court further found: "That the board of directors of plaintiff never authorized said R. H. McDonald, Jr., to make said contract with defendant, and never ratified the same; and that none of the members of said board, other than said McDonald, ever knew that said McDonald had made said contract, or that said defendant had rendered said services;" that plaintiff had at that time regular retained attorneys, "who had been and were employed by said board of directors"; "that on said 3d day of November, 1893, the said plaintiff was insolvent and in liquidation, by the decree of the court duly made and given, which decree is now in full force and effect." It should be stated, also, that defendant's employment was especially for the purpose of testing the question as to whether "the bank directors should have charge of the settlement of the bank's affairs instead of the bank commissioners"; and defendant testified that he brought the action by which this question was settled favorably to his contention and to the bank. It was the case entitled Long v. Superior Court, reported in 102 Cal. 449, 36 Pac. 807, as we understand the testimony, although special reference is not made to the case. The opinion in that case recites the decree which is given in the record on this appeal, and is referred to in the findings, and we think sufficiently identifies the case pending in the lower court, referred to in the transcript, as being the case which gave rise to Long v. Superior Court, supra. The regular bank attorneys were Messrs. Dorn & Dorn, one of whom testified that he advised the employment of defendant because he had made a study of the particular question it was desired to have settled; that they, as bank attorneys, "were not attending to these external matters," and were receiving but \$100 per month for their services; and that the contract was made in one of the bank rooms. It appears that the bank closed its doors June 22, 1893; and, as we understand the history of

the bank, as disclosed by the litigation in this court, and as referred to in the briefs of counsel and the transcript, insolvency proceedings were begun by certain creditors, and the sheriff placed in charge of the bank as receiver in August, 1893. He was succeeded by Mr. Willey on October 10, 1893, as receiver. Later, or about that time, an action was brought by the attorney general, entitled "The People, on the Relation of the Bank Commissioners, vs. The Pacific Bank," under the bank commissioners act, the purpose of which was to place the bank commissioners in charge. On November 3d, the court entered its decree adjudicating the bank to be insolvent, and enjoining it from transacting any further business, and turning over its affairs to the bank commissioners of the state, subject to the control of the court, the court retaining custody of the bank's books and papers. Immediately after this decree was entered, McDonald employed defendant, who knew of all the previous proceedings in court. Defendant's services were performed after this date, and he testified that he brought the suit, and was successful in it, whereby the control of the bank affairs during liquidation was restored to the corporation. It further appears that McDonald resigned as vice president November 18, 1893, and was succeeded by S. F. Long. It appears from the case reported in 102 Cal. 449, 36 Pac. 807, that Director and Vice President Long was the plaintiff. It was after McDonald's resignation and Mr. Long's appointment that most of defendant's services were performed.

Appellant claims, and we think rightly, that the sole question was and is: Was the acting president of plaintiff corporation vested with authority to make the contract in question without the sanction of the board of directors? Appellant puts the question as follows: "The board of directors had been deposed and ousted from the bank by the decree of the superior court. Here arose an emergency. The vice president had the unqualified right, by virtue of his office of acting president, and having the affairs of the bank in charge, to retain an attorney to ascertain the rights of the board. All was confusion in the affairs of the bank. Some one must act. Who, then, other than the head of the institution?" He then points out—that is true—that he performed the service, and was successful, and that the services were beneficial to the bank; and he then asks: "Can a board of directors sit by and take advantage of the work of one employed by their head and chief, and, because no formal resolution has been passed approving the act of that chief officer, receive the benefit of the work and labor, and repudiate the obligation to pay therefor?" When the directors were ousted, McDonald shared their fate, for he was vice president and acting president by virtue of being also a director. There was therefore no emergency calling for action by McDonald which

did not equally appeal to all the other directors. What view might be taken of all the facts and circumstances of the case were this an action for the value of work and labor performed need not be considered; for defendant, having alleged a special contract, and relying alone upon that, cannot be allowed to recover on a quantum meruit.

The evidence falls to show that the directors had any knowledge of the specific contract pleaded, or ever authorized or ratified it. The secretary and manager of the bank brought into court the records of the directors for the fall of 1893, from which it appeared that McDonald resigned as vice president November 18, 1893, and S. F. Long was elected in his place. The further evidence was: "Q. Is there anything in the records of the secretary, or otherwise, of the Pacific Bank, that shows at any time the employment of Mr. Stone by the bank? A. No, sir; not that I know of. Mr. Stone: That is not claimed. It is not claimed that the directors employed me." It was admitted that there was no resolution authorizing the directors or Mr. McDonald to employ Mr. Stone as attorney. It appeared that there was no meeting of the directors between August 30 and November 18, 1893.

Appellant does not claim that the board ratified the contract, except so far as their knowledge of his having rendered services would work a ratification. But that falls far short of legal ratification, if knowledge had been proved, which was not, because there was no evidence showing that the directors had any knowledge whatever of the specific contract sued upon, or of its terms, or that McDonald entered into it, and such knowledge cannot be presumed. It did not rest with plaintiff to show lack of ratification, but the burden was upon defendant affirmatively to show the fact. What will and what will not constitute ratification under our Code is so clearly pointed out in *Blood v. Water Co.*, 113 Cal. 221, 41 Pac. 1017, and 45 Pac. 252, as to make superfluous any further statement of the law upon the subject. See, also, *Underhill v. Improvement Co.*, 93 Cal. 300, 28 Pac. 1049; *Blen v. Mining Co.*, 20 Cal. 603. Appellant quotes from *Streeten v. Robinson*, 102 Cal. 542, 36 Pac. 946, where it is said: "The authority of the president or other head of a corporation to employ an attorney when the exigencies of his company require it has been repeatedly recognized,"—citing, also, numerous other cases. We have examined these cases, beginning with *Pixley v. Railroad Co.*, 33 Cal. 183; and in no one of them is the doctrine laid down that the president of a corporation has by virtue of his office alone the power to bind the corporation in a transaction like the one we have here. In all the cases, as was true in the case in 102 Cal. 542, 36 Pac. 946, the president or other head of the corporation was shown to have been the general business manager; or he had admitted relations to



the corporation from which authority might be inferred; or there was specific knowledge and acquiescence brought home to the directors; or there was a general custom or usage proven that the president or other manager had exercised like powers with the consent and acquiescence of the directors. It is true that Mr. Morse, in his work upon Banks and Banking (volume 1, § 143), lays down the doctrine that to take charge of the litigation of a bank is the function of the president by virtue of his office. But this doctrine is controverted by Mr. Thompson in his treatise on the Law of Corporations (volume 4, § 4620). The cases cited by Mr. Morse presented the question of the authority of the attorney to bring the action for, or to appear and defend, the corporation, and in which the interests of third parties were involved. In such cases the courts presume the authority to so appear. But a distinction is made where the attorney himself sues the corporation upon a contract for services rendered. An instructive case is that of *Bright v. Cemetery Ass'n*, 33 La. Ann. 58. Bright was employed by the president of defendant company to conduct certain litigation, for which the attorney was to be paid as a contingent fee one-third of the amount of the tax from which he might succeed in relieving his client. There was no evidence showing the participation of the board of directors in the contract, or any act of such board to authorize their president to enter into the alleged contract in behalf of the company. The action rested where appellant appears to place his right to recover here, to wit, upon the inherent or ex officio powers of the president. Section 5 of the charter of the defendant company provided that "all the powers of this corporation shall be vested in a board of directors," etc., which is the statute law in this state. The court said: "It is elementary that corporate bodies are artificial beings or persons, who can act only in the mode prescribed by the law creating them, or in the manner specified in their organic law or charter. It is true that, in many corporations, acts of administration in their ordinary business pursuits can, and must of necessity, be performed by the president or other authorized officer; but such authority must be provided for by special laws, or by stipulation in the charter, and must apply to well-defined acts within the essential object or objects for which the corporation was created." After pointing out the declared objects of the defendant corporation, the court said: "But this power could not possibly be extended to cover such a contract as forms the basis of this suit. The record shows that the company had a regular attorney, and, in our opinion, no authority short of the action of the board of directors could justify the president to employ and retain a special attorney, outside of usual legal business, to represent the association in a litigation of great

moment and magnitude, which would be rife with vital consequences to the company, and would entail the payment of a large fee." Upon the point as to when the authority will be presumed, the court said: "Plaintiff fails to recognize a necessary distinction, which qualifies this rule in its application, between cases where the attorneys' authority to appear is to be tested with reference to the effect of their professional acts on the interest of third parties, and cases when, suing for their fees, their authority or employment is specially denied by the parties whom they represented in legal proceedings. In the latter cases they must prove a retainer or contract, as alleged, by legal evidence; and, if the alleged contract was with a corporation, the contract must be shown to have been made by the person or persons duly authorized thereto, for corporate bodies can act or contract only in the manner and form prescribed by law or by their charter." The case was reargued on motion for rehearing, and the authorities again carefully examined, and the motion was denied. We can perceive no reason why a bank president should be clothed with ex officio powers greater than those of the president of any other corporation. As director, he derives his authority from the same source as presidents of other corporations organized under the statute; and, as the presiding officer, his functions and powers, in the management of the corporate business, are no greater than those of any other director. *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788. The statute provides that "a corporation may, by its by-laws, where no other special provision is specially made, provide for: \* \* \* (4) The qualifications and duties of directors. \* \* \* (5) The compensation and duties of its officers." Civ. Code, § 303. "The corporate powers, business and property of all corporations formed under this title must be exercised, conducted and controlled by a board of not less than five nor more than eleven directors," etc. Id. § 305. And by section 308 it is provided that the president of the board of directors must be one of their number, and "must perform the duties enjoined by law or the by-laws of the corporation."

We do not doubt but that authority to employ an attorney may be given to the president orally or without formal resolution by the directors, or that, where he has employed an attorney without such or any authority, the directors may orally or by conduct ratify or sanction such employment (*Pixley v. Railroad Co.*, supra); nor do we doubt that the president may be clothed with such general management of the affairs of the corporation by resolution or by-laws of the directors, or by their acquiescence or consent, as would raise a presumption of authority to act in a particular case where such proofs were made. But in the absence of all evidence of authority to employ an at-



torney, as was the case here, and in the absence of all evidence of subsequent consent or ratification, we must hold that the contract sued upon was unauthorized; and, in an action based thereon, he cannot recover. The case does not present an instance of a contract *ultra vires* (such as *Main v. Casserly*, 67 Cal. 126, 7 Pac. 426, for example, and like cases); for the corporation here did not assume to make the contract with defendant, as in that case. It is not the case of a corporation repudiating its contract while retaining its fruits; it is the case of an officer acting wholly beyond his powers, where there is an entire failure to show that the directors had any knowledge of the contract, or consented to it or ratified it. It is recommended that the judgment and order be affirmed.

We concur: BRITT, C.; BELCHER, C.

HENSHAW and TEMPLE, JJ. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

McFARLAND, J. I concur in the judgment of affirmance. The judgment of the court below on the facts of this case is right. There are, however, some general expressions in the opinion of the commissioner about the employment of an attorney by the president of a bank which are, in my opinion, too broad to be correctly applied to the case of a solvent bank continuously engaged in the regular prosecution of its usual business.

121 Cal. 153

BRYSON v. McCONE et al. (L. A. 279.)

(Supreme Court of California. June 4, 1898.)

CONTRACTS—FILING—WHO ARE CONTRACTORS—DEMAND—GUARANTIES—DAMAGES—LOSS OF PROFITS.

1. A contract to convert ice works into a new system of ice making, and to furnish certain material therefor, is not within Code Civ. Proc. § 1183, providing that contracts for work between an owner and a contractor in excess of \$1,000 are void unless in writing and filed in the recorder's office, since the contract must be considered as one for materials, and not for work except as an incident.

2. An action to recover damages for breach of a contract which was to be performed by a certain time is not prematurely brought where brought a few months after such time, though defendants were still working thereunder with plaintiff's consent, but without his having waived his claim for damages.

3. The consent of a party to a contract that the other party might continue the work after the time stipulated for its completion is not a waiver of damages or of the breach.

4. A complaint on a contract for a breach, consisting of a failure to furnish certain materials which defendants had agreed to furnish, need not aver a demand and refusal to pay the damages.

5. Where defendants contracted to furnish an ice plant built according to certain specifications, and guaranteed its efficiency, they are liable for its failure to do the work, though the specifications were furnished by plaintiff, and

an efficient ice plant could not be constructed by following them.

6. Where a cause of action for breach of contract was complete when the suit was commenced, and plaintiff could not maintain another suit for the damages, it was proper to allow damages accruing after the commencement of the action.

7. Loss of profits are proper elements of damages in an action for a breach of contract to furnish and remodel an ice plant.

Department 2. Appeal from superior court, Los Angeles county.

Action by Isaac H. Bryson against A. J. McCone and others. From a judgment for plaintiff, and from the order refusing a new trial, defendants appeal. Affirmed.

Knight & Heggerty and Ben Goodrich, for appellants. W. P. Gardiner, J. S. Chapman, and R. L. Garrett, for respondent.

TEMPLE, J. This action was brought to recover damages for an alleged breach of contract to convert the ice works of the Consumers' Ice Company at Los Angeles into the Kitton system of ice making, to be located at Riverside, and to furnish certain materials. The work was to be done and the materials furnished according to specifications, describing with apparent minuteness what was to be done. Generally, they were to take down and remove to their shop the old machinery, and were to set the new machinery up at Riverside, so as to make a complete ice plant. Among the things to be furnished by defendants were six new combined iron tanks of the Kitton system, made of Oregon ship timber, three-inch stock, surfaced on one side and two edges, and securely bolted every 16 seconds. Each tank to contain from 16 to 20 molds made of No. 12 steel plate, double riveted and properly calked; all seams to be coated with P. B. paint before being riveted, and the bottom of such parts as come in contact with the wood to be coated with P. B. paint; each tank to contain 2,800 feet of pipe for the expansion of ammonia; also to have proper circulating pumps and connecting pipes, counter shafts, and pulleys; each tank, when completed, to be of sufficient dimensions to contain 10 tons of ice. It was stipulated, however, that "all buildings, foundations, in and about the factory, the flumes, water wheel, and sittings of water wheel, tail race, ropes, or belts for transmission of power, all freights and cartridges, are at the expense of I. H. Bryson, and are outside of this contract." The specifications contained the following guaranty on the part of the defendants: "The new works, when completed, to have a daily average capacity of fifteen tons of good, hard, merchantable ice, free from smell, taste, and objectionable core in can. We guaranty for one year all workmanship and material furnished by us, provided no disarrangement is caused from want of attention of person in charge, and if run according to our instructions. The Fulton Engine Works guaranty that after machine is fully charged, that the yearly additional supply of ammonia shall not exceed four

full drams of ammonia, through any defects of workmanship on their part, or through any defects in any of the material furnished by them, while the same is under the charge of thoroughly competent engineers, who will follow the instructions of said Fulton Engine Works." The works were to be completed and ready to start to work by March 1, 1892. The consideration to be received by defendants was \$12,500. Plaintiff recovered judgment for \$4,102.77, and defendants appeal from the judgment, and from the refusal of a new trial.

The first point urged by the appellants is that the contract upon which suit was brought is void. It is contended that it is a builder's contract, which, under section 1183, Code Civ. Proc., must be filed in the recorder's office of the county in which the work was to be done; otherwise, it is void. It appeared that the contract upon which this action is founded was not so filed. Section 1183 provides that the contract for the work between the owner and his contractor, when the amount to be paid under it exceeds \$1,000, shall be in writing, and filed in the recorder's office of the county; "otherwise they [it?] shall be wholly void, and no recovery shall be had thereon by either party thereto." In *Hinckley v. Biscuit Co.*, 91 Cal. 136, 27 Pac. 594, this section was considered; and it was there held that the word "contractor," as used in that section, does not apply to one who contracts to furnish material only. That case is relied upon as authority here by the respondent, and it seems to me it is quite similar to this in all its essential facts. The case went off upon a demurrer to the complaint, in which it appears that the claimant contracted to construct at its own works, and deliver and put in place on foundations to be prepared by the owner a complete steam plant, machinery, and pump, the several parts of which were enumerated in the complaint. The list is a long one, but it contains the following: Two steam drums, each 30 inches in diameter by 3 feet long, connected with the boiler with twin nozzles, riveted to boiler and drum, with face jointed between; two wind drums, 18 inches in diameter, by 6½ feet long, connected to boilers by twin nozzles; smokestack, 30 inches in diameter, and 50 feet high; Corliss engine, etc. This entire steam plant was to be put up on foundations prepared by the owner, and also connections for steam, water, and exhaust,—made ready for use. That was certainly as much of a structure as that contracted for in this case. The only apparent difference pointed out by defendants is that in this case the tanks were in fact built on the premises, and the woodwork in the brine tank was sublet. There was nothing in the contract, however, as to where they should be made, and all might have been made at the shops, and brought to the premises ready to be set up. And, when put up, they only constituted a machine to be used in the building where they were to be placed. In the case above cited,

it was held that the work done in placing the machinery in position, ready to be used, was but the completion of the contract to deliver. A similar ruling was made in *Roebling's Sons Co. v. Humboldt Electric Light & Power Co.*, 112 Cal. 289, 44 Pac. 568. There the contract was to set up in defendant's building a complete electrical plant, consisting of dynamos, converters, switch boards, lamps, etc., with necessary wiring and connections. In that case it might be argued plausibly that the plant was made on the premises. Much of the machinery and materials, such as the wire, for instance, was as characterless as the Oregon ship timber, the bolts, and steel plates used by the defendants in the construction of the tanks. Yet it was held there, too, that putting up the machinery was but a part of the agreement to deliver material. Questions of this character are often very difficult (though, as pointed out in *Bennett v. Davis*, 113 Cal. 337, 45 Pac. 684, they are not altogether new), being quite similar to a much-vexed question which sometimes arose under the statute of frauds,—the question as to whether a certain agreement was to manufacture or sell goods. I think this case is clearly within the rule laid down in *Hinckley v. Biscuit Co.*, and also in *Roebling's Sons Co. v. Humboldt Electric Light & Power Co.*

The appellants contend that the suit was prematurely brought. It was commenced on the 16th day of July, and, by the terms of the agreement, the contract was to have been fully performed by the 1st day of March preceding. Yet, without objection on the part of the plaintiff, the defendants continued to do some work about the plant, trying to make it work, up to and including the very day on which the action was commenced. There was no agreement to extend this time, or to waive damages for the failure to complete the work in time. On the contrary, there was during the whole period a controversy and an attempt to compromise the matter; and the defendants refused to complete the machine except upon the condition that plaintiff would accept certain additional work and material as full satisfaction, waiving his claim for damages. This plaintiff refused to do, but insisted that the defendants should complete the work, and pay him damages besides. This was a refusal on the part of the defendants to perform the contract. They had no right to insist as a condition that plaintiff should waive his claim for damages.

But consent on the part of plaintiff that defendants might continue the work after the stipulated time was not a waiver of damages or of the breach. Upon the breach, plaintiff, not being himself in default, had the right to rescind or permit the defendants to complete the work, and sue for damages occasioned by the default. This need not be pursued further, however, because, as already said, the evidence was sufficient to warrant a finding that defendants had expressly refused to complete the work. If



McCone, speaking for the firm, refused to go on except on conditions which he had no right to ask, it was a refusal to go on with the contract, and it did not matter that Bell, the other partner, had not refused.

It is said that no cause of action is shown, because it is not averred that demand had been made on defendants that they pay the damages, and that they refused. No demand was necessary. The breach of contract which injured plaintiff, and which constituted his cause of action, was the failure to furnish the materials which defendants had agreed to furnish. It was not a contract to pay money, a breach of which could only consist in a refusal to pay. Such was the contract in *Curtiss v. Bachman*, 84 Cal. 216, 24 Pac. 379. At least, the court there so held. See *Dunn v. Steubing*, 120 N. Y. 232, 24 N. E. 315.

At the trial the defendants' counsel asked one of the defendants, while on the stand as a witness, to relate the circumstances under which the contract was made. Upon objection being made, counsel explained that the particular circumstances he desired to prove were that the written contract was furnished by the plaintiff, and not by the defendants. The objection was sustained, and the ruling is assigned as error. The plaintiff had testified that the contract and specifications were furnished by Kitton, and that Kitton was employed by the defendants. Respondent's brief is largely devoted to showing his advantage resulting from such fact. From the standpoint of plaintiff's counsel upon the trial and here, nothing can be plainer than that the proposed evidence was both relevant and material. It was simply and only contradictory of evidence produced by plaintiff. The ruling will not necessitate a reversal, however, both because, notwithstanding the ruling, the witness proceeded to state the particular circumstances which counsel desired to prove,—for example, he testified that Kitton was acting for both parties, in pursuance of an understanding between plaintiff and the defendants,—and also because the evidence was immaterial.

During the trial, the defendants, in various ways, raised the point that they simply undertook to furnish a machine built according to certain specifications, and that they were not responsible for inherent defects in the Kitton system; and they contended that that system was defective, and that an efficient ice plant could not be constructed under the specifications which they were by their contract required to follow. We had occasion to consider a similar question in *Bancroft v. Tool Co.* (Cal.) 52 Pac. 496. The difference between the cases is mainly that there was no guaranty of efficiency in that case, and in this case there was such a guaranty. Considering the special undertaking of the defendants, I cannot see how it matters who furnished the specifications. The defendants undertook not only to make a plant accord-

ing to the specifications, but also that it would do certain work. This was a warranty of the scheme, as well as an undertaking to do good work themselves in furnishing a plant in accordance with the scheme. It is fair to add that the evidence conclusively shows that the work was not done in accordance with the contract, but was about as defective as it could well be.

Damages which accrued after the suit was commenced were properly allowed. The plaintiff could not maintain another suit for damages which resulted from the breach which had already occurred. His cause of action was complete when the suit was begun, and the damages proved were the natural and necessary consequence of the wrong. *Alfter v. Hammitt*, 54 Mo. App. 303; *Behrman v. Linde* (Sup.) 5 N. Y. Supp. 898; *Filler v. Railroad Co.*, 49 N. Y. 42. Nor was there error in permitting the plaintiff to show the profits which he would have made. *Hitchcock v. Supreme Tent*, 100 Mich. 40, 58 N. W. 640; *Wakeman v. Manufacturing Co.*, 101 N. Y. 205, 4 N. E. 264; *Hawthorne v. Siegel*, 88 Cal. 167, 25 Pac. 1114; *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327. Judgment and order affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

6 Cal. Unrep. 35

BRYSON v. McCONE et al. (L. A. 258.)  
(Supreme Court of California. June 4, 1898.)

#### APPEALS—REVIEW—DAMAGES.

1. Where appellant insists that, on the findings of the lower court, he is entitled to a more favorable judgment, but waives all right to have the case remanded for a new trial, the court will rely entirely on the findings whether or not the evidence supports them.

2. The appellate tribunal will not go beyond the strict rules of law to increase plaintiff's allowance of damages for loss of profits.

Department 2. Appeal from superior court, Los Angeles county.

Action by I. H. Bryson against A. J. McCone and others for damages from a breach of contract. From a judgment for plaintiff, he appeals. Affirmed.

W. P. Gardiner, J. S. Chapman, and R. L. Garrett, for appellant. Knight & Heggerty and Ben Goodrich, for respondents.

TEMPLE, J. This is plaintiff's appeal from the judgment. Defendants also appealed from the judgment, and from a refusal of a new trial. L. A. No. 279 (53 Pac. 637). In that case the facts are stated more at large, and many of the points also involved in this appeal are discussed.

Plaintiff insists that, upon the findings, he is entitled to a more favorable judgment. He has, however, greatly discredited his contention by bringing up in a bill of exceptions all the evidence respecting the relations between plaintiff and defendants subsequent to



March 1, 1892, and regarding any extension of time for completing the contract, and any waiver of damages, and also in regard to the cost of producing ice, and the expenditure of \$1,800 for water power, and \$243.19 for ammonia. If the contention is only that appellant is entitled to a different judgment upon the findings, there can be no use for a bill of exceptions to bring up the evidence. And yet appellant's brief refers indifferently to the facts found and what the evidence shows. I presume counsel realize that the findings must be supplemented upon the points with reference to which they have brought up the evidence. Still, appellant states in his points that he does not desire a new trial; and, if he cannot obtain relief by a simple modification of the judgment, he prefers to waive, and does waive, his claim to additional damages. The court found that plaintiff could have made profits by the manufacture and sale of ice to the amount of \$1,166.66% per month if said machinery had been perfected with the capacity of 15 tons per day, of such ice as was described in the contract, from the 1st day of March, 1892, up to the 1st day of October, 1892; and for the last three months of that period he was damaged to that extent for each month by the failure to complete the machinery according to the contract. It is also found, in effect, that plaintiff gave defendants until the 2d of July, 1892, to perform the contract. It may be true that the evidence shows without conflict that the time for the completion of the contract was not extended, but that plaintiff all the time insisted that defendants had violated their contract, and were liable to him for damages. We cannot supply the defects in the findings, but if facts exist which are not found, and which are material, the error could only be corrected by a new trial.

Formerly, as I understand the history of the proposition of law involved, this claim of damages would have been rejected as speculative. It is only found that plaintiff could have made such profits, not that he would have made them, or that it was reasonably certain that such profits would have been made. It is a harsh rule which allows plaintiff to recover such damages, although I think it is now settled that damages which are reasonably certain to accrue may be recovered. Had this machinery been perfect, yet for some fault of the plaintiff, or through accident, he may not have been able to realize profits. Had what was not been, no one could tell what would have occurred. Under such circumstances, we are not inclined to go beyond the strict rules of law to increase the plaintiff's allowance of damages. He who can recover upon a theory relieved from all hazards has a great advantage. As to the cost of the water and ammonia which was lost to plaintiff by the failure to complete the machinery by the 1st of March, 1892, the same argument will

apply. Possibly, however, some proportion of this should be allowed to the plaintiff as damages, irrespective of any question as to the extension of the time for the completion of the contract, if the proper proportion could be determined from the findings. Again, however, it seems to have been found that the only damage which plaintiff has suffered, for which he is entitled to a judgment, is the sum of the various items which were allowed. These conclusions are reached upon the supposition that appellant waives his right to a new trial. In that view, of course, the evidence brought up has not been regarded. The judgment is affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

121 Cal. 147

WISE et al. v. COLLINS. (L. A. 298.)

(Supreme Court of California. June 4, 1898.)

APPEAL—HARMLESS ERROR—SALE—TITLE—PAROL EVIDENCE—DEPOSITIONS—REFLEVIN.

1. Error in admitting irrelevant and immaterial evidence is cured if during the further progress of the case the evidence becomes material.

2. Evidence showed that defendant's assignor, being in the sheep business, applied to plaintiffs to procure him more sheep, and they arranged to turn over to him a band at \$1.55 per head, on the agreement that plaintiffs were to retain the title until defendant either paid for them, or gave a mortgage on them and other sheep owned by him to secure such payment. A mortgage was thereafter prepared, which defendant refused to execute for the reason that the interest provided was too high. *Held* sufficient to show that the plaintiffs retained the ownership of the sheep.

3. An unexecuted chattel mortgage is not a written instrument, within the rule preventing the introduction of parol evidence to vary or contradict its terms. Its statements are admissions of the party from whom it proceeds, which may be explained by parol, the same as verbal admissions.

4. Code Civ. Proc. § 2032, requires a deposition, after being certified, to be inclosed in an envelope or wrapper, sealed, and directed to the clerk of the court in which the action is pending, etc. *Held*, that an indorsement of the name of the witness and case on the envelope was extra-official, and no part of the deposition, and that an error in the initials of the witness in such indorsement did not detract from the validity and authenticity of the deposition, and might be explained by parol.

5. Where a vendee of property agrees that the title is to remain in the vendor until paid for, and then gives mortgages thereon to a third party, such mortgages are competent, in an action by the vendor to recover the property, to show a violation of the agreement.

6. When, after suit brought to recover property sold under an agreement that the title shall remain in the vendor until paid for, a third person purchased the property from the vendee, with notice of the vendor's claim that the purchase price has not been paid, he takes the place of the vendee, with all the burdens arising from the contract, and a judgment for the property or its value was properly entered against him.

Commissioners' decision. Department 2. Appeal from superior court, Inyo county.

Action by J. H. Wise and another, co-partners, against John L. Collins. From a judgment in favor of plaintiffs, and an order denying a motion for a new trial, defendant appeals. Affirmed.

P. H. Mack and P. W. Bennett, for appellant. Wallis A. Lamar, for respondents.

SEARLS, C. Action of replevin to recover 2,400 sheep, or for \$2,500, the value thereof, in case a delivery cannot be had. The cause was tried by the court without a jury. Written findings were waived. Plaintiffs had judgment for possession of 1,820 sheep, and, if a delivery could not be had, for \$1,740, etc. John L. Collins, one of the defendants, appeals from the judgment, and from an order denying his motion for a new trial.

The first point urged in favor of reversal is based upon a ruling of the court admitting in evidence an agreement between plaintiffs and Bertrand Rhine, assignor of defendant, Collins, in reference to a band of sheep called the "Rodriguez sheep." The substance of this agreement is that Christy & Wise transfer to Rhine a band of sheep, consisting of 1,900 ewes and 700 lambs, more or less, at \$1.50 per head; Christy & Wise to retain the ownership thereof until they were paid for. Rhine was to run the sheep at his own expense, and dispose of them, and all moneys above the cost price of \$1.50 per head realized therefrom to be divided, 60 per cent. to Rhine, and 40 per cent. to plaintiffs. This agreement was dated April 27, 1894, and is a part of a deposition of Harry E. Wise, one of the plaintiffs, taken in the case. Immediately following the agreement, the witness stated in his deposition as follows: "The sheep mentioned in this agreement are not involved in the suit of Christy & Wise against Bertrand Rhine." At the trial, counsel for defendant moved to strike out all the testimony in regard to the Rodriguez sheep, upon the ground that the same is irrelevant and immaterial. The court denied the motion, and the ruling is assigned as error. This ruling was clearly erroneous. If the Rodriguez sheep were not involved in the action, all testimony in reference to them was clearly irrelevant and immaterial to the issues of the case. The error was cured, however, by the later testimony in the case, from which it appeared that in May, 1895, John F. Maio, the agent of plaintiffs, called upon Rhine, and proceeded to separate from other sheep the Rodriguez band; that he got about 1,100 grown sheep, and 700 sucking lambs. Subsequently he found there were some of the band he had not secured, whereupon he returned, and got an order from Mrs. Rhine for the remainder, and parted out, say, 100, when Rhine came, and refused to let him have them. Maio further stated that there were from 100 to 200 of the band which he did not get, and that some of them were taken by the sheriff in this action.

This testimony rendered proof of title to the Rodriguez band of sheep both proper and necessary.

2. The important contention in the case relates to another band of sheep known as the "Caetano band," and consisting of some 2,000. These sheep were owned by M. J. Caetano, of Merced, in the county of Merced. He was largely indebted to plaintiffs, wool buyers of San Francisco. Bertrand Rhine was in the sheep business, and owned some 1,500, which he was pasturing in the county of Inyo. Rhine was desirous of procuring more sheep, and applied to plaintiffs, with whom he was doing business, to aid him in procuring them. The latter arranged with Caetano to turn over to Rhine 2,000 of his band at \$1.55 per head, which was done. The testimony on the part of plaintiffs tends to show that their agreement with Rhine was that plaintiffs should retain the ownership of the sheep until Rhine either paid for them, or gave them a chattel mortgage on the band, and also upon the 1,500 owned by said Rhine. A mortgage was prepared by plaintiffs, and forwarded to Rhine, which he refused to execute, giving as a reason that the interest provided for therein was too high. We think the evidence was quite sufficient to sustain the theory of plaintiffs, to the effect that they retained the ownership of the sheep, and the court so held. Appellant, John Collins, took an assignment of the sheep from Rhine after suit brought, and was substituted as a defendant in place of Rhine.

Several objections were taken to testimony in explanation of expressions used in the chattel mortgage. These were based upon the theory that oral testimony was not admissible to vary the meaning of a written instrument. The answer to this is that the document, not having been executed, was in no proper sense a written instrument, within the purview of the rule invoked. Its statements coming from the plaintiffs were admissions on their part which were subject to explanation equally with like verbal admissions.

The deposition of Alice Simpson Houston, taken on behalf of the plaintiffs at San Francisco, was offered in evidence, and objected to by counsel for defendant upon the ground that the record shows that the deposition of F. K. Houston was taken. A motion was also made to strike out the deposition after it was admitted in evidence, which was denied, and the ruling excepted to. In support of his contention on this point, appellant cites *Dye v. Bailey*, 2 Cal. 383, and *Smith v. Westerfield*, 88 Cal. 375, 26 Pac. 206. The facts as they appeared at the trial are as follows: The clerk of the court was called upon, and produced the deposition, which was contained in a sealed package, and which he stated he received by United States mail. Upon the package was the following indorsement: "In the Superior Court of the State of California, in and for the County of Inyo. John H. and Harry E. Wise, Plaintiffs, vs. John L. Col-



lins et als., Defendants. Deposition of F. K. Houston, a witness produced, sworn, and examined on behalf of plaintiff, taken, sealed up, and deposited in the U. S. mail at San Francisco on the 6th day of November, 1895, by myself, Lee D. Craig, a notary public in and for the city and county of San Francisco, state of California. Registered December 6, 1895, San Francisco, street K, No. 18,244, and addressed to Hon. D. J. Hession, county clerk, Independence, Inyo county, California. Filed December 10, 1895. D. J. Hession, Clerk." The clerk then opened the package, which contained the deposition. It is headed as follows: "Deposition of Alice Simpson Houston." It proceeds as follows: "My name is Alice Simpson Houston, widow of Frank K. My business is stenographer and typewriter. I am employed with Christy & Wise, wool merchants, and have been so employed for six years last August." The witness then proceeds to give important testimony for plaintiffs in reference to the agreement made between plaintiffs and Rhine as to the Caetano sheep. It is conceded that her deposition was signed, "Alice Simpson Houston." Neither the notice under which the deposition was taken, nor the certificate of the notary thereto, is set out in the record. The court also permitted plaintiffs to prove, against the objection of defendant, that Mrs. Alice Simpson Houston and Mrs. F. K. Houston were one and the same person; that in the office where she was employed she usually went by the name of Mrs. F. K. or Mrs. Frank K. Houston, but that she always signed her name as Alice Simpson Houston. The contention of appellant would be sound, and the consequence fatal to the judgment, were it supported by the record, but it is not. The notice of taking the deposition and the certificate of the notary thereto not being set out, we must, in favor of the judgment, presume they were in due form, and described the witness by her true name of Alice Simpson Houston. The indorsement on the envelope inclosing the deposition formed no part of that document. Section 2032 of the Code of Civil Procedure requires the deposition, after being certified, to be inclosed in an envelope or wrapper, sealed, and directed to the clerk of the court in which the action is pending, etc. All else is extraofficial, and can neither add to nor detract from the validity or authenticity of the deposition. It follows that the deposition was, so far as appears, properly admitted in evidence.

The mortgages executed by Rhine to third parties upon the sheep were admissible in evidence, as tending to show a violation of his agreement with the plaintiffs. When, after suit brought, appellant, with full notice, became the purchaser of the sheep from Rhine, and procured himself to be substituted as a defendant in the cause, he took the place of said Rhine, cum onere, and the judgment for the recovery of the sheep, or of their value if delivery could not be had, was properly en-

tered against him. Beyond this and the costs, the judgment did not go.

There are a few other points made on the appeal, but they do not call for comment. We recommend that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

121 Cal. 42

HILL v. DEN. (L. A. 392.)

(Supreme Court of California. May 31, 1898.)

STATUTE OF FRAUDS—ORAL AGREEMENTS TO CONVEY LAND—PART PERFORMANCE—DISAFFIRMANCE—SURRENDERING POSSESSION.

1. Where a party to an oral contract for a conveyance of land had performed her part in full by the rendering of certain services, and the other party had partly performed by putting the former in possession, there is a sufficient part performance to remove the contract from the operation of the statute of frauds.

2. Where services have been rendered by a party in the performance of a verbal contract to convey land, and the other party puts the former into possession, but is unable to make a deed, the former cannot maintain an action in disaffirmance of such contract to recover the value of the services so rendered, unless he surrenders or offers to surrender such possession before the commencement of the action.

3. Plaintiff is not aided by his surrender and offer to restore possession after the commencement of the action, as set forth in his amended complaint.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county.

Action by Jose Vincente Hill against Augustus H. Den. From a judgment for defendant, plaintiff appeals on the judgment roll. Affirmed.

H. C. Booth, for appellant. Jas. B. Devine and W. S. Day, for respondent.

BELCHER, C. This is an action to recover the alleged reasonable value of certain services performed by plaintiff's wife, Maria Augustias Hill, for defendant. The defendant had judgment, and the plaintiff appeals on the judgment roll. The facts of the case, as disclosed by the findings of the court or admitted by the pleadings, are as follows: On or about the 18th day of April, 1894, defendant requested Mrs. Hill, plaintiff's wife, to come to his (defendant's) house, and take care of him, and do the necessary work about and in the house, and agreed that he would support and maintain her while she so remained, and, when he should get married, he would deed to her and her husband a home during their lives, designating certain realty in the city of Santa Barbara as the property to be so conveyed. Under said promise, Mrs. Hill and her husband went to



defendant's house, and remained there until defendant got married, on December 30, 1895, and, while so remaining, did the work and services there to be performed under said promise and agreement; and her services were worth \$50 per month while she remained in his service, to wit, from April 18, 1894, to December 30, 1895. After defendant's marriage he placed Mrs. Hill and husband in possession of the premises agreed upon between him and her, where they remained peaceably and without interference from defendant, or any one acting under him or as his successor, until after plaintiff commenced this action, when, defendant having given them no deed of the premises, they voluntarily surrendered the possession thereof. After plaintiff and his wife entered into possession of said property, and before the commencement of this action, defendant conveyed to his wife, in consideration of love and affection, all the real property which he possessed in Santa Barbara county, the deed being dated, acknowledged, and recorded on January 24, 1896; and there has been no reconveyance to defendant of the whole or any part of the property so conveyed. Defendant has not failed to fulfill his promise and carry out his contract except as before stated, and the execution of the deed by defendant to his wife as shown by the pleadings did not prevent him from carrying out his contract. After the execution by defendant of the deed to his wife, plaintiff's wife demanded of defendant a deed; and he replied that his wife knew all about his arrangement with her (Mrs. Hill), and they would fix it up, and that Thomas McNulta, his attorney, had the deed. Neither plaintiff nor his wife has received from defendant or his wife any deed of the said premises, but defendant's wife has neglected and refused to convey said property to plaintiff and his wife for life or at all. Neither plaintiff nor his wife made any improvements or expended any money on said property during their occupancy thereof. The action was commenced August 4, 1896. On September 8, 1896, plaintiff filed amendments to his complaint, in which he alleged "that plaintiff hereby offers to restore possession of said land to defendant, and hereby, for himself and his said wife, relinquishes, waives, and abandons all right, title, claim, and equity of either or both in and to said land on account of said verbal contract, or a part performance thereof." And on the same day he filed a supplemental complaint, in which he alleged "that since the commencement of said action, to wit, on the 6th day of August, 1896, plaintiff and his said wife, Maria Augustias Hill, have quit and surrendered the possession of the premises described and referred to in the complaint."

There is and can be no dispute upon the proposition that an oral contract for the sale of real property or of an interest therein is invalid under the statute of frauds. Code

Civ. Proc. § 1973. But such a contract may, nevertheless, be executed by the parties to it, and its specific performance may be compelled by a court of equity, in case there has been a part performance thereof. Id. § 1972. Here it appears that Mrs. Hill had performed, by the services rendered, her part of the contract in full, and that there was a part performance of the contract by defendant when he placed Mr. and Mrs. Hill in possession and gave them full control of the property. It is clear, therefore, that plaintiff might have demanded a specific performance of the contract, and had his demand enforced by the courts, as against both defendant and his wife; since, when defendant executed the deed to his wife, the Hills were in possession of the property, and she must therefore be deemed to have taken the deed with notice of their rights.

But whether an action for specific performance was plaintiff's only remedy need not be considered. In *Fuller v. Reed*, 38 Cal. 99, the following language is found in the opinion, on page 110: "If money has been paid or services rendered in the performance of the conditions of a void contract by one party thereto, and the other party fails to voluntarily perform on his part, the injured party has no remedy at law upon the contract. He may, however, under such circumstances, disaffirm such contract, and maintain his action at law to recover back money so paid, or the value of services so rendered." Conceding that the law is thus correctly declared, still the question remains: Can the plaintiff maintain this action, he and his wife having been in the full and undisturbed possession of the property, and having made no offer to surrender the possession or restore the same at the time the action was commenced? In *Browne on the Statute of Frauds* (section 121) the law is stated as follows: "When the purchaser under a verbal contract for land has been put in possession, and has made payments on account of the price, it is plain that he cannot recover the money without surrendering or offering to surrender the possession." And in *Wood on Frauds* (page 435) it is said: "In all cases where a person has gone into the possession of land under a verbal contract which the other party refuses to perform, before he can maintain an action for the purchase money paid by him, or improvements put by him upon the land, he must surrender the possession." In *Abbott v. Draper*, 4 Denio, 51, the court, by Bronson, C. J., said: "Although the statute declares a parol contract for the sale of lands void, it does not make it illegal. It is not a corrupt or wicked agreement; nor does it violate any principle of public policy. Parties are at liberty to act under such contracts if they think proper. Many such have been carried into complete effect by payment of the price and conveyance of the land. Part performance does not take the case out of the statute, so that the contract can be enforced

In a court of law. But, when the vendee has received the possession and paid a part of the price, the contract is not so utterly void that he can recover back the money just as though there had never been an agreement. If he can recover at all so long as the vendor is not in the wrong, he must, at the least, first restore the possession, and demand the repayment of the money. It is impossible to maintain that he can retain the possession and yet recall the money."

The decisions of this court are in line with the authorities above cited. In *Haynes v. White*, 55 Cal. 38, the vendee was put in possession of the land, and paid part of the purchase money. The vendor was unable to convey the title, and the vendee, while in possession, commenced the action to recover the amount of the purchase money paid, and damages. It was held that the action could not be maintained, and the court said: "They [the defendants] failed to comply with their part of the contract here in question, for they did not and could not convey to the plaintiff the title to the property; and the plaintiff having complied in part, and offered to complete the performance of the contract on his part, it is clear that, had he surrendered or offered to surrender to defendants the possession of the property, he could have maintained an action against them. Instead of doing this, he retained the possession of all the property, and commenced this action." And, after citing section 3306 of the Civil Code as to the measure of damages, the opinion states: "But, before an action can be maintained to recover this detriment, the plaintiff must have been evicted, or have voluntarily surrendered or offered to surrender possession. He cannot, as already observed, hold on to the property, and at the same time recover back what he paid." See, also, *Herman v. Haffenegger*, 54 Cal. 161; *Gates v. McLean*, 70 Cal. 42, 11 Pac. 489; *Rhorer v. Bila*, 83 Cal. 51, 23 Pac. 274; *Hammond v. Wallace*, 85 Cal. 522, 24 Pac. 837. It is well settled in this state that an action cannot be maintained unless the cause of action existed at the time the action was commenced. The decisions upon this point are numerous, and need not be cited. And, if a party has no cause of action at the time of its commencement, he cannot maintain it by filing a supplemental complaint founded upon matters which have subsequently occurred. *Wittenbrock v. Bellmer*, 57 Cal. 12. As plaintiff and his wife were in possession of the property at the time he commenced his action, he had then no cause of action for the relief demanded, and he was not aided by his subsequent offer to restore possession. The judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

121 Cal. 137  
**TRABING v. CALIFORNIA NAV. & IMP. CO.** (Sac. 295.)

(Supreme Court of California. June 3, 1898.)

MASTER'S LIABILITY FOR ACTS OF SERVANT—SUFFICIENCY OF COMPLAINT—SINGLE STATEMENT OF DAMAGES—MALICE OF SERVANT—ACTUAL AND EXEMPLARY DAMAGES—WITNESSES.

1. A complaint for damages from being handcuffed and tied to a post under orders of the captain of defendant's steamer sufficiently shows which of defendant's servants were the wrongdoers, where it alleges that the acts were committed by defendant's servants and agents, "who were at said time in charge of said steamer."

2. A complaint by one who was a passenger on defendant's steamer, for being wrongfully handcuffed by defendant's servants, tied to a post, and afterwards ejected from the steamer, states a single ground of recovery, so as to make proper a single statement of the entire damage sustained.

3. A company operating a line of steamboats as a common carrier is liable for the actual damages caused by the wrongful acts of a captain of one of its boats in the course of his duties, in handcuffing, tying to a post, and afterwards ejecting a passenger for an alleged failure to pay his fare, though the captain acted from malicious motives or resorted to unlawful means.

4. The proprietor of a steamboat is not liable for exemplary damages on account of wanton or malicious acts of a captain of its boat towards a passenger in executing the authority given him, unless the act was either authorized or ratified.

5. Instructing that the jury should render a verdict for such damages as appeared from all the evidence to be just is too general in an action against a principal for the malicious acts of its agent done in the course of his duty.

6. On an issue as to whether plaintiff had paid his fare on defendant's steamer, the mother of plaintiff testified on direct examination that she had written him to come home, and that a few days after the date she expected him she had received a letter from him stating that he had been put off the steamer en route. On cross-examination she was asked if he had not told her he had no ticket, which she denied, and also if she had not told P. that he had not paid his fare, which she denied. Held that, the examination being on collateral matters not brought out by any evidence in chief, defendant was bound by the answers; and it was immaterial that the witness was the guardian ad litem of plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county.

Action by Charles Trabling, a minor, by Minnie Jones, his guardian ad litem, against the California Navigation & Improvement Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Woods & Levinsky, for appellant. Nicol & Orr, for respondent.

HAYNES, C. The plaintiff is a minor, and was of the age of 14 years at the time of the injuries complained of. The defendant is a corporation engaged in operating a line of steamboats between San Francisco and the city of Stockton for the transportation of passengers and freight to and from those places and intermediate ports. The



additional facts constituting plaintiff's cause of action, as alleged in the complaint, may be summarized as follows: On the evening of March 23, 1895, at about 8 o'clock, the plaintiff boarded defendant's steamer, *Mary Garratt*, at Benicia, to be carried to the city of Stockton, and paid therefor 50 cents, that being the regular fare. That, when the steamer was but a short distance from Benicia, the defendant's servants and agents in charge of said steamer "wrongfully placed on the plaintiff iron handcuffs, and took him down into and upon the lower deck of said steamer, and there chained him to a post in such way and manner as to cause him great bodily pain. That plaintiff was so kept by said defendant's said servants and agents ironed and chained to said post as said steamer proceeded on its said trip, and until said steamer on its said trip reached the town of Antioch, at which last-named place said defendant's said servants and agents removed said irons from said plaintiff, and then and there, against his will, wrongfully ejected him from said steamer," to his damage in the sum of \$5,000. A demurrer to the complaint was overruled, and the defendant answered, and, after denying specifically the allegations of the complaint, with the qualification "save and except as hereinafter set forth," alleged, in substance, that, after the steamer left Benicia, the plaintiff refused to pay his fare, and "used violent, profane, abusive, vile, and obscene language to and towards the captain of said steamer, who was then in charge of said steamer, in the presence of the passengers"; that, by reason of said language and conduct, he was compelled to, and did, place handcuffs upon him and chain him to a post on the lower deck; that it caused plaintiff no pain; and that he was released and put ashore at Antioch. The jury found for the plaintiff, and assessed his damages at \$2,500. This appeal is by the defendant, from the judgment and an order denying its motion for a new trial.

The demurrer to the complaint was general and special; the latter, upon the ground of ambiguity, in that it did not show whether the plaintiff suffered damage in said sum by reason of being handcuffed, or by reason of being chained to a post, or by reason of being ejected from the steamer, and because it does not show which of defendant's servants did these things. In appellant's brief only the special demurrer is considered, and we shall therefore assume the sufficiency of the complaint as against a general demurrer; and we also think the complaint sufficient as tested by the special demurrer. The wrongs and injuries complained of are alleged to have been committed by the defendant's servants and agents "who were at said time in charge of said steamer." This allegation sufficiently distinguishes between those who were authorized to represent the defendant in the management and control of

the boat and its business, and those who, though employes and servants, were merely laborers and under the immediate control of those "in charge of said steamer." Whether, if these alleged wrongs and injuries had been perpetrated by the deck hands of their own motion, and without the direction of any one in control of the steamer and its business, the defendant would not be liable, upon the ground that it was its duty to prevent it, need not be considered.

1. That the alleged wrong and injury was a continuing one, and was in law one and not divisible, and states a single ground of recovery; and that a single statement of the entire damage sustained, in one sum, is proper, see *Sloane v. Railway Co.*, 111 Cal. 685, 44 Pac. 320.

2. Defendant's motion for a nonsuit at the conclusion of plaintiff's evidence in chief was properly denied. Said motion was based upon the ground that "the evidence on the part of the plaintiff shows that the acts of the captain of the steamer *Mary Garratt* in the arrest and imprisonment of the plaintiff were a willful and wanton wrong and trespass on the part of the captain, and there is no evidence to show that the same were authorized by the defendant, or subsequently ratified by it." The answer of defendant, as well as the evidence given on behalf of the plaintiff, shows that all the acts of the captain constituting the alleged wrongs and injuries were done and performed upon defendant's boat in its operation as a common carrier by the captain in charge thereof, in the line of his employment. That he was authorized by the defendant to see that persons being transported upon its said steamer paid their fare, and to collect the same, and to remove from the steamer those who, not having paid their fare, refused to pay it when demanded, cannot be questioned. That was not only "in the line of his employment," but one of the very purposes for which he was employed; and that defendant is liable in damages for all that the captain wrongfully did to the plaintiff in the execution, or attempted execution, of that authority, even though the captain acted from wanton or malicious motives, or resorted to unlawful means in executing it, is amply sustained by the modern authorities, and among them several of those cited by appellant. See *Cooley*, *Torts* (2d Ed.) p. 625 et seq. (star page 534 et seq.), and numerous cases there cited; *Thomp. Neg.* p. 886, § 4, treating of willful and malicious acts of servants; *Rounds v. Railway Co.*, 64 N. Y. 129; *Lothrop v. Adams*, 133 Mass. 471, 480; *Railway Co. v. Prentice*, 147 U. S. 109, 111, 13 Sup. Ct. 261; *Stephenson v. Southern Pac. Co.*, 93 Cal. 558, 29 Pac. 234; *Warner v. Same*, 113 Cal. 111, 45 Pac. 187; and *Gorman v. Same*, 97 Cal. 1, 31 Pac. 1112. That the injuries were willfully or wantonly inflicted does not relieve the defendant from liability. In *Railway Co. v. Prentice*, supra, the supreme court of the United States said: "A corporation is doubtless liable, like an indi-



vidual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal," citing several cases.

3. It is further contended that the evidence is insufficient to justify the verdict. This contention is based: (1) Because the injuries were willfully inflicted by the captain; (2) that plaintiff provoked the injuries by his own misconduct; and (3) that the damages suffered were merely nominal; and, for the first and second of these reasons, it is also contended (4) that the verdict is against law. So far as these points are not disposed of by what has already been said, they may be considered under appellant's next point, which is (5) that the damages are excessive, and were given under the influence of passion and prejudice.

The plaintiff testified, in substance, that he came to the boat accompanied by his brother Louis and his friends Ray Barrington and H. Starkey; that the purser came to the wharf end of the gang plank, and sold tickets; that his brother gave him 50 cents, that being the full fare to Stockton; that he bought a ticket, and went on the boat, and gave his ticket to a man at the boat end of the gang plank, went onto the passenger deck, and stood at the rail for about 10 minutes, until the boat started; that, after the boat started, the captain accosted him, demanding his fare; that plaintiff replied, "I paid my fare;" that the captain said, "You lie. You did not. Come with me;" that the captain put handcuffs on him, and took him down to the Chinese den, under the engine room, and chained his arms around a post, and kept him thus chained about three hours, until the boat reached Antioch, when he was released, and told to "get out of here," and was put ashore; that while he was handcuffed, with his arms around the post, the handcuffs hurt his arms; that he could sit down, but, while sitting he was kept bent so that he was more comfortable standing up; that he had no money when he was put off the boat, and knew no one in Antioch; that it was then about midnight; that he spent the remainder of the night under the sidewalk, and next day walked back to Port Costa, a distance of 30 miles, crossed the straits in a fishing boat, and reached Benicia about dark. In his testimony that he bought a ticket and went onto the boat on the gang plank, plaintiff was fully corroborated by his brother and by Barrington and Starkey. The captain testified that plaintiff came on the boat from the piling, amidships, and not by the gang plank, and in this he was corroborated. The only abusive language used by the plaintiff before he was taken down into the hold, according to the captain's testimony, was that, when he asked him for his ticket, he replied, "Take it if you can, and be damned to you;" that the other abusive language was used after he had taken him downstairs, and saw that he was going to handcuff him, when he called him a "Dutch son of a bitch." Without stopping to

notice the evidence tending to corroborate or contradict the testimony given on behalf of the respective parties, it is clear that there was ample evidence to sustain a verdict for the plaintiff for compensatory damages. The credibility of the witnesses and the weight of the evidence were exclusively for the determination of the jury.

It is contended by appellant that the jury must have included exemplary damages in their verdict; that the amount awarded the plaintiff cannot be otherwise explained. We cannot determine from the amount awarded whether it includes exemplary damages or not. If the jury were properly instructed upon that subject, an excess in the amount given should be very clear to justify this court in disturbing their conclusion. The question therefore turns upon the instructions given and refused. If the action had been against the captain in charge of the steamer, an instruction to the jury that they might, if they deemed it proper, give exemplary damages if they should find the facts to be as claimed by the plaintiff, would have been proper. But the defendant, the corporation, not having directed the captain to perpetrate the wrongs complained of, while liable for compensatory damages, is not liable for exemplary damages unless it should be made to appear that it ratified the captain's acts; and it is not claimed on behalf of the plaintiff that there was any such direction or ratification. That unless the acts constituting the injury were directed by the corporation, or subsequently ratified by it, exemplary damages cannot be given, see *Warner v. Southern Pac. Co.*, 113 Cal. 105, 45 Pac. 187, and *Railway Co. v. Prentice*, 147 U. S. 106, 13 Sup. Ct. 261. Upon the subject of damages the court instructed the jury, at plaintiff's request, that, if they found certain facts therein enumerated, "then I charge you your verdict will be in favor of plaintiff for such damages as under all the circumstances of the case disclosed by the evidence appear to be just, not exceeding the sum of \$5,000," the sum demanded in the complaint. The defendant requested the following instruction, which was refused: "I charge you that in cases of this kind the plaintiff can recover only the actual damages suffered by him, unless the master authorized the commission of the act complained of, or participated therein, or ratified it after its commission." As an abstract proposition of law the instruction given is correct, but it is too general to properly guide a jury to a correct conclusion under the facts of this case. The instruction would apply to almost any conceivable case, whether the action were against the principal or against the agent who actually committed the tort, and whether the facts did or did not justify exemplary damages. It left the question of exemplary damages entirely to the discretion of the jury. The instruction which was refused should have been given. It would

have informed the jury that they could not give exemplary damages. The jury were not restricted to compensatory damages, either by the instruction asked or by some other instruction of similar import. The exceptions to the other instructions given at plaintiff's request are not well taken. These exceptions are mainly based upon the proposition that the defendant is not liable for the willful acts of the captain, or that they did not embrace facts which would justify the captain in imprisoning the plaintiff. But no facts were either alleged or proved which could justify such imprisonment, and the jury were properly so instructed. We also think the court properly refused all the instructions requested by defendant which were refused, except the sixteenth; and as that instruction included the subject of exemplary damages, upon which the jury had not been instructed, it should have been modified by specifying the grounds upon which compensatory damages should be based, and given as thus modified.

Certain exceptions were taken by the defendant to rulings upon questions of evidence, which should be briefly noticed. Mrs. Jones, the mother of the plaintiff, was the first witness called, and in chief testified to plaintiff's age; that she had written to him to come home, and expected him the morning of the 24th; that she learned some days after that, by letter from the plaintiff, that he had been put off the boat, but was not asked and did not testify to any of the particulars. Upon cross-examination counsel for defendant asked her as to conversations with her son, whether he told her he had bought a ticket, to which she replied that "he said he had." She was then asked whether she had not told Mr. Parker in a certain conversation that plaintiff told her that he had not paid his fare, to which she replied she had not. She was also asked as to whether her daughter, in a conversation with Parker in her presence, had not said that plaintiff had no ticket, but that she told him to say he paid his fare, and to stick to it. This was not a cross-examination of the witness as to any matter testified to in chief, and seemed to be intended to rebut testimony which it was anticipated the plaintiff would give, and, being collateral, the defendant was bound by her answers. For the purposes of contradicting her as to the conversations with Parker, he was called as a witness by the defendant, and asked as to those conversations. Two of these questions were excluded, upon the ground that they called for conversations which Mrs. Jones was not asked to relate, and not of a particular fact alleged to have been stated in the conversation. These questions were properly excluded. What she may have said to Mr. Parker was a purely collateral matter, and did not bind or affect the plaintiff; and no rule of evidence is better settled than that collateral matters cannot be elicited for the pur-

poses of impeachment, and that a party putting such collateral questions is bound by the answers of the witness. The whole of Parker's testimony, so far as it tended to impeach the testimony of Mrs. Jones or her daughter, was improper, and should have been excluded; nor did the fact that Mrs. Jones was the guardian ad litem of the plaintiff make the examination proper or admissible. We advise that the judgment and the order denying a new trial be reversed, and a new trial ordered.

We concur: CHIPMAN, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed, and a new trial ordered.

121 Cal. 145

MOORE v. KENDALL. (Sac. 296.)

(Supreme Court of California. June 3, 1898.)

NEW TRIAL—DISMISSAL—LACHES.

Where the settlement of a statement in support of a new trial is postponed from time to time for nearly a year, when it is discovered that the statement and amendments thereto have been lost, and on stipulation defendant is allowed time to file a rescript, the correctness of which is thereafter disputed, it is not an abuse of the discretion of the court to dismiss the proceedings for a new trial because not prosecuted with reasonable diligence.

Commissioners' decision. Department 2. Appeal from superior court, Placer county.

Action by Mary E. Moore against William S. Kendall. Judgment for plaintiff. From an order dismissing defendant's proceedings for a new trial, he appeals. Affirmed.

A. M. Johnson, for appellant. J. M. Fulweiler and L. T. Hatfield, for respondent.

BRITT, C. Judgment was entered against defendant in this action on October 27, 1894. His attorney gave notice of intention to move for new trial, and in January, 1895, served his proposed statement in support thereof on the attorney for plaintiff. On March 4, 1895, the latter served certain proposed amendments to such statement on the attorney for defendant. Thereupon defendant's attorney gave due notice that he would present the proposed statement and amendments to the judge who tried the cause for settlement on March 14, 1895. The matter of settling the statement was postponed from time to time—at least some of the delay being at the instance of defendant—until some time in October, 1895, when it was found that the proposed statement had been lost. Defendant's attorney then obtained a continuance until December 18, 1895 (afterwards extended by stipulation until January 12, 1896), to enable him to present a redraft of the proposed statement, to be made from the stenographic notes of the trial. He served a paper of that nature, but its correctness



as a rescript of the first draft was disputed by plaintiff's attorney. On February 10, 1896, the attorney for plaintiff gave notice of motion to dismiss the defendant's proceedings for new trial on the ground, among others, that they had not been prosecuted with reasonable diligence. The court granted the motion to dismiss, and defendant appealed.

If we admit, as appellant contends, that the evidence at the hearing showed that the original proposed statement was lost while in the hands of plaintiff's attorney, and that the subsequent embarrassments resulted mainly from such loss, it was yet the appellant on whom rested the duty, as the moving party, to present the proposed statement and amendments, within 10 days after the receipt of the latter, to the judge for settlement, or to deliver them to the clerk of the court for the judge. Code Civ. Proc. § 659, subd. 3. The defendant did neither the one nor the other; and although it may be inferred from the subsequent conduct of plaintiff's attorney that such omission was not objected to by him, and that by consent to proceedings for supplying the lost statement he waived objections he might previously have made, still the defendant is not blameless for the loss of the paper. Had he taken either course allowed by the statute, probably it would not have been lost. According to his own showing, he took no note of the safekeeping of the document for the space of six months or more after it became his duty to deliver it either to the judge or the clerk. Also, there is no explanation of his delay to obtain, or to attempt to obtain, a settlement of the substituted statement during the period from January 12 to February 10, 1896. The circumstances were such as should have incited to dispatch. We see no abuse of discretion in the order appealed from, and it should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(121 Cal. 247)

ROGERS et al. v. KIMBALL et al. (L. A. 199.)<sup>1</sup>

(Supreme Court of California. June 23, 1898.)

CONTRACTS OF INDEMNITY—WANT OF CONSIDERATION—PLEADINGS—VARIANCE—RELEASES—EFFECT BY STATUTE.

1. A recovery cannot be had on a contract to indemnify where there has been no performance, or offer to perform, of the promise which was the sole consideration of the agreement to indemnify.

2. Where there is a failure to establish a case as alleged in the complaint, or to ask leave to amend, the judgment will not be reversed on the ground that, on some different state of the pleadings, plaintiffs might have been entitled to recover.

3. Civ. Code, § 1541, providing that an obligation is extinguished by a written release thereof given to the debtor by the creditor, with or without a new consideration, applies only to instruments which, by their terms, purport to be formal releases, and does not include contracts of indemnity which on their face purport to give a right on which an affirmative action would lie.

In bank. Appeal from superior court, San Diego county.

Action by Thomas L. Rogers and wife against Warren C. Kimball and others. From a judgment for defendants, and from an order denying a new trial, plaintiffs appeal. Affirmed.

D. L. Withington, Works & Works (Withington & Carter, of counsel), for appellants. M. A. Luce, McDonald & McDonald, A. H. Collins, and W. J. Hunsaker, for respondents.

VAN FLEET, J. Appeal by the plaintiffs from a judgment in favor of defendants, and from an order denying a new trial. The action is by and on behalf of Ella S. Rogers, the real party in interest, joining with her Thomas L. Rogers, her husband, to recover upon a certain contract of indemnity, set forth in the complaint. The complaint, after alleging the death of James S. Gordon, and the appointment of the defendant Jessie Gordon Whittlesey as administratrix of his estate, alleges, in substance: That on February 25, 1882, the plaintiffs and the defendants Warren C. Kimball and Moses A. Luce and said James S. Gordon, executed their promissory note for \$10,000, payable to the order of the Consolidated Bank of San Diego six months after date, with interest, and that said bank afterwards indorsed said note to Bryant Howard. That plaintiff Ella S. Rogers signed said note at the request and for the accommodation of said Kimball, Luce, and Gordon. That on February 27, 1882, plaintiff Thomas L. Rogers conveyed and caused to be conveyed to said Luce, Kimball, and Gordon a one-fifth interest in and to a certain concession made by the Mexican government of the right to construct a railroad, to be known as the Sonora and Baja California Railroad; and that, in consideration of said conveyance, said Luce, Kimball, and Gordon executed and delivered an agreement in writing, of which the following is a copy: "We, the undersigned, for and in consideration of a conveyance to us, of even date herewith, of a one-fifth interest in and to the concession by the government of Mexico of the right to construct a railroad to be known as the Sonora and Baja California Railroad, do hereby assume all responsibility for the payment in full of a note of date February 25, A. D. 1882, made to the Consolidated Bank of San Diego, and signed by the undersigned, together with Thomas L. Rogers and Ella S. Rogers; hereby releasing from any payment thereon, as joint or several payors, the said Thomas L. Rogers and Ella S. Rogers, and hereby agreeing with the said Thomas L. Rogers and Ella S. Rog-

<sup>1</sup> Rehearing denied.



ers to indemnify them in full for any loss or damage they may in any manner sustain on account of said note. Witness our hands, this 27th day of February, A. D. 1882. Warren C. Kimball. James S. Gordon. Moses A. Luce,"—and thereby agreed to and did release the plaintiffs from said note. That the said defendants and the said Gordon have paid no part of said note, except the sum of \$3,333.33 paid by said Kimball. That said Howard, to whom said note has been transferred by the bank, on the 15th day of May, 1886, brought suit thereon against the plaintiffs herein, Thomas L. Rogers and Ella S. Rogers, and obtained judgment against them on the 14th day of March, 1889, for the sum of \$7,019 damages and \$63.12 costs. That on February 20, 1893, an execution thereon was issued; and on February 24, 1893, the plaintiff Ella S. Rogers paid out of her separate property, in full satisfaction of said judgment and execution, the sum of \$7,100. That the plaintiffs are husband and wife. That Ella S. Rogers has demanded payment from the defendants of said sum, but no part of it has been paid, and judgment therefor in her favor is demanded. The defendants Moses A. Luce and Jessie Gordon Whittlesey filed a joint answer, in which they deny that Mrs. Rogers signed said note for their accommodation or at their request, and allege that defendants signed said note at the request and for the benefit of plaintiffs; deny that Thomas L. Rogers conveyed, or caused to be conveyed, said concession, or that in consideration of such conveyance they executed the agreement of indemnity set out in the complaint; deny, for want of information, the allegations touching the judgment and execution and its satisfaction. For a second defense, they allege that, at the time they executed said indemnity agreement, Thomas L. Rogers agreed to convey to Kimball, Luce, and Gordon a one-fifth interest in said concession, and that said agreement to convey said interest was the consideration for the execution of the indemnity agreement by Kimball, Luce, and Gordon, and that Rogers never did convey, or cause to be conveyed, said interest; and, upon information and belief, allege that Rogers never had or owned or could convey any interest in said concession, whereby the consideration for their execution of the indemnity agreement wholly failed; and aver that they received no consideration whatever for the execution of said agreement. They also pleaded that plaintiff's cause of action was barred by section 337 of the Code of Civil Procedure. Defendant Kimball answered separately, making substantially the same defense, so far as material to be considered, as that made by his co-defendants. The court found that the plaintiff Ella S. Rogers did not sign the note for the accommodation and at the request of the defendants, or either of them, but that she and the defendants signed at the request of the

plaintiff Thomas L. Rogers; that said T. L. Rogers thereafter promised and agreed to convey, and cause to be conveyed, a one-fifth interest in the Mexican concession, and upon this consideration, and no other, the defendants executed the agreement sued upon, and that the plaintiff Thomas L. Rogers did not convey, or cause to be conveyed, said interest; that the plaintiffs did not, nor did either of them, pay or give any consideration whatever for the execution of said instrument; and it further found that prior to the 19th day of January, 1889, the note was fully paid and discharged. Upon these findings, judgment was entered in favor of the defendants.

The appeal is based upon the one ground that the findings are not sustained by the evidence. Several of the findings are attacked by the specifications, but the material question in the case is whether the evidence warrants the finding of a failure or want of consideration for the contract sued on, since, if it does, the judgment must stand. It is against this finding that the main effort of appellants is directed; but the assault proceeds upon lines largely, if not wholly, at variance with the case made by the complaint, and which the defendants were called upon to meet. It is contended that the evidence shows without conflict that the plaintiff Ella S. Rogers was induced to sign the note in question by the promise of Luce, Kimball, and Gordon to thereafter sign the indemnity agreement, and thereby hold her harmless from liability on the note; that this promise was a valuable consideration moving between her and the defendants, and that it is therefore immaterial, as to her rights in the premises, whether the consideration for the contract, as between her husband and defendants, failed or not; that, when defendants executed the contract of indemnity, they became liable upon the original promise, and are now estopped to deny that her signature to the note was given for a valid and binding consideration. Not only is this proposition not in line with the theory of the plaintiffs' case as made by the complaint, but it rests for its foundation upon the assumption of appellants that the evidence of Ella S. Rogers, as to the circumstances under which she signed the note and the causes inducing her thereto, stands uncontradicted, which very clearly appears from the evidence in the record is not the fact. Mrs. Rogers testified upon this point as follows: "The circumstances under which I signed the note of February 25, 1882, were as follows: Mr. Rogers told me that the defendants wished to borrow \$10,000 of the bank, and the bank would let them have the money if we would sign the note, and that the defendants would give us an agreement of indemnity. Upon this security I was willing and did sign the note at the request of Mr. Rogers, and for the accommodation of the defendants, as I have

stated. None of the defendants signed at my request or as sureties for me. I knew nothing of the conveyance of the concession. I know nothing of the signing of the agreement or the conveyance of the concession. I saw the agreement after it was signed, and am positive that I saw the agreement of indemnification before I signed the note, but it was not then signed by the defendants. I was told that it would be signed by them if I signed the note. That is all I know about it." This was the sum and substance of Mrs. Rogers' testimony. The evidence on behalf of the defendants, however, was positive to the fact that Luce, Kimball, and Gordon signed the note only for the accommodation of Thomas L. Rogers, and that the question of defendants taking an interest in the Mexican concession was never suggested or broached at all until a day or so subsequent to the execution of the note. If this was so, it tended directly to negative the testimony of Mrs. Rogers. If the sale of the interest in that concession had not been proposed at the time she signed the note, the inference would be inevitable that the indemnity agreement had not at that time been drawn or thought of, since that instrument recites and the complaint alleges that the only consideration for its execution was the conveyance of such interest; and, if the agreement had not been then drafted or thought of, it could not, as stated by Mrs. Rogers, have been exhibited to her before or at the time she signed the note; nor, in the nature of things, could it be at all probable that her signature to the note was induced by the promise that such an instrument would be given. Moreover, her evidence is at variance with the allegations of her complaint, and with the recitals of the instrument itself, which latter refers to the note as executed two days before, and as signed by Ella S. Rogers. It cannot be said, therefore, that the evidence of Mrs. Rogers as to the considerations which induced her to sign the note was uncontradicted, and that the court was bound to find in accordance with it. Under the evidence the court was fully justified in finding that there was no consideration moving the defendants to the giving of the indemnity, other than the agreement of Thomas L. Rogers to convey an interest in said concession. This also answers the further proposition that the agreement operated a novation of parties, by which Mrs. Rogers took Luce, Kimball, and Gordon as principals upon the note in place of her husband, since this proposition is rested upon the same contention that she signed the note with the understanding that the agreement would be executed.

It is further advanced that the only right the defendants had upon the failure of Thomas L. Rogers to make the stipulated conveyance was that of rescission; that this right was one to be exercised promptly; and that

by their failure to so exercise it, they are deemed to have waived the making of the conveyance, and are estopped, at least as against the plaintiff Ella, to urge a want of consideration on that ground. But it is a sufficient answer to this proposition to say that no such case is made by the pleadings. No estoppel is pleaded, but it is alleged that the conveyance was in fact made, and the terms of the contract thereby fulfilled. Plaintiffs were bound to establish their case as alleged; or if the evidence showed a state of facts not pleaded, and yet authorizing a recovery, they should have asked leave to amend and conform their pleading to the facts. They failed to do either the one or the other, and, the evidence not warranting a recovery under the facts averred, the findings against them will not be disturbed because, upon some different state of the pleadings, plaintiffs might have been entitled to recover. *Mondran v. Goux*, 51 Cal. 151; *Bryan v. Tormey*, 84 Cal. 126, 24 Pac. 319.

It is said the contract does not by its terms contemplate any further conveyance than that recited therein, and that it appears from the evidence that the defendants got all they contracted for, and never expected any further conveyance. The first part of this proposition involves a construction of the contract which it will not bear, and which the parties themselves never gave it. The second is answered against appellants by the findings of the court, based upon evidence which we deem substantially conflicting.

The proposition that the contract sued on constituted a release of the plaintiffs from their obligation on the note, and, being in writing, was good without further consideration, under section 1541 of the Civil Code, is untenable. The provision of that section making a release in writing of an obligation valid and binding without a new consideration therefor has application only to instruments which by their terms purport to be formal releases, and does not include instruments or contracts which might operate as such indirectly, but which upon their face purport to give a right upon which an affirmative action would lie. Construing this section in *Canal Co. v. Roach*, 78 Cal. 552, 21 Pac. 304, this court said: "The want of consideration is not obviated by section 1541 of the Civil Code. That section provides that 'an obligation is extinguished by a release thereof given to the debtor by the creditor upon a new consideration, or in writing, with or without new consideration.' We think that this provision applies to express releases, given with intent to extinguish the obligation, and not to things which might have that result in a roundabout way. In dispensing with a consideration, the legislature dispensed with the substance of the transaction. And we do not think it ought to be assumed, in the absence of language to that effect, that the intention was to dispense with both form and substance."



We do not deem it necessary to notice the other points discussed. We are satisfied that there was evidence tending substantially to sustain the finding of a failure of consideration for the contract sued on, and this conclusion renders the other questions immaterial. The judgment and order are affirmed.

We concur: GAROUTTE, J.; TEMPLE, J.; McFARLAND, J.; HARRISON, J.; HENSHAW, J.

BEATTY, C. J. I concur. The action is founded, not upon a release, but upon a contract to indemnify; and there can be no recovery upon such a contract when it appears that there has been no performance, or offer to perform, of the promise which was the sole consideration of the agreement to indemnify.

(121 Cal. 227)

HERBERT v. SOUTHERN PAC. CO. (Sac. 339.)<sup>1</sup>

(Supreme Court of California. June 20, 1898.)

#### NEGLIGENCE—ACCIDENT AT CROSSING.

1. Negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence.

2. If one might have seen or heard an approaching train by looking or listening, the fact of his injury raises a presumption that he did not take the required precautions.

3. Plaintiff, after residing four years within 200 feet of a railroad crossing, which was quite near a cut 15 feet deep and 600 feet long, while at a station about 1,000 yards from the crossing, saw there a freight train, as he was starting for home, that he knew was waiting to meet a passenger train. The road which he traveled to reach his home passes near the railroad until within about 450 feet of the crossing, from which point it winds around a hill. When about 800 feet from the station, he met the passenger train; and, when more than 1,000 feet from the crossing, he heard the whistle of the freight engine, indicating that it had started. He could see nothing of the train when he turned to go around the hill, but was unable to see the track within 1,300 feet of the station. He knew that the grade was steep from the station to the crossing, and for that reason steam would be cut off, and the train come down in comparative silence. *Held*, that plaintiff's injuries at the crossing by coming into collision with the freight train were caused by his contributory negligence, although the whistle was not sounded nor the bell rung.

Department 2. Appeal from superior court, Placer county.

Action by T. L. Herbert against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. M. Fulweiler, for appellant. Tabor & Tabor, for respondent.

TEMPLE, J. Action for damages for personal injuries resulting from a collision with a west-bound train of defendant at a private crossing about one-half mile west of Penryn. Plaintiff recovered a verdict for \$5,000. The appeal is from the judgment and from a refusal of a new trial.

It is contended on this appeal that upon

plaintiff's own testimony, and conceding to him all disputed points in the evidence, and also that defendant was guilty of such negligence that it would be liable if plaintiff were not also in fault, it must be held as matter of law that plaintiff was guilty of such contributory negligence that he cannot recover. The rule is that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence. This proposition has been frequently declared by this court. *Fernandes v. Case*, 52 Cal. 45; *McKeever's Case*, 59 Cal. 294; *Chedster's Case*, 59 Cal. 197; *House v. Meyer*, 100 Cal. 592, 35 Pac. 308. The rule is general, and appellant presents a very long list of cases in which the rule has been stated. The effect of all is the same. If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury. *McKune v. Lumber Co.*, 110 Cal. 480, 42 Pac. 980. Our ideas as to what would be proper care vary according to temperament, knowledge, and experience. A party should not be held to the peculiar notions of the judge as to what would be ordinary care. That only can be regarded as a standard or rule which would be recognized or enforced by all learned and conscientious judges, or could be formulated into a rule. In the nature of things, no such common standard can be reached in cases of negligence, where reasonable men can reach opposite conclusions upon the facts. In such cases it was said in *Mann v. Stock-Yard Co.*, 128 Ind. 138, 26 N. E. 819: "It is said to be the highest effort of the law to obtain the judgment of 12 men of the average of the community, comprising men of learning, men of little education, men whose learning consists only of what they have themselves seen and heard, the merchant, mechanic, the farmer, and laborer, as to whether negligence does or does not exist in the given case." But the cases arising from injuries suffered at railroad crossings have been so numerous, and upon certain points there has been such absolute accord, that what will constitute ordinary care in such a case had been precisely defined; and, if any element is wanting, the courts will hold, as matter of law, that the plaintiff has been guilty of negligence. And, when injury results which might have been avoided by the use of proper care, the plaintiff cannot recover, although the defendant has also been guilty of negligence. In this special case the amount of care as well as the nature of it has been settled. The railroad track of a steam railway must itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to

<sup>1</sup> Rehearing denied.

look and to listen for approaching trains. What he must do in such a case will depend upon circumstances. If the view of the track is obstructed, he should take greater pains to listen. If, taking these precautions, he would have seen or heard the approaching train, the very fact of injury will raise a presumption that he did not take the required precautions.

In this case the plaintiff knew that the train was near. He had resided for four years within 200 feet of the crossing where he was injured. Immediately before reaching the crossing, the track passes through a cut, some 15 feet deep, for a distance of between 600 and 700 feet. Plaintiff saw the freight train at Penryn before he started home, and knew it was waiting there for the eastern-bound passenger train. From Penryn it is 1,630 feet to the whistling post, and 1,320 feet from the post to the crossing. It is a steep down grade of about 115 feet to the mile, and the train passes down by gravity, controlled by the brakes. The road passes near the railroad until about 450 feet from the crossing, from which, as plaintiff testified, it meanders around a hill. When plaintiff was about halfway to the whistling post, he met an eastern-bound train; and, when from 15 to 20 rods below the whistling post, he heard the "toot" which indicated that the freight train had started. At that time he was certainly more than 1,000 feet from the crossing, measured along the railroad track. He proceeded along until within about 450 feet of the crossing, looking all the time for the train. At that point he could see about 300 feet above the whistling post, and the train was not in sight. From that place he turned to go down and around the hill, and lost sight of the track. He proceeded at the rate of from six to seven miles an hour, until within about three rods, whence he proceeded on a walk to the crossing. He could see from the eminence from whence he had the last sight of the track that at that time the train was not within 1,620 feet of the crossing, and would have to make that distance while he was going 450 feet; that is, he would have known these facts had he known the precise distances, and these he did not know. He could only estimate. Nor did he know how rapidly the train would move. The engine driver thought he did move at about the rate of 12 miles an hour, but plaintiff could not know that it was not moving at a rate exceeding 20 miles an hour. Had the distances been known and also the speed of the train, it would have been a nice calculation to determine which could reach the crossing first. As a matter of fact, they reached there at about the same time, though plaintiff might have escaped "by the skin of his teeth" had not his horse, startled by the sudden appearance of the engine, stopped at the track.

Now, if the plaintiff had the train in mind, as he says he did, he knew that it was at hand, and could not be more than a few seconds away, and might be, as the event proved. It was a most reckless race with death, and, if it does not present a case free from doubt, such a case cannot be imagined.

Plaintiff must have been more than 1,000 feet from the crossing when he heard the signal that the train had started. He was familiar with the running of the train. When the signal referred to was given, the train was already out of the siding, on the main track, and the switch had been adjusted. The distance from the siding to the crossing, by actual measurement, was 2,980 feet. He knew the train came down more silently because of the steep grade, where no use of steam was required. It passed through the deep cut, where the sound would be deadened. One of the plaintiff's witnesses described how startlingly it appeared at the crossing, as though it came out of the ground. He had, at the best, but to wait a few seconds to let the train pass. Under such circumstances, to attempt to anticipate the train was almost an act of madness. The only answer to this is that defendant's employes did not ring the bell or sound the whistle, and that the fireman was not at his place, on the left side of the engine. The argument, of course, is that, if the signals had been given, plaintiff might have heard, and, not hearing them, he had the right to assume, when about to make the crossing, that the train had not then reached the whistling post 1,320 feet above, and that the fireman might have seen him in time to have prevented the accident had he been upon the lookout. It may be admitted that all this was culpable negligence on the part of defendant's employes. The defense of contributory negligence implies that defendant may have been guilty of such negligence as would justify a recovery by the plaintiff if he were not also in fault. This is no argument, therefore, against the position of the defendant.

The case is not within the rule laid down in *Esrey v. Southern Pac. Co.*, 103 Cal. 541, 37 Pac. 500. Doubtless, notwithstanding the negligence of a plaintiff has put him in peril, yet if his danger is perceived by the defendant in time, so that by the exercise of ordinary diligence on his part injury can be avoided, the defendant will be held for the injury. But that is based upon the fact that a defendant did actually know of the danger; not upon the proposition that he would have discovered the peril of the plaintiff, but for remissness on his part. Under this rule, a defendant is not liable because he ought to have known. The judgment and order are reversed, and a new trial ordered.

We concur: McFARLAND, J.; HENSHAW, J.



(121 Cal. 536)

SPENCE v. SMITH, Sheriff. (Sac. 290.)<sup>1</sup>  
(Supreme Court of California. June 25, 1898.)

EXEMPTIONS—FARMING UTENSILS—USE FOR HIRE  
—EFFECT.

1. Code Civ. Proc. § 690, cl. 3, exempting farming utensils and implements of husbandry from execution, exempts all the farming implements of the judgment debtor, regardless of their value, or the amount of land which may be cultivated therewith.

2. The fact that a judgment debtor, after threshing his own crop, used his machinery to thresh the crops of others, for hire, did not render such machinery, otherwise exempt, subject to levy and sale on execution.

Department 1. Appeal from superior court, Sutter county.

Action by one Spence against one Smith, sheriff of Sutter county. Judgment for defendant, and plaintiff appeals. Reversed.

H. V. Reardon, for appellant. Richard Belcher, for respondent.

HARRISON, J. The defendant, as sheriff of the county of Sutter, levied upon certain personal property under a writ of attachment issued out of the superior court in an action therein against the plaintiff, and afterwards sold the property under a writ of execution issued upon a judgment in said action. After the property had been seized by the defendant, the plaintiff demanded the same from him, upon the ground that it was exempt from execution, and, upon the refusal of the defendant to surrender it, brought the present action. The case was tried by the court without a jury, and judgment rendered in favor of the defendant. From this judgment the present appeal has been taken, and is presented here upon the judgment roll alone, without a bill of exceptions, and is urged upon the ground that the findings of fact do not support the judgment.

At the time the defendant seized the property described in the judgment, he also took certain other property, consisting of farming utensils, which, upon the plaintiff's claim that they were exempt from seizure, he released and returned to him. The court finds that the property so released was sufficient in quantity and kind to properly cultivate and farm more than 200 acres of land. The court also finds that at the time the property was taken the plaintiff was engaged in farming about 2,700 acres of land, and that all of the property levied upon and seized by the defendant was necessary to enable him to properly carry on his said farming operations upon said 2,700 acres; and it also finds that, with the exception of the harnesses, collars, three headers, five header beds, the plows, stretchers, harrows, and blacksmith tools, all of the property involved herein were parts of a threshing outfit owned by the plaintiff, and is of the value of \$460, and that the other property is of the value of

\$190. Whether any property shall be exempt from execution, as well as the character and amount of property to be exempted, is purely a question of legislative policy; and, when the legislature has determined that the farming utensils and implements of husbandry of a judgment debtor shall be exempt, a court is not authorized to refuse the exemption because, in its opinion, they are not necessary for the judgment debtor. The state has fixed no limit to the amount of land which a judgment debtor may cultivate by farming; and, if the farming utensils which he has are necessary for the proper cultivation of his land, they are exempt from execution, irrespective of whether he would need them for cultivating a smaller tract. Code Civ. Proc. § 690, cl. 3, provides that "the farming utensils or implements of husbandry of the judgment debtor" are exempt from execution. In *Re Klemp's Estate* (Cal.) 50 Pac. 1062, it was held that this exemption included a combined harvester which was worth \$300. In that case it was said: "Horse rakes, gang plows, headers, threshing machines, and combined harvesters are as clearly implements of husbandry as are hand rakes, single plows, sickles, cradles, flails, or an old-fashioned machine for winnowing. There is no ground for excluding an implement from the operation of the statute because it is an improvement, and supplants a former implement used with less effectiveness for the same purpose;" and as the legislature had not placed any limitation upon the character of the implements of husbandry, or their value, courts have no right to exclude them from the operation of the statute.

The threshing outfit did not cease to be exempt from execution by reason of the fact that it was usually the custom for the plaintiff to use it, for hire, to thresh the crops of others, after doing his own threshing. At the time the property was seized, it was in use by the plaintiff, and the court finds that all of it was necessary for his use in farming his land. In *Re Baldwin*, 71 Cal. 74, 12 Pac. 44, it was held that the legislature meant by the foregoing exemption such utensils or implements as are needed and used by the farmer in conducting his own farming operations; and in *Stanton v. French*, 91 Cal. 277, 27 Pac. 657, it was held that the debtor is not required to use the exempt property exclusively in his customary vocation. It would be a hard rule upon the debtor to hold that, although the property was necessary for properly carrying on his farming, he would forfeit the exemption should he seek to earn something with it after he had ceased to need it for his own farming. A better suggestion would be that if, in the opinion of the creditor, he is cultivating more land than he needs, he could satisfy his debt by levying his execution upon the land itself. The judgment is reversed, and the court below is directed to enter judgment

<sup>1</sup> For modification of opinion, see 53 Pac. 933.

ment upon the findings in favor of the plaintiff.

We concur: VAN FLEET, J.; GAROUTTE, J.

(121 Cal. 309)

EASTLICK et al. v. WRIGHT et al. (Sac. 396.)

(Supreme Court of California. June 27, 1898.)

WATER COURSES — OBSTRUCTION — POLLUTION —  
TAILINGS FROM MINES — PLEADING —  
VARIANCE — DECREE — APPEAL.

1. The complaint described a mining claim as "the island." The findings of fact described it by metes and bounds. The evidence taken at the trial was not before the supreme court. Held that, as both descriptions might cover the same tract, no variance was shown.

2. Under a cross complaint seeking to restrain plaintiffs from the improper use of a creek, in covering the dumping ground of defendants with debris in the nature of tailings, the right of plaintiffs to carry water over their claim and into the creek is not presented, and cannot be litigated.

3. Under a complaint seeking to enjoin defendants from placing a dam in a creek, and a cross complaint seeking to restrain plaintiffs from the improper use of the creek, in covering the dumping ground of defendants with debris in the nature of tailings, the court cannot prescribe in its decree the line of conduct to be followed by the parties as to the manner of dealing with the tailings of their respective mines,—as to the use of the creek, and the pro rata expense of keeping it in condition for the purpose of carrying off the tailings of the mines.

Department 1. Appeal from superior court, Siskiyou county.

Bill by one Eastlick and others against one Wright and others. There was a decree for plaintiffs, and defendants appeal. Modified.

J. F. Farragher and J. H. Magoffey, for appellants. Gillis & Tappscott, J. A. Reynolds, Warren & Taylor, and G. D. Butler, for respondents.

GAROUTTE, J. This is an action brought to enjoin the defendants from placing a dam in the water way known as "Oro Fino Creek," and for damages occasioned by such obstruction. Defendants made denials of the allegations of the complaint, and also filed a cross complaint, asking for an order restraining plaintiffs from the improper use of Oro Fino creek, in covering the dumping ground of defendants with debris in the nature of tailings. Judgment went for plaintiffs, and this case is before us on the pleadings, findings of fact, and judgment.

A certain mining claim of plaintiffs is described in the complaint as "the island." The finding of fact made by the trial court describes a certain piece and parcel of mining ground owned by plaintiffs, by metes and bounds. Appellants now insist that there is a variance between the pleading and the finding as to the particular tract of mineral ground covered by these descriptions. Upon inspection of the two descriptions, no variance is apparent. Both descriptions may

cover the same tract. There is nothing inconsistent in the two to prevent it. The evidence taken at the trial is not before us, and upon the face of the pleading and of the finding no variance is shown. Error, to invalidate the judgment, cannot be presumed.

Objection is made by appellants to a finding of fact to the effect "that plaintiffs ran, without the consent of defendants, about three hundred inches of water from the Samuel R. Gardner mining claim, after Gardner's use of the water, through plaintiffs' flumes, and into the water way of Oro Fino creek." This finding of fact is possibly outside of the material issues in the case. By their cross complaint, appellants make complaint of the tailings and debris plaintiffs were dumping upon their ground. That is the issue upon which they sought relief. Water is not tailings and debris, and the right of plaintiffs to pass this 300 inches of water over their claim and into Oro Fino creek is not presented by the pleadings as a cause of action. Defendants, by their brief, insist that such act of plaintiffs amounts to a substantial increase of the servitude resting upon their lands; but, as suggested, the character and nature of the servitude resting upon their lands in favor of plaintiffs is not the subject-matter of the litigation, and is outside the pleadings. Especially must this be so as to any mere question pertaining to the amount of water passing from plaintiffs' land into the Oro Fino creek. By this judgment the trial court gave the plaintiffs the relief sought, and denied defendants the relief asked by their cross complaint. The court did not stop here, but proceeded to prescribe the line of conduct to be followed in the future by all parties to the litigation as to the manner of dealing with the tailings of their respective mines, and as to the use of Oro Fino creek, and the pro rata expense of keeping that creek in condition for the purpose of carrying off the tailings of these mines. Those matters are not involved in the litigation. No such relief is sought by the pleadings. All those directions and decrees set out in the judgment, embraced in folios 251 to 254 inclusive, as appears by the transcript, are stricken therefrom, and the judgment is modified to that extent. As so modified, it is ordered that the judgment be affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

(6 Cal. Unrep. 32)

COLUSA COUNTY v. SEUBE. (Sac. 274.)  
(Supreme Court of California. May 31, 1898.)

INTOXICATING LIQUORS—LICENSE—VALIDITY—  
CONSTRUCTION.

The taxing clause of a county ordinance provided that every person who should sell intoxicating liquors in quantities less than one quart should obtain a license, and pay therefor



\$100 per year. *Held*, that since this clause did not impose a license for carrying on the business of selling liquor, as authorized by St. 1893, p. 358, but imposed it for the simple act of selling, and applied to each sale before it was made, it could not be changed by implication from the wording of other sections of the ordinance, which suggested an intention to tax the business itself.

Commissioners' decision. Department 1. Appeal from superior court, Colusa county.

Action by Colusa county against B. Seube. Judgment for plaintiff, and defendant appeals. Reversed.

W. G. Dyas and B. F. Howard, for appellant. Ernest Weyand, for respondent.

CHIPMAN, C. Action to recover a license tax for carrying on "the business of selling liquors at retail, in quantities less than one quart, at a saloon in Colusa county." Plaintiff had judgment, from which defendant appeals. It was stipulated as fact "that the defendant did, from the 5th day of November, 1895, to the — day of December, 1895, carry on a business of selling liquors at retail, and did sell spirituous \* \* \* liquors, in quantities of less than one quart, \* \* \* as in said complaint alleged." Section 4 of the ordinance, under which the action is brought, reads: "Every person who sells spirituous, malt or fermented liquors or wines, in quantities less than one quart, must obtain a license and pay therefor one hundred dollars per year." Section 14 of the ordinance provided as follows: "Against any person required to take out a license, who fails or refuses to take out such a license, or who carries on business without such license, suit may be brought \* \* \* for the recovery of said license tax," etc. This ordinance was enacted by authority of subdivision 27 of section 25 of the county government act of 1893 (St. 1893, p. 358), which gives to boards of supervisors power "to license, for purposes of regulation and revenue, all and every kinds of business not prohibited by law," etc.; "to fix the rates of license tax upon the same." A similar ordinance was the subject of construction in *Merced Co. v. Helm*, 102 Cal. 159, 36 Pac. 399, and so also was the extent of the authority given by the county government act of 1891 (the same as that of 1893) to pass the ordinance clearly defined. It was held in that case that the right to impose a tax upon a "business" will not authorize imposing a tax upon the individual acts connected with such business; and that a license tax required for one business cannot be demanded for any act or business not specified in the ordinance providing for such taxes. The distinction between a single act (such as selling liquors), and the business in which the act is done (such as being engaged in the business of selling liquor) was pointed out, and the adjudged cases cited; and it was clearly shown that the ordinance did not purport to impose a tax for carrying on

the business, but was for the sale, and applied to each sale before it was made, fixing a liability for the full amount of the tax for a single sale.

There is no brief on file for the respondent, and we have no intimation as to what its reply is to the claim of appellant based upon the *Merced County Case*, supra, except as it is found in the opinion of the learned trial judge, which appears in the transcript, given on overruling appellant's demurrer. It is there conceded that the *Merced County Case* is decisive of this case, unless we can resort to other sections of the ordinance to ascertain the meaning of section 4, supra. But it was said in the *Merced County Case* referred to: "The other portions of the ordinance providing a procedure for the collection of the tax cannot be invoked to change the terms of the tax, as the tax itself is only that which is fixed in the twelfth [here the fourth] section." Section 8 of the ordinance requires that "no license shall be issued for the sale of liquors \* \* \* until the applicant shall have presented to and filed with the board \* \* \* a bond \* \* \* conditioned that the said applicant shall conduct the business in a quiet and orderly manner"; further, "that no license shall be issued to any person \* \* \* to transact business \* \* \* under section 4 until they have first filed a petition signed by not less than five freeholders, asking that a license be issued to the applicant, and shall state the place at which said business is to be carried on." Other sections of like import are cited. It was the presence of these provisions in other portions of the ordinance which led the trial judge to conclude that "it is quite plain that it is the business, as contradistinguished from the simple act of selling, for which the license is required." If this conclusion might be held correct as to an ordinance in its nature remedial, it is not correct here where the ordinance is "to be construed strictly in favor of the individual as against the state," as was held to be the rule in the *Merced County Case*. It was said in that case that "no presumption is to be indulged in favor of the right to take the property, or of any intention that is not distinctly so expressed in the statute under which it is sought to be taken." Again: "A tax can never be extended by construction to things not named or described in the statute as the subject of taxation." Quoting from *Lord Cairns in Partington v. Attorney General*, L. R. 4 H. L. 125, it is further said: "If there be admissible in any statute what is called an equitable 'construction,' certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute." We do not think the taxing section of the ordinance can be aided by resort to other of its sections which do no more than, by implication, to suggest that an intention to tax the business of selling liq-

uor, and not the selling merely, was in the minds of the board. We think the reasoning in the Merced County Case is conclusive of this case, and therefore advise that the judgment be reversed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

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EADS v. KESSLER. (L. A. 410.)

(Supreme Court of California. June 22, 1898.)

SALE OF PERSONAL PROPERTY - LIEN FOR PRICE.

Civ. Code, § 5, declares that "the provisions of this Code so far as they are substantially the same as existing statutes or the common law must be construed as continuations thereof." Section 3049 provides that "one who sells personal property has a special lien thereon, dependent upon possession, for its price." *Held*, that section 3049 was merely confirmative of the common-law rule, and that the lien contemplated therein existed only under a complete sale, which passed title to the property, and did not attach when there was a mere executory contract to sell upon compliance with certain conditions by the party proposing to buy.

Department 2. Appeal from superior court, Los Angeles county.

Action by James M. Eads against William J. Kessler, aided by attachment. From an order denying a motion to discharge the attachment, defendant appeals. Affirmed.

Del Valle & Munday, for appellant. Wm. T. Craig, for respondent.

McFARLAND, J. This is an appeal by defendant from an order of the court below denying a motion to discharge an attachment. The motion was based solely upon the ground that the respondent had a lien for the payment of the money sued for in the action, and that, therefore, the attachment was improperly issued. The facts are these: On the 28th of December, 1895, the parties entered into an executory written contract, by which the respondent agreed to sell, and the appellant agreed to buy, a two-fifths interest in certain patent rights, described in certain letters patent set forth in the contract. The price was \$6,000, a part of which was to be paid in cash, and the balance in two payments of \$1,900 each, on the 1st day of January, 1897, and on the 1st day of January, 1898, with interest, etc., and upon the making of said payments the respondent was to give to appellant a good and sufficient assignment and conveyance of said patent rights. The installment due on January 1, 1897, not having been paid, this action was commenced to recover the amount

thereof, and a writ of attachment was issued and levied.

Appellant contends that the writ of attachment was issued improperly, and should be discharged, because the respondent had a vendor's lien upon the patent rights to secure the payment of the money sued for. He rests his contention upon the provision of section 3049 of the Civil Code, that "one who sells personal property has a special lien thereon, dependent upon possession, for its price," etc. But that section contains nothing which changes the common-law rule upon the subject. It was a mere statement, in a convenient form, of what the common law is. The Code declares that "the provisions of this Code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof." *Id.* § 5. And the common law is that a lien such as is contended for in the case at bar exists only under a complete sale which passes the title to the property. Such a lien does not attach when there is a mere executory contract to sell upon compliance with certain conditions by the party proposing to buy. In *Tied. Sales*, § 119, it is said, "In order that a vendor of goods may claim a lien on the goods, they must have already become the property of the vendee, for one cannot have a lien on goods belonging to himself;" and, further, "The only cases in which the vendor can have a lien on the goods are those in which the title to the goods passes to the vendee without delivery of possession." In 21 *Am. & Eng. Enc. Law*, pp. 602, 603, it is said, "The lien exists only when the property has passed to the buyer, while the goods themselves are still in the actual or constructive possession of the seller;" and the cases cited in the notes support the text. See, also, 1 *Jones, Liens*, § 820; *Conrad v. Fisher*, 37 *Mo. App.* 382. In the latter case the court say: "It should be observed that the existence of a vendor's lien always presupposes that the title to the goods has passed to the vendee, since it would be an incongruous conception that the vendor might have a lien upon his own goods." If it has been held that one who makes a written executory contract to sell his real property has a lien upon the property for the payment of the purchase money, it is because the other party to such a contract is held to have an equitable estate in the land; but we have been referred to no cases which hold that there is such a lien upon personal property where there is a mere agreement to sell. The authorities are the other way. This view makes it unnecessary to examine the other point made by respondent, namely, that a patent right is too intangible to be the subject of such a lien as appellant here asserts. The order appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.



Department 2. Appeal from superior court, city and county of San Francisco.

Action by Nicola Ferrea against Ellen A. Chabot, executrix, and others. From a judgment giving plaintiff partial relief, plaintiff appeals. Affirmed.

Sullivan & Sullivan, for appellant. Hilborn & Hall, for respondents.

McFARLAND, J. This action is brought to recover damages for the alleged violation of a written contract entered into on the 3d day of February, 1870, between plaintiff and one A. Chabot, by which Chabot covenanted to supply the plaintiff with certain water for domestic and irrigating purposes. Chabot afterwards made a certain assignment and transfer to the Vallejo City Water Company, which is also made a party defendant; and it is admitted that the company is liable upon said contract to the same extent as Chabot. Chabot died during the pendency of the action, and Hiram Tubbs and Ellen A. Chabot, executor and executrix of his will, were substituted in his place as defendants. The court below made its findings and rendered judgment in favor of the plaintiff for damages in the amount of \$4,800 and costs, but without interest prior to the date of the judgment. Plaintiff, being dissatisfied with the amount of the judgment, and claiming that it should have been for a larger amount, appeals from the judgment, and from an order denying his motion for a new trial.

Counsel for appellant have in their brief presented their side of the case in a very systematic, clear, and able manner; but, after having given full consideration to their arguments, we are not able to see any sufficient reasons for reversing the judgment. If we do not notice in detail all the views set forth by counsel for appellant, it is not because we have not fully considered them. The contentions for a reversal which are most fully presented in the argument of counsel are (1) that the court below "denied plaintiff's constitutional and statutory right to a trial by jury"; and (2) that the court erred "in refusing to allow interest upon our claim from the time of suit brought."

1. The trial of the case, which resulted in the judgment appealed from, took place in February, 1894, in department No. 4 of the superior court of the city and county of San Francisco, before Hon. J. C. B. Hebbard, judge of said court, sitting in said department. No demand for a jury was made at that time in said department or to said judge; and the appellant entered upon and proceeded throughout the trial without any intimation that he desired a jury. This was therefore a waiver of a jury, if we consider alone the occurrences which then took place. *Pfister v. Dasey*, 65 Cal. 403, 4 Pac. 393; *Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22. It is contended, however, by appellant, that he is in the position of having had a

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FERREA v. CHABOT et al. (S. F. 1,139.)<sup>1</sup>  
(Supreme Court of California. June 20, 1898.)

JURY TRIAL—WAIVER—DENIAL OF RIGHT—INTEREST ON DAMAGES—IRRIGATION CONTRACT—CONSTRUCTION.

1. It is a waiver of the right of trial by jury to try a case before the court without demanding a jury.

2. A stipulation waiving a trial by jury should, as a general rule, be set aside on application of a party, where it can be done without injury to the other side, and without causing inconvenience in the conduct of the business of the court.

3. The act of a judge of one department in denying a motion to set aside a stipulation waiving a trial by jury is not binding on the judge of another department before whom the case is subsequently tried, so as to entitle a party to claim that he has been deprived of a trial by jury when no application therefor was made to the second judge.

4. Civ. Code, § 3287, provides that one is entitled to recover interest on damages certain, or which can be made certain by calculation, from the day when the right to recover vested in him. *Held*, that interest prior to the judgment cannot be recovered for damages sustained by a failure to furnish water for irrigating and other purposes, such damages being unliquidated and uncertain.

5. An action for damages caused by failure to supply water for irrigating and other purposes is not changed in its character or in the nature of the damages by allowing as damages the rental value of the premises for a certain period.

6. A contract which recites that the second party is about to construct a reservoir on a certain creek, and that the first party "owns a certain piece of land," situated on that creek, and in which the second party agrees to supply the first party "with water for irrigation of his premises," is a contract to furnish water for irrigation only upon the property mentioned, the first party owning but one tract on the creek mentioned at the time the contract was executed.

<sup>1</sup> For opinion on rehearing, see 53 Pac. 1092.

jury trial denied him on account of certain things which happened more than a year previous to the trial before Judge Hebbard. It appears that on February 11, 1889, Henry C. Pike and P. O. Morbio were the attorneys of appellant, and on that day signed a stipulation waiving a jury trial. Prior to September 30, 1891, the present attorneys for appellant were substituted as his attorneys; and on that day they filed an amended and supplemental complaint. This complaint contains some averments which were not in the original complaint, the principal amendments being the averments which set up the death of Chabot, the presentation of the claim sued on to his executors, etc., and the additional fact that the alleged acts of the respondents in violation of said contract were done wantonly, oppressively, etc., and warranted punitive damages. Afterwards, on January 4, 1894, appellant made a motion to set aside the stipulation waiving a jury, and to place the cause on the jury calendar. This motion was made in department 5 of said court, and before a judge other than Judge Hebbard, and in department 5, and before the other judge, the motion to set aside the stipulation was denied. This motion was made more than a year before the commencement of the trial before Judge Hebbard, and it was denied more than 10 months before that time. The motion was based entirely upon the ground that the filing of the amended and supplemental complaint, and of the answer thereto, had raised issues not pending at the time the stipulation was made. We do not deem it necessary to determine definitely whether or not the judge of department 5 erred in refusing to set aside the stipulation. We think that, as a general rule, a party should be relieved from a stipulation waiving a jury where the same can be done without injury to the other side, and without disarranging the orderly conduct of the business of the court. Such a stipulation should not be looked upon as a contract made upon a valuable consideration, which ought not to be set aside except upon proof of fraud, mistake, etc. Still, the court has some discretion in the matter, and we are hardly justified in holding that the order of the judge of department 5 was a gross abuse of his discretion. But that order certainly did not prevent Judge Hebbard from allowing a jury, if one had been demanded prior to the commencement of the trial before him. The motion was made before the judge of department 5 upon one specific ground, namely, that there had been a material change in the issues of the case; and the judge of that department may reasonably have thought that the reason assigned for setting aside the stipulation was not tenable. Counsel for appellant now claim that the stipulation was, for other reasons assigned by them, void; and if, upon that ground, appellant had demanded a jury before Judge Hebbard, the

latter would certainly not have been bound by the ruling made in another department a year previous. If the matter was one resting in the discretion of the judge, the discretion of Judge Hebbard was not concluded by a former exercise of discretion by another judge; and if, as it is also contended by appellant, the matter was not one of discretion, and he had an absolute right to a jury notwithstanding the stipulation, then, certainly, he should have made his application for a jury trial to the judge who was about to try the case. The allowance of a jury by Judge Hebbard would certainly not have been error. Indeed, the former motion to be relieved from the stipulation may have been really upon the ground of an objection to the judge presiding in that department, and there may not have been any objection at all to trying the case without a jury before Judge Hebbard. The record does not show any intimation at the time of the trial that the appellant desired a jury. Therefore, under these circumstances, we do not see that the appellant has been denied his right to a jury trial.

2. The court did not err in refusing to allow interest prior to the judgment. The action is to recover damages for the alleged violations by appellant of certain covenants expressed in the written contract hereinbefore mentioned. By that contract, Chabot covenanted that, in consideration of the grant by appellant of a right of way for water pipes through a certain piece of land owned by him, and of a right to construct a reservoir on a water course running through the land, he would lay certain pipes, and furnish to appellant from said reservoir, through such pipes, water for the irrigation of said land, the water to be delivered "as high on said premises as it will naturally flow," and to furnish water at the dwelling house for family use, and also to furnish water "for stock and family use" on certain other premises owned by respondent, and known as the "Riordan Ranch"; and it is for the violation of these covenants that this action was brought. It is averred in the complaint that the alleged violations of these covenants resulted in various kinds of damage not necessary to be here set forth; but it is evident from the complaint, and from the very nature of the subject-matter of the action, that the damages here sought to be recovered are not "damages certain or capable of being made certain by calculation," within the meaning of section 3287 of the Civil Code, and that, therefore, interest thereon cannot be recovered under the provisions of that section. The damages asked for here are in as pronounced a way "unliquidated and uncertain" as in any of the cases heretofore decided by this court where interest was not allowed because the damages were not certain or capable of being made certain by calculation. *Brady v. Wilcoxson*, 44 Cal. 239; *Coburn v. Goodall*, 72 Cal. 498, 14



Pac. 190; *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100; *Easterbrook v. Farquharson*, 110 Cal. 311, 42 Pac. 811. And the fact that the court, after hearing a large amount of evidence bearing on various issues, finally concluded to allow as damages the rental value of the premises for a certain period, does not change the character of the action or the nature of the damages.

3. The other points made by appellant are based upon exceptions to rulings of the trial court upon the admissibility of evidence. Most of these exceptions are not well taken if the court correctly construed the contract as embracing only a certain 25-acre tract of land, known as the "Italian Garden." (There is no point made about the Riordan ranch, and it need not be further considered.) The contract commences with a recital that Chabot "is about to construct a reservoir on the Sulphur Spring creek," and that Ferrea, the appellant, "owns a certain piece of land on said Sulphur Spring creek at a point below where said reservoir is about to be constructed." Ferrea is the party of the first part, and Chabot the party of the second part, and the covenant on the part of Chabot to be construed is as follows: "The said party of the second part agrees to supply said party of the first part with water for irrigation of his premises, said water to be delivered on the premises of the said party of the first part through a four-inch pipe, and as high on the said premises as it will naturally flow, and also to supply the said party of the first part with the necessary water for family use in his dwelling house through a service pipe from the main pipe." At the time of the execution of the contract, which was on February 3, 1870, a certain 25-acre tract of land, known as the "Italian Garden," was the only land owned by Ferrea on the Sulphur Spring creek, and his dwelling house was on said tract. Afterwards he acquired another tract of 124 acres, adjoining the Italian Garden on the south. He afterwards leased to one Passalacqua the Italian Garden tract, and also 24 acres of the said 124-acre tract, making 49 acres in all included in the lease. Now, appellant contends that the failure of respondents to furnish water as provided in the contract worked damage to the 24 acres included in the lease, as well as to the Italian Garden tract itself, and that he is entitled to recover damages for the 24-acre tract, as well as for the other. The court held, however, that he was entitled to recover only for the damages which accrued to him as owner of the Italian Garden, and, in our opinion, this ruling was correct. This case was here once before upon appeal (*Ferrea v. Chabot*, 63 Cal. 564); and it was so held on that appeal. In that case the court, speaking of this contract, said: "In this the covenant was to supply

Ferrea with water through a service pipe from the main pipe for family use, and through a four-inch pipe raised as high on the premises known as the 'Italian Garden' as the water would naturally flow, for the irrigation of those premises. The covenant was intended for the use and enjoyment of those premises, in the manner and for the purpose intended by the parties at the time of the execution of the agreement. It extended only to those premises, and did not include or operate upon the twenty-four acres of land of which Ferrea was not the owner." This ruling was clearly correct, and whether considered as the law of the case, or merely as authority, should be followed. The trial court was therefore right in excluding evidence offered for the purpose of showing damage to the 24-acre tract and to certain other tracts acquired by Ferrea after the date of the contract. The covenant of Chabot was not, as contended by appellant, to furnish a definite amount of water to be conducted by Ferrea wherever he pleased, but to furnish the amount of water necessary for the irrigation of the said Italian Garden, when water was required for such irrigation.

Both parties were allowed to freely introduce evidence as to the agricultural character of the Italian Garden, of the value of its use if supplied with water for irrigation, its rental value, etc.; and it was not error, at least not prejudicial error, to exclude certain offered evidence of its fee-simple value as land.

It would require great space to follow the discussion of counsel of the many other exceptions to rulings admitting or excluding evidence. It is sufficient to say that, in our opinion, the court did not err in its rulings excluding certain judgment rolls; or excluding evidence of appellant's asserted losses under his lease to Passalacqua, and of money expended in defending a suit brought by the latter against appellant on said lease; or excluding evidence of money expended by appellant to secure a small supply of water; or excluding certain evidence offered to prove malice and oppression on the part of the respondents; or in excluding evidence of certain other damages, entirely too remote to be recoverable; or allowing certain witnesses of respondents to testify as to the rental value of the premises; or in any other ruling touching the admissibility of evidence to which our attention has been called. The findings of the court as to the rental value of the land in question, and as to punitive damages, are sustained by the evidence; and the evidence does not show that the finding as to the amount of damages is erroneous. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

121 Cal. 240

**BANNING v. MARLEAU. (L. A. 347.)**

(Supreme Court of California. June 22. 1898.)

**FRAUDULENT CONVEYANCES—EVIDENCE—ACCOUNT BOOKS—DECLARATIONS—PLEADING AND PROOF — INSTRUCTIONS.**

1. In an action involving the validity of a sale as against creditors, an instruction that a sale is void, under Civ. Code, § 3140, for want of delivery and an immediate and continued change of possession, was properly refused, where it contained the expression, "like the one in controversy here."

2. On an issue whether a sale of live stock on a ranch owned by the buyer was in fraud of creditors, where the seller had superintended the ranch, and at the time of the levy had a cropping contract which included a part of the land, books showing the condition of accounts between him and the buyer were properly allowed in evidence; the evidence otherwise showing that the books were kept under the direction of the seller, and that he delivered them to the buyer as showing the condition of their accounts.

3. Evidence of declarations of a seller that he had made the sale to protect his property against creditors is not admissible against the buyer.

4. An officer sued by a buyer for possession of property seized under attachment against the seller may prove that the sale was fraudulent as to creditors, under a denial of plaintiff's title and possession, and an allegation of title in the seller, in connection with a plea of justification.

Department 2. Appeal from superior court, Los Angeles county.

Action by Mary H. Banning against W. F. Marleau. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

R. Dunnigan and J. R. Dupuy, for appellant. W. S. Wright, for respondent.

McFARLAND, J. This is an action to recover the possession of certain personal property, consisting mostly of live stock, which was on a ranch owned by the plaintiff. The jury found for plaintiff, and defendant appeals from the judgment, and from an order denying a new trial.

The defendant was a constable, and claimed the property under certain writs of attachment in favor of W. H. Harbell and P. Hardy against one Joseph Hannon; defendant claiming that the property in question was the property of said Hannon. The nature of the case, the principal facts in it, and some of the principles of law which should govern it, may be found in the opinion of this court delivered when the case was here upon a former appeal (*Banning v. Marleau*, 101 Cal. 238, 35 Pac. 772), and it is not necessary to restate them. The appellant contends for reversal on the ground that the court committed errors in instructing the jury, and in ruling upon the admissibility of evidence.

We do not think that the court committed any errors in instructing the jury. The instructions given on the part of the plaintiff were correct; and these instructions, together with those given at the request of ap-

pellant, presented the main features of the case correctly to the jury. The sixth instruction asked by defendant, with intent to apply section 3440 of the Civil Code to this case, was properly refused by the court because it contained the expression, "like the one in controversy here."

The evidence which was admitted was sufficient to warrant the jury in holding that the plaintiff had established title to the property in question. The court did not err in allowing in evidence certain books which showed the condition of accounts between said Hannon and the respondent. There was sufficient evidence to show that the books were kept under the direction of Hannon, and that he delivered them to the respondent as showing the condition of the accounts between them in the business of conducting the ranch. The court did not err in refusing to allow appellant to prove by Harbell declarations of Hannon, made after the sale by the latter to respondent, to the effect that he made a bill of sale to protect his property against creditors, although the ground upon which respondent defends that ruling, to wit, that fraud had not been pleaded in the answer, is not tenable. We see no errors committed by the court, other than the one hereinafter mentioned.

The court, however, erred in excluding certain testimony given by Hannon at a former trial of the case; Hannon in the meantime having died. This excluded testimony was to the point that Hannon had transferred the property to the respondent, and given her a bill of sale thereof, for the purpose of hindering and defrauding his creditors; and it also tended in some degree to show that the respondent knew of this purpose when she took the bill of sale. The transcript does not show on what ground this testimony was rejected, but it appears from the argument of counsel that it was rejected because the answer of the appellant had not set up fraud. But the complaint merely sets up that plaintiff at the time of the commencement of the action was the owner of, and entitled to the possession of, the property, and that appellant had wrongfully come into the possession of the same, and unlawfully retained it. The answer denies the plaintiff's ownership of the property, or her right to its possession, and sets up that the property belonged to Hannon, and was lawfully taken by the defendant under the writs of attachment. The complaint does not show plaintiff's source of title, and that the appellant was not called upon to anticipate what that source of title was; and when, by her evidence, she sought to show title derived from Hannon, the appellant had the right, under the pleadings, to attack her title by showing that the sale from Hannon to her was fraudulent. Respondent's counsel cites in support of his contention on this point merely one case from the state of Oregon, that the decisions in California have been otherwise, and are



clearly founded on the better reason. The case of *Grum v. Barney*, 55 Cal. 254, is exactly in point. The decision of the court in that case, delivered by McKinstry, J., is correctly expressed in the syllabus as follows: "In an action for the recovery of personal property, the complaint alleged ownership and a taking by defendant; and the defendant in his answer denied the ownership, and justified the taking under an execution issued to him as sheriff against one L. Held, that the defendant was not bound to anticipate the case of the plaintiff, or to assume that he claimed as vendee of L., and that the answer averred all that was necessary to make up the material issues." The same point was decided in the same way in the case of *Humphreys v. Harkey*, 55 Cal. 283, where the court, by Ross, J., said: "In the recent case of *Grum v. Barney*, 55 Cal. 254, we had occasion to consider the same question, and there held that the defendant was not bound to anticipate the case of the plaintiff, nor to assume under whom he claimed title. We are entirely satisfied of the correctness of that decision, and it results that the court below erred in the rejection of the proffered testimony." In the later case of *Mason v. Vestal*, 88 Cal. 396, 26 Pac. 213, the former decisions of the court are reviewed, and the law is declared to be as stated in the cases above cited. The opinion of the court in bank, delivered by Temple, C., is correctly condensed in the syllabus as follows: "A sheriff, sued for the value of property seized under a writ of attachment against the plaintiff's brother, need not plead that a sale to the plaintiff from the attachment debtor was fraudulent as to his creditors, but may prove that fact under a denial of the plaintiff's title and possession, and an allegation of title in the attachment debtor, in connection with a plea of justification under the writ." The cases of *Albertoli v. Branham*, 80 Cal. 633, 22 Pac. 404, and *Sukeforth v. Lord*, 87 Cal. 399, 25 Pac. 497, may seem at first blush to indicate a different rule; but, as pointed out in *Mason v. Vestal*, the defendants in those cases had attempted to set up fraud, and the questions involved were merely whether or not the answers presented a sufficient statement of fraud; and the question whether or not, in a case like the one at bar, the defendant was called upon to anticipate the title of the plaintiff, and to attack that title by his answer, was not raised. *Mason v. Vestal* is the latest case on the question to which our attention has been called, and clearly establishes the law on the point involved. The ruling of the court below on this point being erroneous, and upon a material matter, the judgment must for that reason be reversed. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; HENSHAW, J.

6 Cal. Unrep. 37

TUSTIN FRUIT ASS'N v. EARL FRUIT CO.  
(L. A. 330.)

(Supreme Court of California. June 27, 1898.)  
AGENCY—FACTORS—GUARANTY—SALES—WARRANTY—BREACH OF CONTRACT—DAMAGES—PLEADING—EVIDENCE—CORPORATIONS.

1. Where an agent contracts directly as a principal, he may sue on the contract in his own name, regardless of whether the other party knew of his agency.

2. Plaintiff sued on a contract by which defendant agreed to sell plaintiff's fruit, and guaranty sales; alleging that plaintiff "sold and delivered" at a certain place a stated amount of fruit, which was picked, packed, and loaded "by plaintiff under the inspection and approval of the defendant, and was received, accepted, and receipted for by defendant at the prices mutually agreed upon by plaintiff and defendant for said fruit," and setting forth the amount unpaid from defendant to plaintiff for said fruit. Held, that the allegation, taken in connection with the contract, showed a sale by defendant, as a factor, for plaintiff, for which it was liable under its contract of guaranty.

3. A fruit company agreed with an association not to handle the fruit of those who were not members of the association, without its consent. The association, in an action against the company, alleged that under that provision in the contract the company had agreed to pay plaintiff a certain price for each box belonging to a certain fruit raiser, stating the number thereof; that defendant had begun to buy or ship the same; and that plaintiff was entitled to recover of defendant, "by reason of the agreement relating to the handling" of said fruit, a stated amount. Held, that the allegation was sufficient against a general demurrer, though it was not alleged that such fruit raiser was not a member of the association, or that defendant in fact "handled" his crop.

4. Where the contract sued on describes plaintiff as a corporation, no further proof of its incorporation is necessary.

5. An agreement by the stockholders of an association which recited that, "being desirous of having my oranges handled in the manner set forth in the by-laws" of the association, they individually appointed the association their agent, may be introduced in evidence, without the by-laws referred to, in an action by the association on a contract between it and a fruit company for the sale of fruit.

6. Under Code Civ. Proc. § 1854, providing that "when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence," defendant may introduce plaintiff's by-laws, where plaintiff introduced an agreement between its stockholders and plaintiff which stated that, "being desirous of having my oranges handled in the manner set forth in the by-laws" of plaintiff, they individually appointed plaintiff their agent.

7. Under Civ. Code, § 2029, providing that "a factor who charges his principal with a guaranty commission upon a sale, thereby assumes absolutely to pay the price when it falls due, as if it were a debt of his own," and section 2794, providing that the obligation of a factor who undertakes, for a commission, to sell merchandise and guaranty the sale is original, and need not be in writing, a factor selling under a guaranty of sales becomes liable absolutely for the price, and a finding that it was the purchaser is immaterial error.

8. An association contracted with a fruit company to deliver No. 1 fruit, f. o. b., and the company was to guaranty the sale. The association also agreed to deliver to the company No. 2 fruit, f. o. b., the sale of which the company did not guaranty. The fruit was picked,

graded, culled, and packed under the supervision of the company's agent, who receipted for it as "Sold, f. o. b."; and the company's president testified that, at the time of shipment, account sales were rendered the association by the company on the assumption that the fruit was No. 1 except where otherwise stated. *Held*, that a certain consignment, not shown to be within the exception, was accepted by the company as No. 1 fruit.

9. A fruit company contracted with an association to take from it No. 1 fruit, "guarantying original sales and collections; it being understood that all responsibility" of the association "ceases when said fruit is accepted" by the company on board cars. *Held*, that the company, having accepted fruit as No. 1 without any representations of the association touching its quality, was bound to account for that quality of fruit, although, through a latent defect, the fruit proved to be inferior.

10. Where a buyer refuses to accept perishable property under a contract, it is the right of the seller to sell it forthwith, so as to reduce his damages.

11. Civ. Code, § 3353, provides that in estimating damages the value of property to a seller is the price which he could have obtained in the market nearest to the place where the buyer should have accepted it, as soon after the breach of the contract as the buyer could, with reasonable diligence, have effected a resale. *Held*, that the value to a seller of fruit which a buyer refused to take is its value in the condition it was in when the owner could have sold it after the repudiation of the contract.

Commissioners' decision. Department 1. Appeal from superior court, Orange county.

Action by the Tustin Fruit Association against the Earl Fruit Company. From a judgment giving plaintiff partial relief, and from orders denying a new trial, both parties appeal. Affirmed.

Victor Montgomery and J. D. Pope, for plaintiff. M. L. Graff, Guy C. Earl, and J. G. Scarborough, for defendant.

BRITT, C. There are cross appeals in this case. The plaintiff's action is founded on a written contract executed by and between the parties now litigant, of which the more material portions are as follows: "This agreement, made and entered into at Tustin this 18th day of December, 1894, in duplicate, by and between the Tustin Fruit Association, a corporation, of Tustin, Orange county, California, party of the first part, and the Earl Fruit Company, a corporation, of Los Angeles, California, party of the second part, witnesseth: That the party of the first part hereby places all oranges under its control, or that may come under its control during the season of 1894-5, in the hands of the party of the second part, to market for their [its] account, on the terms and conditions hereinafter stated. Party of the second part to sell all No. 1 fruit of regular sizes, together with as many off sizes as are included in the standard car, as established by the Southern California fruit exchanges, f. o. b. Tustin, guarantying original sales and collections; it being understood that all responsibility of the party of the first part ceases when said fruit is accepted by the party of the second part on board cars at

Tustin. Party of the second part to make best disposition possible of No. 2 fruit, and any accumulation of off sizes, on which it is understood no guaranty is made. The party of the first part agreeing to allow party of the second part a commission of twelve and one-half per cent. of the gross price for which the fruit is sold, f. o. b. Party of the second part to make cash payment for all guaranteed sales as fast as such shipments are made, or not later than the week after shipment, and cash settlement for all other sales as fast as account sales are rendered. Selling prices are to be mutually agreed upon Wednesday of each week, which prices will rule for the following week; it being understood and agreed that such selling price shall at no time exceed the prices which the Southern California fruit exchanges are selling equal grades of fruit during the same period. It is further understood and agreed that all orders taken, to not exceed twelve cars per week after March 13th, or more if accepted by the party of the first part, shall be protected and filled by the party of the first part. The party of the second part to furnish orders for at least (average) twelve car loads per week, when requested by party of the first part, after March 15th. Party of the second part to dispose of all seedlings and navels, hereby contracted, on or before May 15, 1895, and all other varieties of oranges on or before July 1, 1895, unless otherwise mutually agreed. Picking, grading, culling, and packing of fruit and loading of cars to be done by the party of the first part, and subject to the approval and inspection of the party of the second part. Party of the first part to pick and grade the fruit into grades substantially equivalent to the grades as determined and established by the Southern California fruit exchanges. Choice and standard grades of fruit, more particularly described, are as follows: Choice grade is to be bright, clean, juicy, and free from smut, scale, frost, and culls. 'Standard' grade, it is understood, will be somewhat smutty and scaly, but juicy, and free from frost and culls. Party of the second part further agrees not to handle the oranges of any grower of Tustin or Santa Ana who is not a member of the Tustin Fruit Association, except with the consent of the party of the first part."

In its complaint the plaintiff charged several breaches: First, that defendant failed to pay a balance of \$4,059.78 due for 13 car loads of oranges received by it between March 3, and March 15, 1895; second, that defendant refused to accept 12 car loads of oranges at prices agreed on by the parties for the week following March 13, 1895, to plaintiff's damage in the sum of \$4,600; third, that defendant similarly refused to accept 12 car loads of oranges for the week following March 20, 1895, to plaintiff's damage in the sum of \$4,600; fourth, that after said March 20th defendant refused to agree with plain-



tiff on the prices of oranges, or to receive any fruit, or to furnish any order therefor, to plaintiff's damage in the sum of \$25,000; and, fifth, that defendant handled the crop of oranges belonging to one Wall, within the prohibition of the last clause of said contract, and failed to pay plaintiff for consent given thereto as it (defendant) had promised. A demurrer to the complaint interposed by defendant was overruled.

By its answer the defendant admitted the execution of the contract alleged, but denied most of the other allegations of the complaint. It also pleaded, at considerable length, several counterclaims: Firstly, that defendant, as agent of plaintiff, after the execution of said contract sold to various of its (defendant's) customers in the Eastern market 58 car loads of oranges as No. 1 fruit; that the same proved to be not No. 1 fruit, in that it developed a lack of good shipping and carrying qualities, and so arrived at the several places of destination of the cars at the East in bad condition, and that defendant sustained a loss of \$3,110.54, in the excess of advances it made to plaintiff thereon above the sum realized for the fruit. The second counterclaim was founded on the same transactions as those described in the first, and claimed general damages in the sum of \$50,000. Some particulars of the pleading will be stated when we come to consider the demurrer thereto, which was sustained by the court. As the ground of the third counterclaim, defendant set up a contract between the parties of date March 9, 1894, for marketing the oranges of plaintiff for the season then current. Such contract was quite similar in its main features to that of December 18, 1894, on which plaintiff sues. The classification of fruit in the earlier contract, however, was as choice and standard only; and defendant averred that thereunder it received and handled for plaintiff between March 10, 1894, and July 13, 1894, 147 car loads of oranges, believing the same to be choice, as defined in that contract; and, for reasons similar to those alleged in said first counterclaim,—the fruit proving to not be choice, and arriving in bad order in the Eastern market,—defendant alleged that it sustained a loss, in its advances of purchase price to plaintiff above returns from the fruit, amounting to \$12,500.53. The fourth counterclaim, to which the court sustained a demurrer, bore a like relation to the foregoing third counterclaim that the second bore to the first, and alleged damage in the sum of \$50,000 for detriment incidental to defendant's performance of the said contract of March 9, 1894. The fifth counterclaim was for a balance of \$1,002.26 for goods, etc., sold by defendant to plaintiff about March 18, 1895.

After trial, the court made findings from which it concluded that defendant is liable to plaintiff in the sum of \$4,059.78 for 13 car loads of oranges received by defendant under the contract of December 18, 1894, as al-

leged in the complaint (defendant's commissions, and a credit allowed by plaintiff for the value of the merchandise mentioned in the fifth counterclaim, having been first deducted); that defendant is further liable to plaintiff in the sum of \$77 on account of oranges handled by defendant for said Wall; that for the several failures of defendant to receive oranges from plaintiff after March 15, 1895, pursuant to the contract of December 18, 1894, defendant is liable in nominal damages only, fixed at \$3; and that defendant should take nothing by reason of its counterclaims. Judgment was entered accordingly. Each party moved for a new trial, and their respective motions were denied. We shall consider first the appeal of the defendant.

1. It is contended that plaintiff is not the real party interested in the relief it demands, and for that reason ought not to be permitted to maintain the action. This objection is taken on certain allegations of the complaint which, it is claimed, show that plaintiff was not the owner of the oranges that were the subject of the contract of December 18, 1894; that the stockholders of plaintiff, in their respective individual capacities, owned the various crops of oranges making up the aggregate with which plaintiff assumed to deal; and that plaintiff was merely their agent to market the same. Admitting that all these things appear from the complaint, it is yet not perceived why plaintiff may not sue. The defendant contracted directly with plaintiff as a principal, and in such a case the law allows the agent treated as a principal to sue in his own name on the contract, whether the fact of agency was or was not known to the other contracting party. 1 Chit. Pl. 8; Pom. Code Rem. §§ 141, 177; Mechem, Ag. § 755; Phillips v. Henshaw, 5 Cal. 509; Du Bois v. Perkins, 21 Or. 189, 27 Pac. 1044. It was averred in the complaint that plaintiff "sold and delivered on board cars at Tustin thirteen car loads of No. 1 fruit, \* \* \* all of which fruit was picked, graded, culled, packed, and loaded on said cars by plaintiff under the inspection and approval of the defendant, and was received, accepted, and receipted for by defendant at the prices mutually agreed upon by plaintiff and defendant for said fruit"; that at such prices, less defendant's commissions, the amount unpaid from defendant to plaintiff for said 13 car loads is the sum of \$4,059.78, etc. It is objected that these allegations are defective, in that, while alleging a sale by plaintiff, they do not show a purchase by defendant; that the contract provides that defendant shall sell the fruit, guarantying sales thereof; and that to aver that plaintiff sold the goods was to allege a violation of the contract by plaintiff. The criticism is not well founded. Understood in connection with the provisions of the contract, the averment showed a sale made through the instrumen-

tality of defendant, as factor for the plaintiff, under such conditions that defendant's liability for the price, less its commissions, had attached pursuant to its contract of guaranty. So understood, it was not incorrect to say that plaintiff sold the goods.

Respecting Wall's crop of oranges, plaintiff alleged, in substance, that in virtue of the last clause of the contract the defendant agreed to pay plaintiff, in consideration of its consent, 5 cents for each box of Wall's crop—stated at 10,000 boxes—that defendant bought or shipped; that defendant "has commenced to buy or ship the same for said Wall, and that plaintiff is entitled to have and recover of and from the defendant, by reason of the agreement relating to the handling of said Wall's crop of oranges, the sum of five hundred dollars"; also, that defendant committed a breach of its contract, in not settling with plaintiff for the oranges shipped from the orchard of Wall at the rate of 5 cents per box. To these averments of the complaint defendant objects, mainly, that they fail to show that Wall was not a member of the Tustin Fruit Association, and also fail to show that defendant has in fact "handled" his crop. The allegations under view lack the precision which should characterize good pleading, but they show that defendant shipped—and thus handled—some of Wall's oranges, and that for plaintiff's consent to this proceeding defendant promised, "in virtue of the last clause of said contract," to pay a stated sum. It is to be inferred, therefore, that Wall was not a member of the plaintiff's association, for it was crops of outsiders only that defendant was forbidden to handle without plaintiff's consent. Hence the statement of a cause of action as to Wall's oranges must be held sufficient against a general demurrer, which is the only form taken by defendant's objections in the record. *Amestoy v. Transit Co.*, 95 Cal. 311, 30 Pac. 550; *Alexander v. McDow*, 108 Cal. 29, 41 Pac. 24.

2. The court found that plaintiff is a corporation, and defendant claims that there was no evidence to sustain the finding. The contract between the parties described the plaintiff as a corporation, and no further proof on that point was necessary. *Irrigation Co. v. Warner*, 72 Cal. 379, 14 Pac. 37.

It is urged that there was no evidence to support a certain finding of the court to the effect that prior to the contract of December 18, 1894, the stockholders of plaintiff, for the purpose of marketing their several crops of oranges, sold and conveyed to plaintiff, in trust for themselves, their, and each of their, entire crops, etc. We see no materiality in the finding, in view of other facts found or admitted. It sufficiently appears that plaintiff had control of the oranges concerning which it contracted for the purpose of marketing the same. If the stockholders were making demands on defendant similar to those on which plaintiff

sues, there might be ground for inquiring into their relations with plaintiff; but this is not shown, and defendant has no concern in the nature of the plaintiff's title to the fruit,—whether it was that of full legal ownership, or the qualified interest of an agent. Upon this point, see the authorities above cited on the question of plaintiff's right to maintain the action; also, *Lumley v. Corbett*, 18 Cal. 494; *Groover v. Warfield*, 50 Ga. 644.

Here may be noticed the objection to the admission in evidence of the written agreement signed by plaintiff's stockholders, and entitled, "Contract for Marketing Oranges." Such instrument contained the following preface: "Being desirous of having my oranges handled in the manner set forth in the by-laws of the Tustin Fruit Association, [I] do for such purpose hereby constitute and appoint the Tustin Fruit Association, a corporation, my sole agent," etc. This introduction was followed by other matter showing the purpose of the individuals signing the document that plaintiff should market their oranges, and pay to them, pro rata, the net proceeds of sales thereof. The special objection urged is that the document was not accompanied by the by-laws to which it referred. Assuming (what is by no means clear to us) that the instrument was any essential part of plaintiff's proofs, we yet think the objection was not well taken. We agree that no part of a document should be wrenched from its context, and received as a disjointed member of what is properly an indivisible unit of evidence. But here the paper offered by plaintiff was no such fragment. It seemed to be complete in itself, so far as regards authority to sell the subscribers' fruit, and contained no intimation that the by-laws varied, or might vary, its import; for, in terms, it purported to conform to the by-laws. The effect of the reference to the by-laws was to make them admissible, had defendant chosen to offer the same, but not to render them the inseparable accessory of the paper containing the reference. *Code Civ. Proc.* § 1854; *Toohey v. Harding*, 1 Fed. 174, 177; note to *Rouse v. Whited*, 82 Am. Dec. 345, and cases cited.

The court found that between March 3 and March 15, 1895, "plaintiff sold and delivered to defendant, on board cars, thirteen car loads of No. 1 fruit; the same being oranges," etc. The finding of a sale from plaintiff to defendant (if such is the proper import of this language) was both outside the issues made by the pleadings, and contrary to the evidence, but it does not follow that the judgment should fall. It appeared clearly enough from the findings that plaintiff sold and defendant received the goods pursuant to the guaranty of sales in the contract of December 18, 1894. Defendant was therefore liable absolutely for the price when it became due, and the finding that



it was in fact the purchaser is of no consequence. Civ. Code, §§ 2029, 2794, subd. 4; Mechem, Ag. § 1014.

It is strongly insisted that the finding to the effect that said 13 car loads of oranges consisted of No. 1 fruit is without support in the evidence. There was evidence that all the fruit received by defendant under the contract, including said 13 car loads, was picked, graded, culled, and packed under the direct supervision of defendant's agent, as allowed by the terms of the contract. It was in testimony that such agent went into the orchards, and selected the fruit to be picked. He decided what fruit should be accepted by defendant, and what rejected, and when the cars were packed he receipted for them. As to each of the said 13 cars his receipt showed that the fruit was "Sold, f. o. b." Now, we agree with defendant that to admit a sale of fruit, f. o. b., did not necessarily admit it to be No. 1 fruit; for although the No. 1 fruit was by the terms of the contract to be sold f. o. b., and thereupon fell within the scope of defendant's guaranty, yet No. 2 fruit, sales of which were not within the guaranty, might also be sold f. o. b.; but a sale f. o. b. was evidently a sale for shipment, and the defendant's president testified that "the general course of business was that, at the time of shipment of all these various cars of fruit, account sales were rendered by defendant to plaintiff upon the assumption that the oranges were No. 1 fruit, and of good keeping quality, except where especially otherwise stated," etc. None of said 13 car loads were shown to have been within the exception mentioned by the president. Considering his statement in connection with the evidence of the supervision exercised by defendant in the matter of grading and culling the fruit, it is plain that defendant accepted the said cars of oranges as No. 1 fruit. For reasons presently to appear, this admission was conclusive, and fully justified the finding.

3. As stated above, the evidence tended to show that the picking, grading, culling, and packing of the oranges were done under defendant's supervision. There was evidence that the fruit which was packed as No. 1 had the appearance of being No. 1, and was accepted by defendant accordingly. It appears that the terms "choice" and "standard," employed in the contract, applied to both No. 1 and No. 2 oranges; that is, there was choice and standard No. 1 fruit, and choice and standard No. 2. No question was made whether the grades of the oranges as packed corresponded substantially "to the grades as determined and established by the Southern California fruit exchanges," in the language of the contract. But defendant made various offers of evidence having the general purpose to show that a large part of the oranges received by defendant from plaintiff arrived in the Eastern markets in

bad order, and that this was because of a latent defect in the fruit, viz. "that they lacked the inherent quality necessary to make them No. 1 fruit, having no carrying or good keeping quality." It was stated that not even by cutting an orange and examining its interior could it be determined whether it possessed "good keeping qualities," and defendant sought to prove that this could only be ascertained by its actual journey to the Eastern markets. The court refused to consider such evidence, and also evidence of various other matters alleged in defendant's first and third counterclaims, except upon condition that defendant would show that it was prevented from inspecting the fruit prior to shipment, which condition, defendant admitted, it could not fulfill. It will be observed that defendant's offer of evidence was not to define No. 1 oranges as those only which arrived at the East in good condition, but it was, in effect, that oranges, in order to grade as No. 1, must possess such "keeping and carrying qualities" at the point of shipment as will prevent deterioration from inherent causes in course of transportation to the East. Defendant urges in support of the offer that by the contract plaintiff warranted that No. 1 fruit, to which defendant's guaranty of sale applied, had no latent defect which would prevent its arrival at the Eastern markets in sound and merchantable condition; that such a warranty was implied, whether the defendant be treated as a purchaser of the goods, or as a factor of the plaintiff for marketing the same. In the latter phase of the question, it is claimed that plaintiff is bound to indemnify defendant for losses incurred by it as plaintiff's agent in disposing of the fruit. In considering the matter, we may assume, in accordance with defendant's contention, that plaintiff knew the goods were sold for shipment to Eastern markets, though there is nothing indicative of such a purpose in the contract. It is true, as defendant says, that any person selling or agreeing to sell goods of a specified designation or description thereby warrants that they shall be of the quality indicated by such designation or description, and it may well be that one promising to supply to his agent or factor goods for sale to others should be held bound by the same principle. But, by the contract here, plaintiff represented no oranges to be either No. 1 or No. 2,—either choice or standard. Whether, and to what extent, if at all, they fell within those designations, were matters for defendant's discrimination, to be reasonably exercised at the proper time, viz. when the oranges, pursuant to defendant's order, were to be picked, packed, accepted, and shipped. Then they were open to defendant's determination whether they were properly graded and culled, and its duty to accept or reject arose. Defendant made its determination when it

accepted the several car loads of goods, and plaintiff's responsibility thereupon ended, by the express provision of the contract. Defendant urges that this provision meant only responsibility for the safe-keeping and carriage of the fruit, and collection of the purchase money from Eastern customers. We think that construction too narrow. These exemptions from responsibility are included in other and more specific provisions of the contract. Thus, by its guaranty of original sales and collections, and its agreement to make cash payment for all guaranteed sales, the defendant was clearly bound for the prices at which the oranges were sold f. o. b., whether they ever reached their destination or not, and whether defendant ever collected from its Eastern customers or not. The stipulation for immediate payment apparently looked to a closed and completed transaction between the parties as to every car load of fruit sold under the guaranty. Both the contract, and the conduct of the parties under it, show with reasonable certainty that defendant depended on its own skill and judgment to procure what it wanted; and there is no ground for saying that a warranty from plaintiff, surviving acceptance by defendant, accompanied the goods. The point is illustrated by the case of a sale of a ship's bowsprit, which the buyers had the opportunity to inspect, and which appeared at the time of delivery to be perfectly sound. After some use, it was found to be rotten. There was no fraud. Held, that the seller was not liable for the subsequent failure, and was entitled to recover the apparent value at the time of delivery. *Bluet v. Osborne*, 1 Starkie, 384. To similar effect, *Moore v. McKinlay*, 5 Cal. 471; *Parkinson v. Lee*, 2 East, 314; and see *Bartlett v. Hoppock*, 34 N. Y. 118; *Benj. Sales* (6th Ed., by Bennett) p. 646, and cases cited; *Tied. Sales*, § 187, p. 273, and cases cited. Defendant having accepted the oranges as No. 1 fruit, relying on its own judgment, it is very clear, we think, that no warranty of quality was implied, even though there were latent defects in the goods, undiscoverable by the closest examination. We conclude that the court rightly refused to consider defendant's offers of evidence to support its first and third counterclaims. We have carefully considered the various cases relied on by defendant in argument (*Ruiz v. Norton*, 4 Cal. 355; *Polhemus v. Heiman*, 45 Cal. 573; *Fruit Co. v. Curtis*, 116 Cal. 632, 48 Pac. 793; *Long v. Armsby*, 43 Mo. App. 253; *Gould v. Stein*, 149 Mass. 570, 22 N. E. 47; *Maitland v. Martin*, 86 Pa. St. 120; *English v. Commission Co.*, 6 C. C. A. 416, 57 Fed. 451; and others), and are of opinion that they teach no doctrine at variance with the result we have reached.

4. The question raised on the exclusion of evidence to support the first and third counterclaims does not differ much from that respecting the demurrer to the second coun-

terclaim. Counsel have discussed them together. The construction of the contract, as we find it, is determinative of both. In said counterclaim it was averred that the 58 car loads of fruit delivered by plaintiff under the contract of December, 1894, were "picked, graded, culled, and packed, and shipped without the approval or inspection of the defendant." This averment was contrary to the evidence at the trial, but for the purposes of the demurrer we accept it as true. It was, however, further alleged that defendant sold to sundry of its customers, f. o. b., the said 58 cars of oranges for shipment to the Eastern market "as No. 1 fruit"; and from this and other allegations of the same pleading it is clearly inferable that defendant accepted the oranges from plaintiff as of that grade, and nothing is alleged to rebut the inference. Since, therefore, it was not shown, in addition to the alleged fact of the grading, culling, etc., of the oranges without defendant's inspection, that plaintiff was in some manner responsible for the failure of defendant to supervise those processes, the counterclaim makes a case of voluntary acceptance of the fruit by defendant without the inspection which, by the terms of the contract, it was its right and duty to make. If course, then, in the absence of some fraud of plaintiff (which is not charged), the consequences of acceptance must follow as declared by the contract, viz. that the responsibility of plaintiff thereupon ceased. *Moore v. McKinley*, 5 Cal. 471. We need not repeat the considerations which have been already advanced on the effect of acceptance. It is not contended that the fourth counterclaim is, as a pleading, on a footing materially different from that of the second. What is said above suffices for the disposition of the demurrer to both of them. In our opinion, it was rightly sustained.

5. As to the appeal of plaintiff: Since the court found that defendant violated the contract, in refusing to agree with plaintiff on prices of oranges after March 15, 1895, and in refusing to accept any fruit after that date, the plaintiff's only ground for appeal is on the measure of damages. The court held that the recovery for those breaches should be for nominal amounts only. Both sides assume that the rule of damages is furnished by the following provisions of section 3311 of the Civil Code: "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be: \* \* \* (2) If the property has not been resold in the manner prescribed by section thirty hundred and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred



for the carriage thereof if the buyer had accepted it." There was evidence tending to show that many thousands of boxes of oranges were refused by defendant after said March 15, 1895, because plaintiff would not agree to assume the risk of deterioration thereof in transportation, according to defendant's construction of the contract, but also that plaintiff might have sold the same to others at prices equal to those defendant should have agreed on pursuant to the contract; that plaintiff did not avail itself of the opportunity to sell elsewhere, and that a large part of the total crop went to waste. On April 23, 1895, defendant sent a letter to plaintiff, in which, after proposing certain prices for oranges, defendant proceeded: "We insist upon the construction of the contract as heretofore contended for by us, and the above prices are made upon the basis of such construction. We hereby demand of you a compliance with the terms of the contract, as agreed upon between us, and will hold you responsible for any failure on your part to carry out the same." It is the contention of plaintiff that under said section 3311 the fruit lost as stated was of no value, and that it was entitled, therefore, to recover of defendant the full market prices for the same. It insists that this was more especially true of oranges lost after the date of said letter. Defendant maintains, on the contrary, that it was the duty of plaintiff to sell the oranges, when it had opportunity, to others, and not allow them to go to waste. Defendant's letter of April 23d was no more than an accentuation of its refusal to abide by the contract. True, it insisted on plaintiff's compliance with the contract, but it insisted, also, that the contract with which compliance was demanded should be something different from that which the parties had made,—thus proposing a new term, and consequently a new engagement. Upon defendant's refusal to proceed further under the contract, the plaintiff was at liberty to sell the oranges to any person. *Rayfield v. Van Meter* (S. F. No. 762, filed March 25, 1898) 52 Pac. 666. The goods were perishable, and we think it was plaintiff's right—perhaps its duty—to sell them forthwith, and in this manner reduce its damage. *Hill v. McKay*, 94 Cal. 5, 15, 29 Pac. 406. In any view, the value of the oranges to plaintiff, after defendant's repudiation of the contract, was not that of fruit gone to decay, but of the fruit in the condition it was when plaintiff could have sold it. Civ. Code, § 3353. In our opinion the judgment and order denying the motions for new trial should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying the motions for new trial are affirmed.

(121 Cal. 232)

BRODER et al. v. CONKLIN et al. (Sac. 429.)<sup>1</sup>

(Supreme Court of California. June 29, 1898.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS—SALES BY ASSIGNEE—FRAUD—EVIDENCE—CONSTRUCTIVE TRUSTS—LIMITATIONS—ACCRUAL OF CAUSE OF ACTION.

1. In an action by creditors to enforce an alleged trust against the property of their insolvent debtor, which had been sold in bulk, at public sale, by the assignee of such insolvent to his attorney, a judgment in favor of defendants will not be set aside, on the ground that the evidence was insufficient to sustain the findings of fact, where such evidence, though preponderating in favor of the theory of plaintiffs, was conflicting, and where such purchaser, as a witness in his own behalf, testified directly and positively that he had never agreed to purchase the property in question for the benefit of plaintiffs, but that, on the contrary, he had purchased it openly and avowedly for his own personal benefit alone.

2. Under Civ. Code, § 2230, subd. 1, prohibiting trustees and their agents from taking part in any transaction concerning the trust, adversely to the interest of the beneficiary, except "when the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so," a sale by the assignee of an insolvent debtor to his own attorney was void as to creditors, and raised a constructive trust in their favor, in the absence of evidence that they had the capacity to contract, and had a full knowledge of such purchaser's motives, and of all other facts concerning the transaction which might affect their decision, and that they permitted him to make such purchase without the exercise of any influence on them by him, though such conditions existed as to some of such creditors.

3. Where the attorney of the assignee of an insolvent debtor purchased the property of the insolvent in fraud of the rights of creditors, the cause of action for the enforcement of the constructive trust in their favor accrued immediately on the creation of such trust, a repudiation by the trustee being unnecessary to mature it.

Department 1. Appeal from superior court, Mono county.

Bill in equity by R. C. Broder and others against A. R. Conklin and others to declare and enforce an alleged trust. From a judgment in favor of defendants and from an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

Richard S. Miner, for appellants. P. Reddy (W. H. Metson, of counsel), for respondents.

GAROUTTE, J. Greenly, assignee of Broder, an insolvent debtor, sold at public sale, in bulk, the property of the insolvent, consisting of a large amount of realty and personalty, to A. R. Conklin, the attorney for the assignee. The creditors, by a bill in equity, now seek a judicial decree to the effect that the property purchased by Conklin at the sale be held in trust by him for their benefit. The relief sought is based upon the claim of the existence of a trust relation between Conklin and the creditors, and they rely both upon an express trust and a constructive trust. At the trial a vast amount

<sup>1</sup> Rehearing denied.

of evidence was taken to support and overthrow these respective positions. And, as a result, the creditors were defeated all along the line, the trial court finding the facts against them. This appeal is now prosecuted from the judgment and order denying their motion for a new trial.

Counsel for appellants declare their main contention to be that the evidence is insufficient to sustain the findings of fact made by the trial court; and to the consideration of this question, as bearing upon the existence of an express trust, this court will first address itself. Conklin was an attorney at law and attorney for the assignee. It is claimed by appellants that prior to the time set for the sale he entered into an express understanding and agreement with them to the effect that he would purchase the property at the sale, for their benefit, take possession of and manage the same to their interest, and eventually satisfy their claims from the proceeds thereof. It is conceded that the trust agreement relied upon arose in parol, but it is contended that a part performance thereof relieved it from the effect of the statute of frauds. There is evidence to support these contentions, and findings of fact to that effect would not have been disturbed by this court. It may be said that the evidence preponderates that way. Still, conceding all this, it does not follow that the finding of fact to the contrary should be set aside. Notwithstanding the evidence, as it appears to us, may preponderate against the truth of the finding, still a preponderance of evidence is not inconsistent with the existence of a substantial conflict in the evidence, but is entirely consistent with it. It is said in *Grant v. McPherson*, 104 Cal. 167, 37 Pac. 864: "Upon a question of the character here presented this court cannot say that the evidence of two witnesses or of three witnesses must as to certain facts overthrow the evidence of one witness testifying to a contrary state of facts." Indeed, the trial court is not bound to decide in accordance with the testimony of the greater number of witnesses. The question here presented is, does this evidence present a substantial conflict as to the fact? And the question as to the presence of a substantial conflict is in no way dependent upon a great number of witnesses upon the one side and a limited number upon the other, for it often occurs that one shall prevail against the many. The defendant Conklin was a witness in his own behalf, and the all-important witness to disprove the charges made by the creditors. He testified directly and positively that no sort or semblance of an agreement or understanding was ever entered into by him with the creditors to purchase the property for their benefit; but that, upon the contrary, he purchased the property openly and avowedly for his own personal benefit alone. As indicated by the findings of fact, the trial court be-

lieved his statements of these matters and disbelieved all of the evidence contradictory thereto, and to get at the truth, in the light of this contradictory evidence, was essentially the duty of the trial court. As to the rule in such cases, it is said in *Grant v. McPherson*, supra: "Evidently his testimony was believed by the jury and by the court, and, under the circumstances here presented, we are not at liberty to cast it aside. A wall of adjudications to this effect has been raised up by this court which we have no desire to pass over or batter down, for the wisdom of the rule declared in those adjudications cannot be gainsaid."

A constructive trust arises by operation of law from the relation of the parties coupled with the transaction had. Is such a trust disclosed by this record? Conklin was attorney for Broder, the insolvent, and also attorney for Greenly, the assignee. But it becomes unnecessary to consider the relative relations existing between the insolvent and the assignee, or the legal propriety of one person acting as attorney for both insolvent and assignee. This is so because Broder received his final discharge in insolvency May 13, 1879, and at once Conklin's employment as his attorney ceased. The sale of the estate did not take place until the month of June. Hence at that time Conklin was not an attorney for the insolvent, for there was no insolvent. But the serious objection to the validity of the sale still remains, for upon the day of sale Conklin was attorney for the assignee, and the assignee was a trustee for the creditors. Under such circumstances it was a very delicate matter for Conklin to deal with this property for his own individual ends. Acting in his own interest, he would buy the property at the lowest possible figure, while, acting for the creditors' interest, he would sell the property at the highest possible figure. And a trustee should not place himself in a position where his duty is to be performed under such serious temptation. An assignee or his solicitor is denied the right of buying the estate of the bankrupt, save in most exceptional cases. And the reasons upon which this most wholesome doctrine is laid may be found convincingly stated in the very early cases of *Ex parte Bennett*, 10 Ves. 381a, and *Ex parte James*, 8 Ves. 337. At the same time, under certain conditions, the trustee may deal with the trust property to his own benefit, and those conditions are declared by section 2230 of the Civil Code of this state, which provides: "Neither the trustee nor any of his agents may take part in any transaction concerning the trust, in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows: (1) When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and



without the use of any influence on the part of the trustee, permits him to do so." This principle declared by the Code is but a perfect echo of the common law. It is said in *Sugd. Vend.* \*\$95, that, to support such a sale, "it must clearly appear that the purchaser at the time of the purchase had shaken off his confidential character by the consent of the *cestui que trust*, freely given, after full information and bargaining for the right to purchase."

Tested by this principle of law, was Conklin, under the facts disclosed by the record, authorized to buy this property at the sale? And, in considering this question, it must be borne in mind that there are no presumptions in favor of the action of a trustee where he deals with the property of his beneficiary. The presumptions are against him, and the burden of proof is upon him. The trial court found the value of the property at the time of the sale to be \$5,000, and that Conklin, being the highest bidder, purchased it for \$2,500. It was also found that the sale was a public sale, made after due notice. But we attach no importance to the fact that the attorney bought the property at one-half its value. The principle which condemns the sale does not depend upon the presence of that fact. It covers much broader and deeper ground. Neither does the fact that the sale was made at public auction after full notice relieve the attorney of a single responsibility laid upon him in equity by reason of his confidential relations to the parties. The success of his venture depends upon no such principle. The fact that the sale was public can hardly be considered even a trifling circumstance in his favor. It is said in 1 *Story, Eq. Jur.* § 322: "So that, in fact, in all cases where a purchase has been made by a trustee on his own account of the estate of his *cestui que trust*, although sold at public auction, it is the option of the *cestui que trust* to set aside the sale, whether *bona fide* made or not. \* \* \* And this doctrine applies, not only to trustees strictly so called, but to other persons standing in like situations, such as assignees and solicitors of a bankrupt or insolvent estate, who are never permitted to become purchasers at the sale of the bankrupt or insolvent estate."

Every creditor of the insolvent had a direct interest in the estate. He was a beneficiary of the trust fund; the assignee was the trustee; and the attorney was the agent of the assignee. The attorney occupies the same confidential relation to the creditors as the assignee, and in equity should be weighed and measured in the same scales. *Burke v. Bours*, 92 Cal. 108, 28 Pac. 57. Neither could purchase for himself unless coming within the exception declared by subdivision 1 of section 2230 of the Civil Code. Standing alone, a mere naked purchase by the attorney of the assignee from the assignee was *prima facie* void, and the burden rested upon him of showing its validity by competent evidence.

The character of evidence necessary to accomplish that result is declared in subdivision 1 of the aforesaid section of the Code. It is to this effect: The evidence should show that the creditors had the capacity to contract, that they had a full knowledge of the motives of Conklin in making the purchase, a full knowledge of all the other facts concerning the transaction which might affect their decision, and that without the use of any influence exerted upon them by him they permitted him to make the purchase. The findings of the trial court do not disclose such a state of facts, and, if those findings did disclose such a state of facts, the evidence to support them is wanting in the record. It is argued by respondent that these facts existed as to some of the creditors, and that existing as to some they existed as to all. In other words, it is contended that notice to and consent and knowledge of one creditor is notice to and consent and knowledge of all creditors. No authority is cited to support this position, and we know of none. The proposition stamps itself as unsound. Every creditor was a separate and distinct beneficiary of the trust estate. The assignee was a trustee for each and every creditor. No creditor had the authority to bind any other creditor. A majority of the creditors, upon a proposition such as here involved could not bind the minority. As to any acts looking towards the validation of this sale, every creditor stood alone, and his rights could not be bartered away by any number of the remaining creditors. We conclude that the sale was void as to the creditors, and, that being void, a constructive trust in their favor was fastened upon the property by operation of law.

If this action is not barred by the statute of limitations, upon the facts disclosed by the record the creditors are entitled to the relief sought. The trial court found that the statute had run against it, and to that question our attention will be directed. By the bill the creditors relied upon both an express and a constructive trust. They alleged a repudiation of the express trust by Conklin in 1884, and brought this action shortly thereafter. If they had established by the evidence the existence of an express trust and a repudiation of it at the time alleged, clearly their cause of action upon that line of attack would not have been barred. But, unfortunately for them, the trial court found against their contention as to the existence of any such trust, and, as already stated, we will not disturb that finding of fact.

In considering the statute of limitations in connection with the constructive trust, we find this action to have been brought some seven years after Conklin bought the property at the assignee's sale. It is therefore immaterial whether the three-year or four-year statute of limitations is applicable to the case; for, if the action is barred at all, it is barred under either contingency. No repudi-

ation of a constructive trust by the trustee is required in order to set the statute of limitations in motion. A cause of action is created in favor of the beneficiary at the very moment the law creates the trust. In *Howell v. Howell*, 15 Wis. 55, the court, in speaking as to a constructive trust, declared: "The trust in such cases originates in a fraud, which is in itself as complete and absolute a denial of the rights of the injured party as it is possible to have, and every day which passes without reparation of the injury is a continuation or repetition of it. William Howell might have commenced his action the moment the land was purchased, and consequently it was barred before his death." Without further discussion it may be said that at the present day the law is settled upon this question. The statute of limitations begins to run the moment the trustee violates his duty and makes the purchase. *Perry, Trusts*, § 865; *Haynie v. Hall's Ex'r*, 5 *Humph.* 290; *Wilmerding v. Russ*, 33 *Conn.* 67; *Kennedy v. Baker*, 59 *Tex.* 150; *Hecht v. Slaney*, 72 *Cal.* 363, 14 *Pac.* 88; *Nougues v. Newlands*, 118 *Cal.* 102, 50 *Pac.* 386. The present action, not having been brought for seven years after the cause of action accrued, was barred by the statute of limitations. Having arrived at this conclusion, we deem it unnecessary to consider the many assignments of error relied upon by the appellants in the matter of the admission and exclusion of evidence at the trial and other rulings upon preliminary questions. For the foregoing reasons the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

6 *Cal. Unrep.* 52

SHEPHERD v. KEAGLE, County Auditor.  
(Sac. 436.)

(Supreme Court of California. June 25, 1898.)  
COUNTY SUPERVISORS—EXPENSES—LIABILITY OF  
COUNTIES.

A member of the board of supervisors, who attended a supervisors' convention in another county as one of a committee of the whole, authorized and appointed by the board so to do, cannot recover compensation from the county for his expenses, since not within the duties of the board as authorized by law.

Department 1. Appeal from superior court, San Joaquin county.

Action by D. C. Shepherd against A. C. Keagle as county auditor of San Joaquin county. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

James A. Louttit, for appellant. Smith & Grove and W. B. Nutter, for respondent.

PER CURIAM. The board of supervisors of the county of San Joaquin passed the following resolution March 2, 1897: "Resolved, that the members of the board of supervisors of San Joaquin county be, and are hereby, authorized and appointed as a committee of

the whole to attend the supervisors' convention to be held in Los Angeles on April 19, 20, and 21, 1897, and to visit other county seats en route; to inspect county hospitals, jails, methods of handling, costs of administering county business, roads, etc., and to act for San Joaquin county on all matters within the law looking to better methods and more economical handling of county and government affairs at all the county seats they may visit, and report to this board." Thereafter the plaintiff, who was a member of said board of supervisors, attended the convention at Los Angeles, and visited other county seats en route, as proposed by said resolution, and in the performance of said acts necessarily expended the sum of \$44.25 for traveling expenses. After his return he presented to the board of supervisors and filed with the clerk his claim for said expenses, in proper form, which was thereupon allowed and approved by the said board, and ordered paid, and said order of allowance was properly certified to the defendant, who was the auditor of said county, and demand was thereupon made upon him by the plaintiff that he draw his warrant for said amount upon the county treasurer. The defendant refused to comply with said demand, and the plaintiff made his application to the superior court for a writ of mandate directing the defendant to draw said warrant. A demurrer to the petition was sustained by the court, and judgment entered dismissing the application. From this judgment the present appeal has been taken.

The principles involved under the facts in this case do not differ in any substantial respect from those presented in the case of *Irwin v. Yuba Co.* (*Cal.*) 52 *Pac.* 35, and upon the authority of that case the judgment is affirmed.

121 *Cal.* 327

In re WATKINS' ESTATE. (*S. F.* 1,145.)  
(Supreme Court of California. June 30, 1898.)

PRINCIPAL AND AGENT—POWER OF ATTORNEY—  
ANTAGONISTIC DUTIES.

The authority of an agent under a power of attorney to collect and receipt for a claim against an estate is suspended by his appointment as administrator; and his receipt thereafter to himself as administrator, in the name of his principal, is not binding.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county.

Objections by Elizabeth Lawrence to the final account of James B. Watkins, administrator of the estate of Mary G. Watkins. From an order sustaining the objections, the administrator appeals. Affirmed.

J. H. G. Weaver, for appellant. W. L. Duff, for respondent.

BRITT, C. On November 23, 1894, one Mrs. Elizabeth Lawrence, a creditor of the estate of Mary G. Watkins, deceased, made to James B. Watkins a power of attorney, in



terms authorizing him to demand, and, if necessary, sue for and recover, all sums of money due or to become due from the said estate to her, the said Elizabeth Lawrence, and to receipt in her name therefor. In January, 1895, said James B. Watkins applied for and received letters of administration on said estate, and thereafter a portion of Mrs. Lawrence's claim was regularly allowed and established as a debt of the deceased. In April, 1897, said administrator filed a final account of his administration; crediting himself therein, among other items, with a sum of money alleged to have been paid in satisfaction of said allowed claim against the estate. Said creditor contested the account on the ground that the administrator had made no such payment. On the hearing he produced as his voucher a receipt to himself, as administrator, for the money due to Mrs. Lawrence, which receipt was subscribed with her name by himself, as attorney in fact, in virtue of the aforesaid power. He did not pay the money to her, but retained it in his own hands, and claimed the right to apply it on a demand he set up against her on account of certain dealings she had had with him in his individual capacity. The court sustained the objections to the account, and ordered the administrator to pay said creditor the amount of her allowed claim.

The conduct of the administrator was wholly indefensible. In his official character, he was a trustee. *Bergin v. Haight*, 99 Cal. 52, 33 Pac. 760. He had no capacity to "demand, sue for, or recover" sums of money claimed by others against the estate which was the subject of his trust. Civ. Code, §§ 2232, 2234; *Byrne v. Byrne*, 94 Cal. 576, 29 Pac. 1115, and 30 Pac. 196. The authority to sign a receipt, conferred by the power of attorney, was but an incident of the authority to collect the money. It necessarily follows that when he became administrator of the estate the operation of the power from Mrs. Lawrence was suspended, if, indeed, his agency for her was not entirely renounced. Civ. Code, §§ 2232, 2322, 2355, subd. 4. Of course, he had no right to set off any claim held by himself individually against a debt due from him as administrator to a creditor of his intestate. The order should be affirmed.

We concur: CHIPMAN, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(6 Cal. Unrep. 53)

LESZYNSKY v. MEYER. (S. F. 1071.)<sup>1</sup>  
(Supreme Court of California. June 30, 1898.)  
BROKERS—COMPENSATION FOR SALE OF REALTY—  
INSUFFICIENT EVIDENCE.

On January 17, 1891, plaintiff, at London, transmitted to decedent an offer from a cor-

poration there to purchase certain land owned by him, which he accepted on conditions, one of which was that £10,000 be advanced as security for performance. On April 25th plaintiff wrote, asking that the conditions be waived. No direct response was made, and decedent, on June 2d, wrote that, unless he received notice by July 1st that the matter was closed, he would withdraw about one-half the land from the pending proposals. No such notice was sent, but plaintiff wrote that the letter was not clear, and that he expected to hear from decedent that the proposition was satisfactory. On December 5th plaintiff wrote that the corporation would be glad to do business, and requested decedent to send some one to London to complete the negotiations as outlined in their former propositions, which letter was delivered by R. On January 15, 1892, decedent replied that he was sorry his last letter was not sufficiently clear, and that he was willing to sell on the terms proposed in their letter of January 17, 1891, or would divide the property into two portions, and, if the matter was definitely settled, his son-in-law could go to London, provided £1,000 was paid for his expenses. On March 16th plaintiff wrote that the corporation was in liquidation, and he would try to sell the land to others. R. testified that when he delivered the letter of December 5, 1891, decedent said he knew satisfactory terms had been made between himself and the corporation about June or July, 1891, and that plaintiff had effected a sale with these parties, and that he should have gone across, and closed up the matter on the other side. *Held*, in an action to recover for services rendered in procuring the purchaser for the land, that there never was such a meeting of the minds of the negotiating parties as would authorize recovery.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Julius Leszynsky against H. L. E. Meyer, administrator of the estate of Joseph P. Hale, deceased, to recover for brokerage commission. From a judgment of nonsuit, plaintiff appeals. Affirmed.

George Leszynsky, for appellant. A. D. Keyes, for respondent.

BRITT, C. According to the view taken by plaintiff (which for present purposes we may concede to be correct), the cause of action on which he rested his case at the trial is to be regarded as founded on the asserted liability of Joseph P. Hale for services rendered by plaintiff in procuring a purchaser for a great tract of land owned or controlled by Hale, and situated in Lower California; the reasonable value of such services being stated at the sum of \$160,000. On the evidence for plaintiff the court below rendered judgment of nonsuit against him. The greater part of the evidence consisted of a series of letters passed between plaintiff at London, England, and Hale at San Francisco, Cal. It will be sufficient to state the effect of only a few of these. Hale died before this action was begun. On January 17, 1891, plaintiff procured and transmitted to Hale an offer in writing from a concern styled usually in the correspondence the London & Amsterdam Trust Company. Such offer was a proposal to form a corporation to "take over, work, and develop the proper-

<sup>1</sup> Rehearing denied.

ty," and to pay Hale therefor \$400,000 as follows: Cash, \$100,000; 6 per cent. first mortgage debentures, \$100,000; shares in such proposed corporation, \$200,000. Hale replied that he would accept the offer on conditions, one of which was that said trust company should advance \$10,000 cash, as security for performance. April 25, 1891, plaintiff wrote to Hale, asking that he waive this condition. Hale made no direct response, but on June 2, 1891, he wrote to plaintiff saying that unless he received notice by July 1st that the matter was closed he would withdraw about one-half of the tract from the pending proposals. No such notice was sent, but plaintiff claims that Hale's letter of June 2d was intended as an acceptance of the original offer of said trust company. The following is the more material evidence in which plaintiff sees color for this contention: July 10, 1891, plaintiff wrote to Hale that the letter of June 2d was not clear, and saying that he expected to hear from him fully that the proposition of said trust company was satisfactory. Hale made no reply to this. On December 5, 1891, the plaintiff wrote to Hale that the London & Amsterdam Trust Company "would be glad to do the business with your Lower California lands. \* \* \* To carry out their program it would be necessary to send over here power of attorney either to your son-in-law, the Honorable Mr. Boyle, or anybody else you please, to sell your land on the terms and price outlined in their former propositions"; which letter was delivered to Hale in San Francisco by one A. J. Rich. January 15, 1892, Hale replied: "I regret that my last letter should not have seemed sufficiently clear to you, and will endeavor to be more explicit in this one. I am willing to sell the whole of my property in Lower California \* \* \* to the London and Amsterdam Trust Company on the terms they proposed in their letter dated 17th January of last year, \* \* \* or I am prepared to divide my lands into two portions, and dispose of them separately [stating terms at length]. \* \* \* My son-in-law, the Honorable R. Boyle, is with me here, and, if the matter were definitely settled, he would, if necessary, go over to London to see the directors. In the event of his being sent, I should, of course, expect a sum, say \$1,000, to be paid to my bankers in London for his expenses, which sum would be deducted from the first cash payment." Replying, plaintiff wrote on March 16, 1892, that said trust company was then in liquidation, and he was trying to sell the land to other parties. Said A. J. Rich testified that when he delivered to Hale plaintiff's letter of December 5, 1891, Hale said he knew "that satisfactory terms had been made between himself and the London & Amsterdam Trust Company about June or July, 1891; that Mr. Leszynsky had effected a sale to these parties; and that he [Hale], accord-

ing to his agreement, should have gone and closed up the matter on the other side."

Looking to the said letters, it is plain that there never was a meeting of minds of the negotiating parties. *Masten v. Griffing*, 33 Cal. 111. Hale's letter of June 2, 1891, contained no language intimating that he waived an immediate payment of \$10,000; and when, in December following, plaintiff sought to continue the treaty, the provision was added that Mr. Boyle or other person in London must be empowered to sell the land on terms formerly stated. The reply of Hale was, not that he had at any time before accepted the trust company's offer, but that he was then, on January 15, 1892, willing to sell on the terms that company had proposed on January 17, 1891, and would meet the new requirement by sending Boyle to London, expecting, "of course," an advance of \$1,000 for his expenses. Why should Hale have proposed new terms for the sale of his land by parcels if he had, or believed that he had, previously accepted an offer for the whole? Thus the negotiation ended. The prospective purchaser went into liquidation, and Hale's demand for an advance of \$1,000 for the expenses of an attorney in fact—declared by plaintiff to be necessary for closing the business—was never answered. The testimony of Rich, under the circumstances appearing, is of no consequence. At the most it tended to show only that Hale had intended to accept the offer made to him. This was not sufficient. Notice of acceptance must have been communicated to the plaintiff at least, if not to the trust company also. Granting that Hale's remarks to Rich were declaratory of either present or past acceptance of the trust company's offer, still there is no proof that Rich communicated the same to anybody, or that he had authority so to do, or that such acceptance was ever in any manner put in course of transmission to plaintiff. A contract cannot be made by manifesting to strangers that assent which the law requires to be communicated mutually between the parties themselves. Civ. Code, § 1565; *White v. Corlies*, 46 N. Y. 467; *Trounstin v. Sellers*, 35 Kan. 447, 11 Pac. 441. The judgment should be affirmed.

We concur: CHIPMAN, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(121 Cal. 276)

DICKEY v. GIBSON et al. (Sac. 419.)<sup>1</sup>

(Supreme Court of California. June 25, 1898.)

MORTGAGES—FORECLOSURE—HOMESTEAD—PARTIES—PROBATE COURT—JURISDICTION—EJECTMENT.

1. The heirs of a deceased spouse are not necessary parties defendant to an action to foreclose a mortgage on the homestead, brought after the death of such spouse, since, under Civ.

<sup>1</sup> Rehearing denied.



Code, § 1265, the title to the homestead vests in the surviving spouse.

2. The title derived by a mortgagee who purchases at his foreclosure sale dates back to the date of the mortgage, so as to cut off interests acquired subsequent to its execution.

3. The probate court has no jurisdiction to try adverse claims to property on a petition by the widow to set it apart as homestead property inventoried as belonging to decedent's estate; and hence the overruling of an adverse claimant's opposition to the granting of such an order does not preclude him from establishing his title in an action for that purpose.

4. A mortgagee who purchases the mortgaged premises at foreclosure sale is not precluded from bringing ejectment by the court's refusal to grant him a writ of assistance.

Department 1. Appeal from superior court, Stanislaus county.

Ejectment by Lafayette Dickey against Crecencia Gibson and others. From a judgment for plaintiff, defendants appeal. Affirmed.

C. W. Eastin, for appellants. Maddux & Stonesifer, for respondent.

HARRISON, J. Ejectment for certain lands in the county of Stanislaus. Samuel Gibson was the owner of the lands in question in his lifetime, and executed a mortgage thereon to the plaintiff December 2, 1889, to secure the payment of his promissory note for \$5,700, with interest. Gibson died May 28, 1894, and his widow, Crecencia Gibson, was appointed executrix of his last will and testament. October 17, 1894, the plaintiff commenced an action in the superior court for the foreclosure of his mortgage against the said executrix, and certain other defendants claiming interests in the mortgaged property. The executrix appeared and answered the complaint, and upon the trial of the cause judgment was rendered in favor of the plaintiff for the foreclosure and sale of the lands in satisfaction of his claim. This judgment was afterwards affirmed by this court. 113 Cal. 26, 45 Pac. 15. At the sale under the judgment the plaintiff became the purchaser, and a deed for the land was executed to him by the sheriff December 8, 1895. After the execution of this deed, and after the judgment had been affirmed in this court, the surviving widow, Crecencia Gibson, made an application to the superior court to set aside the lands in question as a homestead for the use and benefit of the family of the deceased. The plaintiff appeared at the hearing of this application, and contested the same; but his objections were overruled, and on the 19th day of August, 1896, the court made an order setting apart the same as a homestead, which order was on the same day recorded in the office of the county recorder. Prior to the commencement of this action, the plaintiff applied to the superior court for a writ of assistance to place him in possession of the premises, which was refused; and on the 10th of July, 1896, he commenced the present action for the possession of the land.

The defendants and appellants are the surviving widow and children of Gibson, the deceased mortgagor. Judgment was rendered in favor of the plaintiff, and the defendants have appealed.

It was held in the case of *Dickey v. Gibson*, 113 Cal. 26, 45 Pac. 15, that at the date of the mortgage to the plaintiff the land was the separate property of Gibson, and that the mortgage by him was valid, and created a lien in favor of his mortgagee. For the foreclosure of this lien, after the death of Gibson, it was not necessary to make his heirs parties defendant to the suit. *Bayly v. Muehe*, 65 Cal. 345, 3 Pac. 467, and 4 Pac. 486; *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1085. The executrix represented the estate of Gibson, and the judgment against her bound the heirs and devisees of Gibson; and the sale under the judgment related to the date of the mortgage, and cut off the interest of all parties to the suit derived under Gibson subsequent thereto. By the sheriff's deed under this sale the plaintiff acquired all the right in the land held by Gibson at the time of his death, so that nothing passed to the defendants herein, as heirs of Gibson, either by descent or devise.

The order of the court setting apart the premises as a homestead for the family, made subsequent to the execution of this deed, did not impair the interest in the land which the plaintiff acquired by virtue of the deed. By this order the title to the land was not transferred or affected, its only effect being to withdraw the property from administration. No adjudication of title was appropriate, or could be made in such proceeding. In *re Burton's Estate*, 64 Cal. 428, 1 Pac. 702; In *re Kimberly's Estate*, 97 Cal. 281, 32 Pac. 234. And the fact that the plaintiff's opposition to granting the order was overruled did not preclude him from establishing his title in an action for that purpose.

It was not necessary that the plaintiff should make a personal demand upon the defendants for the possession, prior to commencing the present action. This provision in the judgment in the foreclosure suit was a condition annexed to his right to apply for a writ of assistance, but has no application to an action for the possession of the property. In such action his right of recovery is established by showing his title to the land, and that it is withheld from him by the defendant. Although the plaintiff derived his title through the judgment in the foreclosure suit, he was not limited to a writ of assistance for the purpose of gaining possession of the land, but was at liberty to bring an action for its recovery, and the right to bring such action was not affected by the refusal of the court to grant a writ of assistance. *Trope v. Kern*, 83 Cal. 553, 23 Pac. 691. The refusal of the court to grant the writ was not an adjudication of his title or right to possession as against the defend-

ant. The court may have denied his application for the reason that they were not parties to the foreclosure suit, since in such cases courts very often refuse the writ, and remit the petitioner to an action. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(121 Cal. 323)

Ex parte WILLIAMS. (Cr. 442.)<sup>1</sup>

(Supreme Court of California. June 30, 1898.)

FALSE PRETENSES—DEFAUDING INNKEEPER—SUFFICIENCY OF COMPLAINT ON HABEAS CORPUS PROCEEDINGS.

Pen. Code, § 537, provides that any person obtaining food or accommodation at an inn without paying therefor, with intent to defraud the proprietor, or who obtains credit by the use of any false pretenses, or who, after obtaining credit, absconds without paying for his accommodation, is guilty of a misdemeanor. A complaint alleged that defendant by false representations did fraudulently obtain credit at a particular boarding house to the extent of \$48, and did willfully and unlawfully defraud the proprietor thereof. *Held*, in habeas corpus proceedings, that, although brought under the second clause, it sufficiently stated a cause of action under the first clause to meet an objection that it charged no offense under the statute.

In bank. Appeal from superior court, Mariposa county.

Petition by Benjamin Williams for a writ of habeas corpus. Writ denied.

Stanton L. Carter, for petitioner. The Attorney General, for respondent.

VAN FLEET, J. Petitioner was convicted in the justice's court of Mariposa county of a misdemeanor arising under section 537 of the Penal Code. He was fined, with the alternative of imprisonment, and, failing to pay the fine, went to jail. He now seeks his release on habeas corpus, assigning (1) that the complaint charged no offense under the statute; and (2) that the statute is unconstitutional.

1. As to the last point, the validity of the section was impliedly sustained in *Ex parte Ruffin* (Cal.) 51 Pac. 862, and we do not regard the further objections now urged by petitioner as seriously challenging the constitutionality of the provision.

2. The proposition that the complaint is insufficient is based, we think, upon an erroneous construction of the pleading. The section of the Code under which the conviction was had, which is intended to prevent frauds and impositions upon innkeepers, and the like, provides: "Sec. 537. Any person who obtains any food or accommodation at an inn or boarding-house without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at an inn or boarding-house by the use of any false pretense, or who, after obtaining credit or accommodation at any inn or boarding-house, absconds and surreptitiously removes

his baggage therefrom without paying for his food or accommodations, is guilty of a misdemeanor." St. 1889, p. 44. As suggested by petitioner, the act contemplates three classes of offenders who shall be amenable to its provisions: First, those who obtain food or accommodation at such an institution without paying therefor, with intent to defraud; second, those who obtain credit thereat by the employment of any false pretense; and, third, those who, after obtaining such credit or accommodation, abscond and surreptitiously remove their baggage without paying their score. The material part of the complaint filed against the petitioner was "that said Dr. B. Williams on or about the 6th day of February, 1898, at Mariposa, in the said county of Mariposa, state of California, by false and fraudulent promises and representations, did willfully, unlawfully, and fraudulently obtain credit for food and lodging at the boarding house of Peter Gordon, in said town, county, and state, to the extent of forty-eight dollars in value; and said Dr. B. Williams did then and there willfully and unlawfully defraud said Peter Gordon out of such board and lodging, to said value of forty-eight dollars." Petitioner construes this as an effort to state an offense solely under the second clause of the section,—the obtaining of credit by the use of false pretenses,—and his contention is that it is wholly insufficient for that purpose, because of its failure to state what the false pretenses were; that the mere averment that false pretenses were used, without setting them out, is but the averment of a legal conclusion, which is not sufficient to make out the offense; and such may be conceded to be the law, under that view of the complaint. *People v. McKenna*, 81 Cal. 158, 22 Pac. 488. But the fact that the complaint may have been intended to state a case under that clause of the section will not affect our present inquiry, if, upon inspection, it is found to contain sufficient facts to bring it within either clause thereof. While the inquiry on habeas corpus may extend to the question whether the complaint or information charges an offense known to the law, since this objection goes to the question of jurisdiction (*Ex parte Maler*, 103 Cal. 476, 37 Pac. 402), the proceeding may not be made to subserve the office of a demurrer; and if the facts alleged squint at a substantive statement of the offense, no matter how defectively or inartificially they may be stated, or however confused and beclouded they may be rendered through intermingling them with immaterial or unnecessary averments, the writ will not lie. *Ex parte Whitaker*, 43 Ala. 323; *Ex parte Prime*, 1 Barb. 340. While in this case the pleader would seem to have had rather a confused idea of the requirements of the statute, and of the case he desired to allege, and, as justly said by petitioner, has so confused his averments as to make it difficult to determine under which

<sup>1</sup> Rehearing denied.



feature of the statute he intended to proceed, we are nevertheless satisfied that the complaint contains sufficient, in substance, when picked out, to constitute an offense under the first clause of the section. It is made to appear therefrom, we think, to a common certainty, that petitioner obtained food and lodging at the boarding house of Peter Gordon, without paying for it, and with the intent to defraud Gordon thereof. This was all that it was essential to allege under the first clause of the section. The fact that it contains allegations as to the employment of false pretenses—matter calculated to bring it within another feature of the statute—cannot, as suggested, affect the sufficiency of the facts to state an offense. Because a demurrer might have lain for duplicity or uncertainty, or some other special ground, will not, as we have seen, avail the petitioner in this proceeding. It is only necessary that the complaint should state an offense within the jurisdiction of the court trying it, to meet the objection here. And this, we are satisfied, has been done. Writ denied, and petitioner remanded.

We concur: GAROUTTE, J.; HARRISON, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

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(121 Cal. 312)

REDLANDS, L. & C. DOMESTIC WATER  
CO. v. CITY OF REDLANDS  
et al. (L. A. 336.)

(Supreme Court of California. June 29, 1898.)  
MUNICIPAL CORPORATIONS — WATER COMPANIES—  
RATES.

On an issue as to the reasonableness of water rates established by ordinance, the items of necessary expenditure by the water company should not include interest on the company's indebtedness, nor the sum the plant will depreciate annually aside from the sum requisite for its maintenance and repairs.

Department 1. Appeal from superior court, San Bernardino county.

Action by the Redlands, Lugonia & Crafton Domestic Water Company against the city of Redlands and others. From a judgment for plaintiff, defendants appeal. Reversed.

C. C. Bennett, for appellants. Bicknell & Trask, for respondent.

HARRISON, J. The board of trustees of the city of Redlands having, in February, 1896, adopted an ordinance fixing the rates to be charged or collected for furnishing water to its inhabitants for domestic purposes during the year commencing July 1, 1896, the plaintiff brought the present action for a judgment annulling the ordinance, upon the ground that

the rates therein prescribed would not yield a revenue sufficient to enable it to pay the interest on its indebtedness, its operating expenses, and taxes, and keeping its plant in repair, and replacing the same. At the trial of the cause the court found that the total amount of income which the plaintiff would receive during the year would be \$20,749.08, and that its necessary expenditures would be \$22,367.60; and also found that the plaintiff is entitled to have the rates so fixed that the aggregate income therefrom, together with its other income, will enable it to meet the above amount of expenditures, "and such additional amount as, in the opinion of said board of trustees, said plaintiff is entitled to as profit upon its investment for furnishing water to said city of Redlands and its inhabitants"; and thereupon rendered judgment annulling the ordinance, and awarding to the plaintiff a mandatory injunction requiring said board of trustees to forthwith fix the rates for said year "so as to assure an annual income to the plaintiff sufficient to pay the interest on its indebtedness, its operating expenses, taxes, and annual depreciation of plant, and to pay plaintiff a reasonable and just compensation for the services rendered in furnishing water to the said city of Redlands and its inhabitants." From this judgment the defendants have appealed, presenting the appeal upon the judgment roll without any bill of exceptions.

In the items of expenditure which the court found that the plaintiff is entitled to be reimbursed from the income derived from the rates fixed by the ordinance is the sum of \$7,580 for interest, and \$2,898.60 for depreciation of plant, the latter item being the amount which the court finds will be the annual depreciation of the plant, aside from the amount requisite for its maintenance and repairs during the year. In *San Diego Water Co. v. City of San Diego*, 118 Cal. 556, 50 Pac. 633, it was held that the interest upon the indebtedness of the water company is not a proper item of expenditure to be provided for in fixing the annual rates to be charged or collected for furnishing water to the inhabitants of a city, and that the water company is not entitled to have the rates so fixed as to enable it to set apart a certain amount each year as a sinking fund for the depreciation of its plant. The provision in the judgment herein directing that the rates be fixed so as to assure an income sufficient to pay these items is inconsistent with the principles declared in the *San Diego Case*. Deducting the amount of these two items from the amount of expenditures which the court finds will be necessarily incurred by the plaintiff, the income which the plaintiff will receive from the rates fixed in the ordinance will exceed its expenditures by \$8,860.08. Whether this amount is, under all the circumstances of the case, a reasonable compensation to it is a question of fact depending upon a consideration of all the circumstances of the case, and must be determined in the first instance by the superior court. The jurisdiction of this

court in the matter is limited to a review of the action of the superior court. The judgment is reversed, and new trial ordered.

I concur: GAROUTTE, J.

I concur in the judgment: VAN FLEET, J.

6 Cal. Unrep. 70

In re MURDOCK'S ESTATE. (Sac. 452.)  
(Supreme Court of California. July 7, 1898.)  
PROBATE—ACCOUNTS OF EXECUTORS—ALLOWANCES.

An order in probate court settling the first annual account of executors, which strikes out certain items for sums paid to experts and detectives in investigating an alleged fraudulent claim against the estate, on the ground that the court is unable to examine such items because the executors object to disclosing the particulars for fear of defeating their object, is not erroneous, where leave is given to restate such items in some future account.

Department 2. Appeal from superior court, Glenn county.

In the matter of the estate of William Murdock, deceased. From an order made on the hearing of exceptions to the executors' first annual account, they appeal. Affirmed.

F. C. Lusk (Richard Bane, of counsel), for appellants. Reddy, Campbell & Metson, for respondent.

PER CURIAM. The executors of the last will and testament of William Murdock, deceased, filed their first annual account in the superior court of Glenn county, and one Mary Helen Murdock, claiming to be a creditor of said estate, filed exceptions thereto, and the executors appeal from the order made upon the hearing of said exceptions. After publication of notice to creditors, Mary Helen Murdock presented to said executors a claim against said estate upon an alleged promissory note purporting to have been made by said testator on September 5, 1877, for the sum of \$100,000, payable to her order 20 years after date, "with interest at one per cent. per month from date until paid." This claim was presented August 22, 1894, and was not then due. The executors held said claim for 10 days without allowing or rejecting it, whereupon said claimant elected to consider the claim rejected and brought suit thereon, but dismissed it shortly afterwards.

The question principally discussed by counsel for appellants concerns the right of said claimant to contest said account, it being contended that the presentation of her claim did not comply with the requirements of section 1494, Code Civ. Proc., in reference to the presentation of claims not due; that it was therefore nugatory, and gave her no standing to contest the account. Some other questions incidental to the right of said contestant to be heard were also raised; but unless the order made by the court settling the account was itself erroneous, it cannot be reversed because of errors occurring at the



hearing, so that the only material question upon this appeal is whether that order is erroneous.

Several items were ordered to be retired from the account, with leave to the executors to restate them in some future account. These, so far as complained of, relate to compensation paid by the executors to an expert in handwriting and certain detectives employed by them in investigating the claim of the contestant based upon said alleged promissory note, which, if valid, would amount at maturity to \$340,000; and the ground upon which these items were retired was that the executors having objected to disclosing the particulars of their services, for the reason that it might defeat the object sought to be attained, namely, the defeat of the alleged fraudulent claim of contestant, the court could not sufficiently investigate the character and value of the services rendered to enable it to determine whether those items should be allowed. We think this action of the court was proper, and that the executors were not prejudiced thereby. No opinion is expressed upon the other questions discussed, for the reason that it is not necessary to a decision of this appeal, and questions which may arise in other proceedings should not be now anticipated; and if the questions discussed and not decided upon this appeal should again arise, the parties will not be prejudiced or concluded by the action of the court below in this proceeding, except as to the order settling said account, which is hereby affirmed.

(121 Cal. 257)

ISAACS v. JONES et al. (Sac. 250.)<sup>1</sup>

(Supreme Court of California. June 24, 1898.)

RECEIVERS—GUARDIANS—APPOINTMENT—COLLATERAL ATTACK—PARTNERSHIP—DISSOLUTION—PARTIES—INTERVENTION.

1. Where the court had jurisdiction to appoint a receiver, error in making the appointment or in not controlling the receiver's conduct is not ground for intervention.

2. An order of a court of competent jurisdiction in appointing a guardian for one alleged to be incompetent to manage his affairs is not subject to collateral attack.

3. Under Code Civ. Proc. § 387, providing that any person having an interest in matter in litigation, or in the success of either party, or against both, may intervene by joining plaintiff in claiming under the complaint, or by uniting with defendant in resisting the claim of plaintiff, or by demanding anything adversely to both, an individual creditor of one partner, who has attached the firm assets, cannot intervene in an action to dissolve the partnership and distribute the assets under direction of the court to the parties entitled thereto after payment of partnership debts.

4. In an action to dissolve a partnership and to distribute the assets through a receiver, the bona fides of mortgages made by defendant partner on separate property, or the question whether plaintiff and defendant were conspiring to defeat intervenor in another county, cannot be litigated by intervention.

Department 1. Appeal from superior court, Amador county.

Petition by the Bank of Yolo for leave to intervene in the suit of Michael Isaacs against Morris Jones and others. From an order denying the petition, the bank appeals. Affirmed.

C. M. Thomas and E. A. Bush, for appellant. Robert T. and W. H. Devlin, for respondents.

HARRISON, J. The plaintiff and the defendant Bernhard Isaacs formed a partnership in the town of Lone, in 1873, for business purposes, and continued to conduct business under their partnership relation until some time in 1895, when the defendant Bernhard became legally incompetent of contracting, and by an order and judgment of the superior court of Amador county was adjudged to be an incompetent person, and unfit to manage his property; and the defendant Morris Jones was appointed the guardian of his estate, and letters of guardianship were duly issued to him. Plaintiff thereupon determined upon a dissolution of the partnership, and has brought the present action to wind up its affairs, including an accounting and determination of the respective rights of the parties hereto, and such distribution of the proceeds of the partnership property as may be proper and just. The complaint alleges also that it is necessary that a receiver of the partnership property be appointed "to take charge thereof, and to collect the demands due to said partnership, and to pay off the claims against the same, and deliver to the parties entitled their respective shares, after the same are determined by an accounting and judgment of this court." Upon the filing of the complaint and petition therefor a receiver was appointed. After the present action had been commenced, and after the appointment of the receiver, the Bank of Yolo commenced an action in the superior court of Yolo county against the defendant Bernhard Isaacs upon a promissory note made to it by him in June, 1895, and caused a writ of attachment to be issued in said action, which was levied by the sheriff of Amador county upon certain real estate in said county, and under which garnishments were served upon the receiver and upon the plaintiff and the guardian of Bernhard. Thereafter the Bank of Yolo presented its petition to the superior court of Amador county for leave to intervene in the present action "as a creditor of the defendant Bernhard Isaacs, one member of said firm, and to appear therein for and in behalf of itself and said Isaacs as against the other parties to the action, and for all other persons similarly situated." In its petition it set forth that it had commenced the action against Bernhard, and the proceedings under the writ of attachment issued therein, and averred that it has thereby acquired a lien upon all of said property of the partnership, and upon the interest of said Bernhard in the real estate levied upon. It also stated that Bernhard is reasonably worth not less than \$50,000, and that the officers of the petitioner "have been informed" that he intended to defraud it out of

<sup>1</sup> For dissenting opinion. see 53 Pac. 1101.

said debt, and that "said bank verily believes" that he has entered into a conspiracy with the plaintiff to defeat the bank in the collection of the note. The petition also alleges that the application for the appointment of the guardian of Bernhard was insufficient to support the order, and that the facts alleged in the petition for said appointment were not sufficient to give the court jurisdiction to make the order, and that since his appointment the guardian has not properly discharged his duties; and also that the order appointing a receiver was not authorized either by the facts alleged in the petition therefor or the manner in which the appointment was sought, and that the person appointed is unsuitable for that office. Upon these averments the petitioner asked, in addition to being permitted to intervene, that the parties to the action show cause why the order appointing a receiver should not be revoked, and all property belonging to Bernhard, or in which he has an interest, be delivered to the sheriff, and why the sheriff should not proceed to sell and dispose of it under his writ of attachment. A citation was issued to the parties to the action, and their demurrer to the petition was sustained by the court, and an order made denying the petition. From this order the Bank of Yolo has appealed.

The right of the appellant to intervene in the action is not enlarged or diminished by the action of the court in appointing the receiver, or by his conduct after his appointment. The court had jurisdiction to appoint a receiver in the action, and whatever error it may have committed in making the appointment, or in not controlling his conduct, may be corrected at the instance of the parties to the action, but it does not confer upon a stranger the right to intervene in the action. Neither is the action of the court in appointing a guardian for Bernhard Isaacs open to a collateral attack. The order therefor was made by a court of competent jurisdiction, and, in the absence of a direct attack, will be presumed to have been correctly made. Section 387, Code Civ. Proc., provides: "Any person may before the trial intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant." There have been many decisions upon the right of intervention which is given by this section, but in none of them has there been any attempt to define the right in any clearer terms than those of the section itself. Whether any particular case is within the terms of the premises is best determined by a consideration of the facts of that case; and the consideration of the effect of any particular con-

struction to be given to a statute is of advantage in determining the construction to be given to it, and is frequently decisive of the question. To avail himself of the right given by this section, the applicant must have either an interest in the matter in litigation or in the success of one of the parties to the action, or an interest against both of them. The interest here referred to must be direct, and not consequential, and it must be an interest which is proper to be determined in the action in which the intervention is sought. In one sense it may be said that a creditor of the plaintiff in an action for damages may have an interest in his recovering judgment against the defendant, since thereby he may be able to recover his own debt; but such interest will not give him the right to intervene in the action. The second sentence of the section above quoted itself defines the circumstances under which an intervention may be had, and is to that extent a limitation upon the terms used in the first sentence. The third person must have an interest in claiming what is sought by the complaint, or in resisting the claim of the plaintiff, or must demand something which is involved in the litigation adversely to both of the parties.

The object of the present action is a distribution, under the direction of the court, of the assets of the partnership, including the determination of the amount thereof to which each partner will be entitled after the payment of all the partnership claims. Although the individual partners are entitled to the surplus according to their interests as the same shall be ascertained by the court, a litigation in the action of disputed claims against the individual partners is not appropriate. If every claim against each of the partners could be made the subject of a distinct issue and determination in such an action, it is easily seen that the litigation might be indefinitely prolonged. When the partnership affairs have been adjusted, the court should enter its judgment in accordance with such adjustment. Its authority to appoint a receiver rests upon its right to retain in its possession the property of the partnership until the rights of the several claimants thereto have been satisfied, and when this has been accomplished the receiver is to be discharged. The court is not authorized to retain in its possession thereafter the property adjudged to belong to the individual partners, for distribution among their respective creditors, any more than it would have been authorized to appoint a receiver for that purpose in the first instance. So far as the rights of these creditors are legal rights, they are to be enforced in the ordinary mode for enforcing legal obligations. In the present case the appellant alleges that it has secured its claim against Bernhard Isaacs by the lien of an attachment, and it appears from the record that the court refused the motion of the plaintiff to dissolve the attachment. This lien of the ap-



pellant is upon the entire share of his debt or in the surplus assets of the partnership, and such lien will be available to him when he shall have obtained a judgment in the action in Yolo county. He has not yet established any claim against this surplus, and, as it is possible that he may not obtain a judgment in that action until long after the partnership affairs shall have been adjusted in the present action, it would be unjust to permit an intervention here, the only effect of which would be to tie up the property until the determination of the suit in Yolo county. If he shall obtain judgment in that action prior to the entry of judgment herein, a sale under that judgment of the interest of Bernhard Isaacs in the real estate upon which his attachment has been levied, as well as in the partnership property, will make the purchaser its owner, and entitled to receive from the court whatever may be found to belong to Bernhard. If, as is alleged, Bernhard Isaacs has made fraudulent mortgages upon the attached property, that is a question to be determined when the appellant or some other purchaser shall become clothed with title to the property; and, if the plaintiff herein is conspiring with Bernhard to defeat the appellant in the action in Yolo county, the resistance against such conspiracy must be made in the action in that county. Neither of these matters is properly a subject to be litigated in this action, and neither of them gives any ground for an intervention by the appellant. The order is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

121 Cal. 264

MINER v. JUSTICE'S COURT OF TOWN OF  
BERKELEY et al. (S. F. 1149.)

(Supreme Court of California. June 24, 1898.)

JUSTICES OF THE PEACE—CONSTITUTIONAL LAW—  
SPECIAL LEGISLATION.

1. A freeholders' charter of a city adopted under Const. art. 11, § 8, providing that such charter, when approved, shall become the organic law thereof, and supersede any existing charter, operates to abolish justices' courts in such city created by a former charter enacted by the legislature; and, since inferior courts cannot be created under the constitution by a freeholders' charter adopted by mere resolution of the legislature, such courts continuing after the adoption of such a charter by a city are without jurisdiction.

2. Act March 27, 1895, created a court for the town of Berkeley, to be known as "the justice's court of the town of Berkeley," consisting of two justices of the peace, and provided that the judicial power of the town should vest in such court and such other courts as may be provided by law. *Held*, that this act was special and local legislation, within the prohibition of the constitution, and therefore void.

Beatty, C. J., and Van Fleet and McFarland, JJ., dissenting.

In bank.

Mandamus by one Miner against the justice's court of the town of Berkeley and W.

H. H. Gentry, justice of the peace, to compel the issuance of an execution on a judgment recovered by petitioner in said court. Denied.

R. Y. Hayne and Brewton A. Hayne, for petitioner.

HARRISON, J. Application for a writ of mandate. The petitioner seeks by this writ a direction to the respondents, commanding the said Gentry to issue an execution upon a judgment alleged to have been recovered by the petitioner against A. M. Niver in the justice's court for the town of Berkeley, July 20, 1897, on an action commenced therein July 9, 1897. The question presented for determination is whether the justice's court for the town of Berkeley was in existence at the time the plaintiff commenced the action against Niver, or subsequent thereto, and this involves a consideration of the effect of the adoption of a freeholders' charter upon the previous charter of the town. The town of Berkeley was incorporated by an act of the legislature passed April 1, 1878 (St. 1878, p. 888). Section 3 of this act declares: "The government of said town shall be vested in a board of trustees to consist of five members, an assessor, a marshal, who shall be ex officio tax collector, a clerk, a treasurer, two justices of the peace and two constables." Provision is made in other sections for the election and duties of justices of the peace and defining their jurisdiction.

February 26, 1895, the electors of the town of Berkeley adopted a charter, which had been prepared by a board of freeholders chosen therefor under the provisions of section 8 of article 11 of the constitution, and a resolution approving this charter was passed by the legislature March 5, 1895 (St. 1895, p. 409). Section 76 of this charter declares: "The judicial power of the town shall be vested in two justices' courts, and such other courts as may be provided by law." The election and jurisdiction of justices of the peace is provided for in other sections. March 27, 1895, the legislature passed an act entitled "an act to create a court in and for the town of Berkeley, state of California." St. 1895, p. 205. Section 1 of this act is as follows: "There is hereby created and established in and for the town of Berkeley, state of California, a court to be known as the justice's court of the town of Berkeley, which court shall consist of two justices of the peace, and the judicial power of the town shall be vested in said justice's court and such other courts as may be provided by law."

Under the decision of this court in the case of *People v. Toal*, 85 Cal. 333, 24 Pac. 603, the provision in the freeholders' charter for the creation of a justice's court in the town of Berkeley, and the election of justices therefor, was ineffective. By virtue of the provision in section 8 of article 11 of the constitution, that upon the approval by the

legislature of a freeholders' charter "it shall become the charter of such city, and shall become the organic law thereof, and supersede any existing charter, and all amendments thereof, and all laws inconsistent with such charter," the charter of the town of Berkeley which was granted by the act of April 1, 1878, was superseded. Hence the provision in that charter for justices of the peace and a justice's court ceased to exist or have any force after the freeholders' charter was adopted. The contention of the petitioner that, inasmuch as the freeholders' charter could not create a court, it could not have the effect to destroy one which was in existence, was fully considered in *Ex Parte Sparks* (Cal.) 52 Pac. 715, involving the effect of a provision in the charter of Sacramento, and it was held not to be tenable. It was there said: "The old charter is not repealed because it is so enacted in the new charter, or because its provisions are inconsistent with those of the new charter. The new charter does not abrogate the old *ex proprio vigore*, but because the constitution declares that such consequence should follow. It is not the passage of an ordinary law, but the establishment of a government. The new is to take the place of the old, however dissimilar, and, although some of the parts of the old charter have no corresponding provisions in the new, there is no presumption that anything is continued, for the new scheme is deemed complete in itself, and to provide all that is desired." The provision for the election of justices in the act of April 1, 1878, was a part of the charter of the town of Berkeley, and was by the terms of that act declared to be a part of the government of the town. It was not necessary that such provision should be made in the charter, but having been placed there it became a part of the charter, and fell with the other parts upon the legislative approval of the freeholders' charter. The act of March 27, 1895, is special and local legislation, and is within the prohibition of the constitution. The act singles out the town of Berkeley from the rest of the state for which provision upon the subject involved in the act has been made by general laws, and purports to create a special tribunal whose jurisdiction is defined in the act itself. The writ is denied.

We concur: HENSHAW, J.; GAROUTTE, J.; TEMPLE, J.

We dissent: BEATTY, C. J.; VAN FLEET, J.

McFARLAND, J. I dissent. In my opinion, that part of the act of April 1, 1878, incorporating the town of Berkeley, which creates the office of justice of the peace, was not repealed by the freeholders' charter of February 26, 1895. It could not have been so repealed, because, as heretofore held, a free-

holders' charter cannot deal at all with the judiciary; and therefore that part of the act of February 26th which creates the office of justice of the peace could not be repealed except by a law, and "no law shall be passed except by bill," which must be signed by the governor, or, in the event of his veto, passed by two-thirds of the members of each house of the legislature. Const. art. 4, §§ 15, 16. The provision of section 8 of article 11, that a freeholders' charter shall supersede any existing charter, applies, in my opinion, only to those things which may be legally included in a freeholders' charter, and not to the judiciary. Nor, in my opinion, is the act of March 27, 1895, creating and establishing a justice's court in the town of Berkeley, unconstitutional. Justices of the peace, under article 6, § 1, are constitutional officers, and by section 11 of the same article the legislature is given the power to determine the number of justices to be elected in any town, city, or town; and the legislature is prohibited from passing local or special laws with respect to justices of the peace, only in the matter of "regulating the jurisdiction and duties" thereof. Article 4, § 25. The said act of March 27, 1895, is therefore not unconstitutional, as being special or local, except so far, perhaps, as it undertakes to regulate the jurisdiction of the court. In other respects it is constitutional, and its jurisdiction would be derived from the general law on that subject. In my opinion, the writ ought to issue.

(121 Cal. 254)

EDWARDS v. GRAND et ux. (L. A. 396.)

(Supreme Court of California. June 24, 1898.)

MORTGAGE — RECORDING — WHAT CONSTITUTES — FORECLOSURE — ATTORNEY'S FEE.

1. Civ. Code, § 1241, declares that a homestead is subject to execution for a debt secured by a mortgage thereon, "executed and recorded before the declaration of homestead was filed for record." Section 1170 provides that "an instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office with the proper officer for record." *Held*, that where a mortgage duly executed was delivered to the recorder at his office after five o'clock on the day it was executed, though not recorded until the next morning, it was "filed for record" prior to the declaration of a homestead, handed to the recorder the next morning on his way to the office, with a request that he record it the first thing after the office was opened.

2. An instrument is "filed" for record when it is deposited in the proper office with a person in charge thereof, with directions to record it, although not within the time that the recorder's office is required by statute to be kept open.

3. The indorsement on an instrument of the fact and time of deposit in the recorder's office for filing is not essential to the filing thereof, and does not affect it.

4. Delivery of an instrument required to be filed to the proper officer at a place other than the office where it is to be filed is not sufficient, although the officer indorse it as properly filed.

5. The hours during which a county recorder's office is required by statute to be kept open



are for the convenience of the public, but do not limit the time within which individuals may file instruments therein.

6. It is within the jurisdiction of the court in a foreclosure proceeding to determine whether the whole or a portion of the stipulated attorney's fee was a reasonable fee, even if no evidence was presented in reference thereto.

Department 1. Appeal from superior court, Santa Barbara county.

Action by one Edwards against Gerard Grand and wife to foreclose a mortgage on land a part of which was claimed exempt as a homestead. From a judgment in favor of plaintiff for sale of the entire property, defendants appeal. Affirmed.

B. F. Thomas, for appellants. W. S. Day, for respondent.

HARRISON, J. The defendant Gerard Grand executed a mortgage to the plaintiff November 22, 1892, and on the same day his wife, Maria Jesus Grand, made a declaration of homestead upon a portion of the mortgaged premises. The present action against both husband and wife for the foreclosure of the mortgage is resisted by the wife upon the ground that, to the extent that the mortgaged premises are covered by the declaration of homestead, the mortgage is invalid, for the reason that she did not unite in its execution. The facts relating thereto are as follows: On the day that the mortgage was executed, the agent of the plaintiff took it to the office of the county recorder for record a few minutes after 5 o'clock in the afternoon, and, as the statute only required the office to be kept open until 5 o'clock, he delivered it to the recorder with the request that he would record it the first thing on opening the office on the next morning; and it was thereupon received by the recorder, and left in his office. On the next morning, a little before 9 o'clock, while the recorder was on his way to the office, the declaration of homestead was handed to him, with the request that he would record it the first thing after the office was open, and when he reached his office, finding that the two instruments affected the same premises, he indorsed each of them as follows: "Filed for record November 23, 1892, at nine o'clock a. m." Upon these facts, the court found that the record of the mortgage was in fact prior in point of time to that of the declaration of homestead, and rendered judgment in favor of the plaintiff for a sale of the entire mortgaged premises.

Subdivision 4, § 1241, Civ. Code, declares that the homestead is subject to execution or forced sale in satisfaction of a judgment obtained on a debt secured by a mortgage on the premises "executed and recorded before the declaration of homestead was filed for record." "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office with the proper officer for record." Civ. Code, § 1170; *Watkins v. Wil-*

*hoit*, 104 Cal. 395, 38 Pac. 53. An instrument is "filed" for record when it is deposited in the proper office, with a person in charge thereof, with directions to record it. *Tregambo v. Mining Co.*, 57 Cal. 501. Indorsing the fact and time of its deposit is not an essential part of the filing. *Bishop v. Cook*, 13 Barb. 326; *Smith v. Biscailuz*, 83 Cal. 344, 21 Pac. 15, and 23 Pac. 314. Delivering an instrument to the proper officer at a place other than the office where it is required to be filed is not sufficient, even though the officer indorse it as properly filed. *Schulte v. Bank*, 34 Minn. 48, 24 N. W. 320. See, also, *Estate of Sbarboro*, 63 Cal. 5. The court therefore properly held that the mortgage was executed and recorded before the declaration of homestead was filed for record.

The contention of the appellants that, inasmuch as the mortgage was delivered to the recorder after the hour for closing the office, it cannot be deemed to have been filed for record until the hour for opening the office on the next morning, is untenable. We are cited to no authority in support of the proposition that an instrument can be properly filed only within the hours fixed by statute for keeping the office open. These hours are established for the purpose of defining a duty of the officer, and for the convenience of the public, and are not to be construed as limiting the time within which individuals may avail themselves of rights elsewhere conferred by statute.

There was no error in the allowance to the plaintiff of attorney's fees for the foreclosure of the mortgage. *O'Neal v. Hart*, 116 Cal. 69, 47 Pac. 926. The court could determine whether the whole or a portion of the amount stipulated in the mortgage was a reasonable fee, even if no evidence was presented in reference thereto. *Clancy v. Plover*, 107 Cal. 272, 40 Pac. 394. The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

121 Cal. 289

BRODER et al. v. CONKLIN et al. (Sac. 375.)  
(Supreme Court of California. June 25, 1893.)

JUDGMENTS—FINALITY—APPEAL—EFFECT—SUPERSEDEAS.

1. A judgment rendered on the merits is not final, where an appeal is taken therefrom.

2. A bond on an appeal from a judgment is not necessary or authorized by the Code to stay proceedings as to money turned into court by agreement of parties pending litigation.

3. Where a receiver is discharged, and the funds in his hands are turned into court on a stipulation that defendant shall give a bond to account for the amount, after judgment for defendant and filing appeal bond by plaintiff the court can order the fund paid to defendant, notwithstanding the appeal.

Department 1. Appeal from superior court, Mono county.

Action by one Broder and others against one Conklin and others. From an order entered after judgment for defendants, placing funds of a receiver turned into court into the hands of defendants, plaintiffs appeal. Affirmed.

Richard S. Miner, for appellants. P. Reddy (W. H. Metson, of counsel), for respondents.

**GAROUTTE, J.** This appeal arises from an order made subsequent to judgment in the case of Broder and others against Conklin and others. In view of the fact that the appeal from the judgment and order denying the motion for a new trial in the principal case has this day been held ineffectual, and the judgment and order affirmed (53 Pac. 699), it would seem that the appeal in the present case, in its importance to appellants, has been reduced to very small proportions; yet, nevertheless, it demands some consideration.

The facts are these: A receiver was appointed in the above-entitled cause. Upon a stipulation entered into by all the parties he was discharged, and the net proceeds of his receivership were ordered by the court to be placed in the county treasury subject to the further order of the court. These proceedings took place pending the litigation in the main case. After the judgment was rendered by the trial court in that case in favor of defendants, upon application of their attorneys the court ordered these moneys which had been heretofore placed in the hands of the county treasurer to be paid to them. This appeal is now prosecuted from that order.

The particular grounds of fact and law which actuated the trial court in making the order are not plainly disclosed by the record. The motion of defendants for the relief sought is based upon two grounds: (1) That the action of Broder and others against Conklin and others had come to final judgment against plaintiffs; and (2) the bond filed by plaintiffs upon the appeal in that case did not warrant the detention of the money in the hands of the county treasurer. Neither of these positions are tenable; for, firstly, the judgment rendered upon the merits was not a final judgment, for an appeal therefrom was pending in this court at the very time the motion was made; and, secondly, no bond upon appeal from the judgment was necessary, or authorized by the Code, to stay proceedings as to the money held by the county treasurer. See *McCallion v. Society*, 98 Cal. 442, 33 Pac. 329. But, looking at the other side of the case, the bond given by appellants upon their appeal in the main case did not prevent the trial court from dealing with this fund in the county treasury. The bond given upon that appeal was the statutory bond of \$300 and a bond in double the amount of

the judgment for costs. Under such circumstances, the trial court was still authorized to deal with the receiver, and also the funds paid into the treasury by him under the aforesaid order of the court. *Baughman v. Superior Court*, 72 Cal. 572, 14 Pac. 207.

Upon the stipulation, to which reference has already been made, and the bond filed and approved in pursuance of that stipulation, the order of the court from which this appeal is taken is affirmed. By that stipulation it was agreed "that the said receiver be discharged upon the defendant in said action, A. R. Conklin, giving a bond in the sum of ten thousand dollars to pay and account for all the rents and profits, for all the real estate that may come into his hands from this date to the final determination of said action, and that he will pay any judgment which may be recovered against him for the rents and profits of the same." The bond based upon this stipulation provides: "Now, therefore, we, the undersigned, are here and firmly bound to the said plaintiffs in the penal sum of twenty thousand dollars, to the tenor and effect that said defendants shall and will truly account for and pay to the plaintiffs any judgment that may be recovered against them for the rents and profits of said real estate, not exceeding said sum of ten thousand dollars." The money in the hands of the county treasurer was rents of the real estate, and came into Conklin's hands after the signing of the stipulation and the giving of the bond. We have no doubt but that a recovery upon the bond could be had for this money in a proper case. For the foregoing reasons the order is affirmed.

We concur: **VAN FLEET, J.; HARRISON, J.**

(121 Cal. 270)

**ETCHAS v. ORENA. (L. A. 499.)<sup>1</sup>**

(Supreme Court of California. June 25, 1898.)

**ACTION AGAINST EXECUTOR—PLEADING—SUFFICIENCY OF EXECUTOR'S DENIAL—APPEAL—AFFIRMING ORDER FOR NEW TRIAL—EFFECT.**

1. A complaint alleged that the plaintiff rendered services to testatrix, set forth their character and value, the amount paid thereon, the amount still due, and that the testatrix promised to pay for the same by a provision in her will. Without making a specific denial of each of these allegations, the defendant executor, in the form authorized by section 437, Code Civ. Proc., averred that he had no information or belief as to allegations of the complaint sufficient to enable him to answer the same; and he therefore placed his denial of each of said allegations on that ground, and denied each and all of the same, and every part thereof. *Held*, that his denial was sufficient.

2. As an order granting a new trial in effect vacates the judgment, affirmance thereof leaves nothing in the court below on which an appeal from the judgment can operate.

Department 1. Appeal from superior court, Santa Barbara county.

<sup>1</sup> Rehearing denied.



Action by Josefa Etchas against Leopoldo Orena, as executor, etc., for services rendered defendant's testatrix. A verdict was rendered for plaintiff, and from the judgment, and order of the court granting a new trial, plaintiff appeals. Affirmed.

C. H. Gould and C. F. Carrier, for appellant. Thos. McNulta, for respondent.

**HARRISON, J.** When this cause was called for trial in the superior court, the plaintiff moved for judgment on the pleadings in her favor; and, the court having denied her motion, she excepted to the ruling. The cause was thereupon tried before a jury, and a verdict rendered in favor of the plaintiff for the sum of \$1,500. The defendant moved for a new trial, upon the ground, among others, that the evidence was insufficient to justify the verdict; and, after hearing the motion, the court made an order granting a new trial upon that ground, unless the plaintiff should before a certain day remit all of the verdict in excess of \$735. She declined to remit this excess, and has appealed from the judgment, and also from the order granting a new trial.

1. The appeal from the judgment is based upon the refusal of the court to grant her motion for judgment upon the pleading, the appellant contending that such motion should have been granted and judgment rendered in her favor for \$2,124, the amount claimed in the complaint. The ground of the motion was that there was no denial in the answer of the allegations of the complaint. The defendant is the executor of the will of Josefa Loureyro, deceased, and the action is brought against him to recover from the estate of the testatrix certain moneys claimed by the plaintiff to be due to her for services rendered the testatrix, and for which claims had been presented against the estate and been rejected by the defendant. In his answer the defendant "avers that he has no information or belief on the subject mentioned in paragraphs one, two, three, and four of said complaint sufficient to enable him to answer the allegations therein contained, and he therefore places his denial of each of said allegations on that ground, and denies each and all of the same and every part thereof." The paragraphs thus referred to are the allegations that the plaintiff rendered services to the testatrix, her character and value, the amount paid thereon, and the amount still due, and that the testatrix promised the plaintiff to pay for the same by making a provision for her in her will. None of these facts were presumably within the knowledge of the defendant, and he was authorized by section 437, Code Civ. Proc., to answer the allegations in the above form. In answering the complaint in this form, it was not necessary that he should make a specific denial of each of the allegations. The several allegations were a connected part of the transaction between

the plaintiff and the testatrix out of which her cause of action arose; and, as the defendant was equally without information or belief upon either of them, he could properly make the denial in the form adopted by him. The same form of denial was held sufficient in *Read v. Buffum*, 79 Cal. 77, 21 Pac. 555.

2. The rule that the trial court may set aside a verdict, if in its opinion it is not sustained by the evidence, or may direct a new trial unless the plaintiff will remit a portion of the verdict if in its opinion the verdict is for more than the evidence will justify, is so well established that it is not necessary to cite authorities in its support. As the order granting a new trial had the effect to vacate the judgment, the affirmance of that order leaves nothing in the court below upon which the appeal from the judgment can operate. *Pierce v. Birkholm*, 110 Cal. 669, 43 Pac. 205. The order appealed from is affirmed.

We concur: GAROUTTE, J.; VAN FLEET.

121 Cal. 279

WINTERS v. BUCK, Judge. (S. F. 1408.)

(Supreme Court of California. June 25, 1893.)

BILL OF EXCEPTIONS—SETTLEMENT—DUTY OF COURT.

Where a bill of exceptions improper for surplusage, in that it was a substantial transcript of the notes of the official stenographer, is presented for settlement, the court will not be justified in refusing to settle it until he has called on the attorney presenting it to remodel it, as directed.

Garoutte and McFarland, JJ., dissenting.

In bank. Application by Harry Winters for a writ of mandamus against George H. Buck, judge of the superior court of San Mateo county. Writ granted.

Nagle & Nagle, for petitioner. Henry W. Walker, for respondent.

**HENSHAW, J.** The petitioner, Harry Winters, was convicted of murder in the first degree. He moved for a new trial, and his motion was denied. He gave notice of his appeal from the judgment and from the order denying him a new trial, and presented for settlement a purported bill of exceptions, which the trial judge (respondent herein) refused to settle, basing his refusal upon the fact that the proposed bill of exceptions was substantially a transcript of the notes of the official stenographer, taken by him upon the trial. This is an application for a writ of mandate to compel a settlement of the bill of exceptions. In justice to the learned judge of the trial court, it should be said that his refusal finds support in declarations in some of the adjudicated cases. *People v. Getty*, 49 Cal. 581; *People v. Sprague*, 53 Cal. 422; *January v. Superior Court*, 73 Cal. 537, 15 Pac. 108. But in its later utterances this court has softened the harsh rule previously laid down, and has expressed other

views of the duty of the judge under the circumstances here presented,—views which we think are more in consonance with the spirit of the law, and which certainly tend to secure to a defendant the benefits of his appeal, which otherwise, through no fault of his own, but through the indolence or indifference of his counsel, might be wholly lost to him. Thus, in *Cohen v. Wallace*, 107 Cal. 133, 40 Pac. 101, it is said that it would be far better if the judge of the trial court should disregard technical objections, and should endeavor to settle the bill, rather than to refuse it; and it is pointed out that it is not necessary that the labor of framing a proper bill should be cast upon the judge, but that the party presenting an improper bill could be required by the judge to remodel it. In *Sansome v. Myers*, 80 Cal. 483, 22 Pac. 212, the trial judge had refused to settle a bill of exceptions because it was inaccurate, untrue, and but a meager and defective skeleton. The court in bank held this to be no sufficient ground for refusal, and what is there said to be the correct rule is as applicable to a case where the proposed bill is improper for deficiencies as where it is improper for surplusage. It is said in that case: "It was not the duty of the judge to prepare a statement, but it was his duty to see that one was properly prepared, and then sign it." It is further said that for the judge to refuse to settle the statement—an imperative duty cast upon him by the statute (Pen. Code, §§ 1174, 1175)—would place it in the power of the judge to deprive a litigant of his right of appeal by simply refusing to perform a plain duty. It need not be apprehended from this that any undue or excessive labor will be cast upon trial judges. If the proposed bill be radically objectionable or obnoxious, it is a simple matter for the trial judge to call upon the attorney to present a proper bill. In this case the offer of defendant's counsel so to do after the refusal of the trial judge was not entertained. Mr. Justice McFarland, in his concurring opinion in *Sansome v. Myers*, supra, has said: "If the document presented was not in reality a bill of exceptions, that fact should have been called to the attention of the attorney presenting it. The judge should have informed him that for such reason the document would not be considered as a bill of exceptions, and that he must prepare a real bill within a reasonable time." We think this language indicates the true rule, and the proper course under the circumstances for the judge to pursue. Let the writ issue as prayed for.

We concur: BEATTY, C. J.; TEMPLE, J.; HARRISON, J.; VAN FLEET, J.

I dissent: McFARLAND, J.

GAROUTTE, J. I dissent. In this case the defendant, by his appeal, makes the

point that the evidence is not sufficient to establish his guilt. To support this contention, he presents to the trial judge a bill of exceptions containing all the evidence by question and answer introduced at the trial. For this court to recognize the legality of such a practice is in the interest of indolent attorneys, greatly increases the labor of this court, and doubles the expense entailed upon the various counties of the state in the printing of transcript upon appeal. This court has repeatedly held that the trial judge is justified in refusing to settle such a bill of exceptions, and has sustained his action in so refusing. See cases cited in *Cohen v. Wallace*, 107 Cal. 133, 40 Pac. 101. There is no case to the contrary in the reports of this state.

121 Cal. 267

In re MATHENY'S ESTATE. (S. F. 907.)  
(Supreme Court of California. June 25, 1898.)  
HOMESTEAD—DISTRIBUTION—CONFLICTING STATUTES—CONSTRUCTION.

Real estate, the separate property of a married woman, which was, on her decease, set apart by order of court to her surviving husband, for a limited period, as a homestead, where none had been selected by decedent or her husband, was properly distributed to her heirs at law, under Code Civ. Proc. § 1468, by which such property vests in the "heirs" of decedent, subject to such homestead, and not to her devisee, under Civ. Code, § 1265, which provides that it shall go to the "heirs or devisees" of such decedent, as the section first cited is a limitation on the power of testamentary disposition as to such homestead.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Final distribution of the estate of Jane Matheny, deceased. From a decree making such distribution to the heirs at law of decedent the devisee, John A. Miller, appeals. Affirmed.

John E. Richards, for appellant. W. H. Mahoney, for executor. Blake & Harrison, for Matheny. W. W. Davidson, for certain heirs.

CHIPMAN, C. Appeal from decree of final distribution. Appellant, John A. Miller, is the devisee by the will of deceased of certain real estate situated in the city and county of San Francisco. This real estate was the separate property of deceased in her lifetime, and was by order of court duly set apart to her surviving husband as a homestead for the term of five years, none having been selected by decedent or her husband. By decree of partial distribution all the estate was disposed of except the premises in controversy. The final decree distributed this property to the heirs at law of decedent. The sole question presented by appellant to which he asks answer is: What is the effect of an order of a probate court setting apart, for a limited period, separate property of a decedent to the surviving spouse, which has already been devised to another person, and upon which no ante-mortem



homestead had been filed? It is conceded by appellant that the question is answered in the case of *In re Walkerly's Estate*, 108 Cal. 627, 41 Pac. 772, but counsel says that there "the issue was involved in several other perplexing problems, and was comparatively a minor factor in the general result." The precise question arose in that case, was given careful consideration, and received a deliberate answer. It is true that the devise was in trust for, and not directly to, the beneficiaries named; but that fact cannot affect the question. It was earnestly contended in that case, as it is here, that there exists an irreconcilable conflict between section 1468, Code Civ. Proc., by which the separate property selected as a homestead by the court vests in the "heirs" of deceased, subject to the homestead, and section 1265, Civ. Code, where a homestead selected from the separate property during the life of the spouse without his consent goes upon his death to his "heirs and devisees"; and that these sections can only be harmonized, and both allowed to stand, by reading into the section 1468 the words "or devisees." Appellant presents with much clearness the reasons for adopting this method of harmonizing these apparently inharmonious provisions. But we find no phase of the argument now made which did not have consideration in the *Walkerly Case*. After a clear statement of the objections as then and now urged, and the reasons for not yielding to their force, Mr. Justice Henshaw, in concluding that branch of the opinion, remarks as follows: "The section is plain and unambiguous. Its meaning is in no way uncertain, and when that meaning is found nothing is left but to declare it. The wisdom of the law is for the legislature alone. It is concluded, therefore, that the section is a limitation upon the power of testamentary disposition, and operates to vest the title to the homestead in the heirs at law, and so to withdraw it from the disposition made by the testator under his will." This opinion had the concurrence of an undivided court, which afterwards denied a rehearing. The answer to appellant's question, therefore, as given in the case *In re Walkerly's Estate*, must be regarded as final and conclusive. The judgment and decree should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and decree are affirmed.

121 Cal. 272

LEMON v. WOLFF et al. (L. A. 397.)  
(Supreme Court of California. June 25, 1898.)

CHATTEL MORTGAGES — PROSPECTIVE CROPS — FUTURE ADVANCES — STATUTORY FORMALITIES — PRIORITIES — LANDLORD AND TENANT — LIABILITY FOR RENT — PREFERENCE TO CREDITORS.

1. A valid mortgage may be made of a crop to be raised, before it has been planted, to secure future advances as well as existing indebtedness.

2. As between the parties thereto, a chattel mortgage is valid and may be enforced, though the formalities prescribed by statute (Civ. Code, § 2957) have not been observed.

3. Under Civ. Code, § 2957, prescribing certain formalities requisite to the validity of a chattel mortgage as against creditors of the mortgagor and subsequent purchasers and incumbrancers in good faith, a mere creditor at large, without a lien on the mortgaged property, or some process for the collection or enforcement of his debt, cannot question the sufficiency of such mortgage, where valid as between the parties thereto.

4. Where the mortgagees of certain personal property obtained possession thereof with the consent of the mortgagor, before a creditor adversely interested acquired any lien thereon, they acquired a right thereto, irrespective of any irregularities in their mortgage.

5. Under a lease containing a provision that lessor should have and control all the produce from the leased land, with the right to sell and dispose thereof, until all the stipulated rent should be paid, she acquired no lien thereon or interest therein as against the creditors of lessee, or purchasers from him, though such produce had been harvested and sacked, and placed in a barn on the premises, and though lessor had marked such sacks with her initials, and removed them to a different place in the barn, where there was no evidence that lessee had surrendered to her the possession thereof.

6. Where the common debtor of both plaintiff and defendants, having the right to do so, appropriated the property in controversy in payment of his debt to defendants, in preference to that to plaintiff, defendants, by obtaining possession thereof with such debtor's consent, obtained a prior right thereto.

Department 1. Appeal from superior court Ventura county.

Action by Minnesota Lemon against M. L. Wolff and others to recover for the conversion of certain personal property by defendants. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Blackstock & Ewing, for appellant.  
Barnes & Selby, for respondents.

HARRISON, J. W. S. Morton leased a tract of land in Ventura county from the plaintiff for the term of one year from November 1, 1895, at the annual rent of \$420, payable before the termination of the lease. The terms of the lease were agreed upon, and a written instrument expressing them was prepared on that day, but was not signed by the parties until the 23d of December. The lease was not recorded, and contained the following provision: "It is agreed, by and between the parties hereto, that the party of the first part shall have and control all produce from said land, and shall have the right to sell and dispose of the same, until the whole amount of the rental herein provided for shall have been paid." On the 8th of November, Morton and his brother executed a chattel mortgage to the defendants upon "the crop of beans now being, standing, and growing, or to be grown, upon" the land leased to him, as security for a promissory note of \$100 that day executed to the defendants, and for such monies as should be advanced or merchandise sold to them, not exceeding \$500 in addition

to the amount of the note. The beans were planted in June, 1896, and in August or September the crop was harvested and sacked and placed in a barn upon the premises. Morton did not pay the note of the advances, and on the 21st of September the defendants took the beans from the premises with the consent of Morton, and under a provision in the chattel mortgage authorizing them to do so, and thereafter disposed of them. The rent of the premises was not paid by Morton, and prior to the removal of the beans by the defendants she loaned him \$100 upon their security, and September 15th the sacks in which they were contained were marked with her initials and moved from one side of the barn to the other. The present action was brought to recover the value of the beans, upon the ground that they had been converted by the defendants. Judgment was rendered in favor of defendants, and the plaintiff has appealed.

Whether a chattel mortgage upon a crop yet to be planted is valid is a question which has not received a uniform decision. See Ping. Chat. Mortg. § 217 et seq. Whatever may be the law in other states, the right to make a chattel mortgage upon a crop to be raised before the same has been planted was affirmed in *Arques v. Wasson*, 51 Cal. 620, and has become an established rule of property in this state; and such mortgage may be made to secure future advances as well as an existing indebtedness. Civ. Code, § 2884; *Tapia v. Demartini*, 77 Cal. 383, 19 Pac. 641; *D'Oyly v. Capp*, 99 Cal. 153, 33 Pac. 736. As between the mortgagor and the mortgagee, such a mortgage is valid and may be enforced, even though the formalities prescribed in section 2957, Civ. Code, have not been observed. *Works v. Merritt*, 105 Cal. 467, 38 Pac. 1109. This section makes a failure in such compliance available only to creditors of the mortgagor and subsequent purchasers and incumbrancers in good faith. Only a creditor who has acquired a lien upon the mortgaged property by virtue of some legal proceeding, or who is armed with some process authorizing a seizure of the property, can question the compliance with these formalities. A mere creditor at large, without some process for the collection or enforcement of his debt, cannot question the sufficiency of a mortgage which is valid between the parties thereto. *Jones, Chat. Mortg. § 245*; *Jones v. Graham*, 77 N. Y. 628; *Button v. Rathbone*, 126 N. Y. 187, 27 N. E. 266; *Cameron v. Marvin*, 26 Kan. 612. As the defendants obtained possession of the property with the consent of the mortgagor, before the plaintiff acquired any lien thereon, they acquired a right thereto irrespective of any irregularities in their mortgage.

The plaintiff acquired no lien upon the beans by virtue of the foregoing provision in the lease. *Society v. Purvis*, 112 Cal. 236, 44 Pac. 561; *Ferguson v. Murphy*, 117 Cal.

134, 48 Pac. 1018. She was not entitled to recover from the defendants either the beans or their value, by reason merely of being a creditor of Morton. Being his creditor gave her no right to this specific property. She had, however, the right to obtain a lien upon it by virtue of some legal process, and, after obtaining such lien, to claim its priority over that of the defendants.

Neither did the plaintiff, by the act of marking the sacks and moving them to a different place in the barn, acquire any interest in the beans as against the creditors of Morton, or any one who should purchase them from him. Such acts did not constitute a delivery or change of possession of the property. *Byxbee v. Dewey* (Cal.) 47 Pac. 52; *Button v. Rathbone*, supra. The court finds that at the time the defendants took the beans from the premises they were in the possession of Morton, and under the evidence it was authorized to make this finding. The lease to Morton gave him the right to the possession of the land as against the plaintiff, and, having taken possession under the lease, he was presumptively in possession during its term. If the plaintiff would claim that he had surrendered the possession, this was affirmative matter to be shown by her. There was no direct evidence of this fact, and there was evidence to the contrary before the court.

The rent for the premises was, by express agreement between the parties, payable "before the termination of the term," and the plaintiff had no claim therefor at the time the beans were taken by the defendants (or, indeed, when the present action was commenced); and, as the beans were then in the possession of Morton, he had the right to appropriate them to the payment of his debt to the defendants, irrespective of the mortgage. As between his creditors, he had the right to give a preference to either, and the defendants, by obtaining possession of the property with his consent, obtained a prior right thereto. See *Cameron v. Marvin*, 26 Kan. 612. The judgment and order are affirmed.

I concur: VAN FLEET, J.

I concur in the judgment: GAROUTTE, J.

121 Cal. 355

PEOPLE v. SMITH. (Cr. 396.)

(Supreme Court of California. July 1, 1898.)

HOMICIDE—EVIDENCE—VENUE—PLEA—SECOND TRIAL—ARGUMENTS OF COUNSEL.

1. Evidence which is introduced without objection may be considered as aiding in establishing any fact which it tends to prove.

2. Where the witnesses in a prosecution for manslaughter committed in K. county state that the deceased was killed at a certain store, and it incidentally appears from the testimony of several witnesses that the store named is in K. county, the venue is sufficiently established.

3. Where one accused of manslaughter pleads



not guilty, and also "once in jeopardy," and the jury find against him on the latter plea, and disagree on the former, he is not entitled to have his plea of "once in jeopardy" submitted to the jury at his second trial.

4. In a prosecution for manslaughter, the evidence of the state consisted principally of the evidence of two men who testified that defendant killed deceased; but at the inquest and preliminary examination they testified that they did not know who did the killing. Defendant's brother was present when deceased was killed, and defendant testified that his brother told him that deceased killed himself, but his brother did not testify. *Held*, that comments by the district attorney in his argument to the jury to the effect that the defense had subpoenaed the brother, and then did not put him on the stand, and that the presumption of law was that the brother's testimony would have been adverse to defendant, were unauthorized, and the overruling of defendant's objections thereto material error.

In bank. Appeal from superior court, Kern county.

Gonzales Smith was convicted of manslaughter, and appeals. Reversed.

J. W. Ahern and J. W. P. Laird, for appellant. Atty. Gen. Fitzgerald, for the State.

**VAN FLEET, J.** Defendant was convicted of manslaughter for the killing of one Emelio Bencomo, in the county of Kern, and was adjudged to suffer imprisonment in the state prison for the term of 10 years. He appeals from the judgment, and from an order denying him a new trial.

1. Appellant's first contention is that there was no evidence to prove venue. But this objection is not sustained by the record. It is true, as appellant urges, that no witness was asked the direct question, nor testified in so many words, that the killing took place in Kern county; but this was not essential if the fact otherwise sufficiently appeared. Appellant contends that the only evidence touching upon the question was contained in the deposition of the witness Miller, taken at the coroner's inquest; that this deposition was introduced at the trial for another purpose, and was not competent or admissible to prove venue. The deposition was introduced and read in its entirety without objection; and, while the primary purpose of its introduction was apparently other than to establish the venue, the purpose was not limited, and, being in, the evidence could be regarded in aid of any fact which it tended to establish. A defendant may waive the objection that evidence is incompetent, and a failure to object to it on that ground is such waiver. But, independently of the deposition, there was evidence sufficient to show that the offense was committed in the county of Kern. All of the witnesses refer to and designate the place where deceased was shot and killed as being at "Scodie's store," and it incidentally appears in the testimony of several of the witnesses, and without conflict, that this store was in the town of Onyx, in Kern county.

2. At the first trial of the case, in Febru-

ary, 1897, the defendant, with his plea of not guilty, introduced the plea of "once in jeopardy." As a result of that trial, the jury returned this verdict: "We, the jury impaneled to try the above-entitled cause, find for the people upon the plea of once in jeopardy, introduced by defendant; that is, we find that he has not been in jeopardy. James Curran, Foreman." But upon the plea of not guilty to the charge laid in the information the jury announced that they were unable to agree upon a verdict, and were discharged. Subsequently, in May, 1897, the cause was tried a second time. The record does not disclose whether the issue raised by the plea of jeopardy was again submitted to the jury upon this second trial, or that any evidence was offered in support thereof; but the jury returned a verdict convicting defendant of manslaughter, without any mention of the special plea. Thereupon the defendant made a motion for a new trial, but made no mention therein, nor in his bill of exceptions, of said plea of jeopardy, or any assignment of error based thereon or growing out of the trial thereof, in any way. His motion was denied, and judgment entered against him, which constitute the order and judgment from which this appeal is prosecuted.

It is now urged that defendant was entitled to have his special plea again submitted to the jury at his second trial, and to a verdict thereon at their hands, and that the judgment could not competently be entered against him without such finding. In other words, appellant's position is that the verdict of the jury upon that issue at his first trial, by reason of the failure to find upon the question of guilty, went for naught, and was wholly nugatory, and should not have been received; apparently upon the theory that, as no final judgment of conviction could be entered upon such verdict, no appeal would lie therefrom, nor any opportunity be afforded to the defendant to have the trial of that issue reviewed, and consequently that that issue should now be regarded as if never tried. But this objection is determined adversely to the position of the appellant by the case of *People v. Majors*, 65 Cal. 138, 148, 3 Pac. 597. In that case the defendant, under an indictment for murder, had been previously tried upon the plea of "former conviction," and a verdict found against him thereon. Subsequently he was placed on trial under the same indictment, upon his plea of not guilty. At this second trial he asked to be permitted to again interpose the special plea, but this was refused, and the refusal was assigned as error. The objection was briefly answered in this court by the obvious suggestion that "the defendant had been tried on his plea of former conviction, and it was not the duty of the court to grant him another trial on that." Upon reason and principle, this must be so. Why should a defendant be entitled to a second trial of

such an issue any more than that of guilt, except for error?

But it is said that it was error to receive such a partial verdict; that the contemplation of the statute is that the pleas of the defendant shall be tried and determined together. It is true that such is the more usual, more expeditious, and more desirable mode of trying criminal cases; but there is nothing in the statute, nor any reason, imperatively demanding that course. A plea of this character is in no way dependent upon or interwoven with that of not guilty, but is separate and apart therefrom; and there is nothing, therefore, in the nature of things, precluding the idea of trying it separately. The defendant had a verdict in response to both his pleas before final judgment was entered, and that was all he was entitled to.

But it is said that in such a case defendant can have no opportunity to have reviewed any error occurring in the trial of his special plea. This is refuted by the ruling in the Majors Case, and by the provisions of the statute. The fact that the special plea has been tried first, no matter how long before the question of guilt is determined, does not preclude defendant from moving for a new trial for any error arising therein. As suggested in the first appeal in *People v. Majors*, 65 Cal. 100, 3 Pac. 401, the statute does not contemplate a motion for a new trial until all the issues of fact have been tried. When those issues have been determined, and before final judgment is entered, the defendant has his motion for a new trial, upon which may be assigned and reviewed the errors, if any, occurring in the trial of any or all of the issues. That was the course pursued and recognized in *People v. Majors*, first above cited (65 Cal. 138, 3 Pac. 597), and to our minds a perfectly proper and logical one.

3. The most serious exception in the case is that based upon certain statements of the district attorney made in his closing argument to the jury, and the ruling of the court thereon. The evidence disclosed that there were present at the time Bencomo was killed but four persons other than deceased,—the defendant, his brother, John Smith, one Porfirio Tapia, and a lad named Harvey Mills. John Smith, the brother, was informed against jointly with defendant for the murder of the deceased, but prior to the trial had, on motion of the district attorney, been ordered discharged. Whether he had in fact been discharged, or was for some reason still in custody at the time of the trial, the record does not disclose. It was suggested at the argument that he was yet in custody, but there is no evidence to show that such was the fact. There is nothing in the record to show that he was present at the trial, or in the county, or even within reach of the process of the court at that time; and he was not called as a witness. Tapia and Mills

were the principal witnesses for the state. They testified at the trial that the deceased was shot and killed by defendant, and they gave their version of the details of the shooting. There was evidence, however, on the part of the defense, tending more or less strongly to impeach the testimony of these witnesses, by showing that they had both theretofore made statements at variance with their evidence, to the effect that, while they were near the place of the shooting at the time it occurred, they did not see it, nor know who did it. In fact, it was shown that they had testified substantially to that effect before the coroner at the inquest on the body of deceased, and again at the preliminary examination of the accused. The defense was that the defendant did not commit the act; and in support of this defense the defendant testified that he was going to or standing by his horse at some distance from, and with his back to, the deceased at the time the shots were fired; that he heard the shots, but did not do the shooting, nor see who did it; that, when he started to go to his horse, he left his brother John and the deceased in conversation; and that, when he returned to where the deceased was lying after the shots were fired, his brother was still there, and told him that deceased had shot himself.

We are not to judge of the probabilities of this defense, nor of the case made by the prosecution; those were questions exclusively for the jury. But the defendant was entitled as of right to have the question of his guilt determined solely upon the evidence placed before the jury; and this right, it is claimed, was denied him by what follows: During his closing argument the district attorney stated to the jury: "There was present at that shooting Gonzales Smith, John Smith, Tapia, Harvey Mills; and Emelio Bencomo was killed. Now, sir, Mr. Tapia and Mr. Harvey Mills came on this stand and told you the story of the shooting. Mr. Gonzales Smith comes onto that stand, the defendant, and denies the story as given by those two men. Now, sir, I say, 'Where is John Smith?'" At this point the defendant interposed this objection: "If your honor please, we object to the district attorney commenting on the fact that John Smith was not called as a witness by the defendant, and we ask the court to instruct the district attorney that he has no right to comment on that to the jury." The district attorney: "That is just exactly the proposition I propose to talk to you about, and you gentlemen can see the defense is afraid of it or they never would have squealed." The defendant again objected to the remarks of the district attorney as improper, and asked for a ruling of the court on his objection. The court remarked that "the district attorney can comment on the fact, if he desires to," to which ruling the defendant excepted. Thereupon the district attorney further stated to the jury: "The presumption



of the law is that, if John Smith had testified before you gentlemen as to the facts in this case,—the presumption of the law is that his testimony would have been adverse to the defense.” To this statement the defendant objected as improper, and asked a ruling of the court. The court: “Let the district attorney proceed with his argument.” The defendant’s attorney: “Note an exception.” The district attorney: “He was subpoenaed as a witness on the part of the defense, and not put on the stand.” The defendant’s attorney: “Note an exception to the remark of the district attorney commenting on something that is not in evidence.” The court: “You have got the benefit of the objection on this particular line of the district attorney’s argument, and don’t interrupt him any more.” It is hardly necessary to say that these statements by the district attorney were under the circumstances wholly unauthorized and highly improper, and that the overruling by the court of defendant’s objections thereto was error. Nor can we avoid the conclusion that the error was one calculated to greatly prejudice the defendant’s case. There was, as we have seen, no evidence to warrant the facts stated by the district attorney in the remarks quoted, nor the unfavorable inference deduced therefrom; and yet the court, by its ruling, implicitly told the jury that both the statement of fact and the deduction made by the district attorney therefrom were proper matters for their consideration. If the jury acted in the belief, as presumptively they did, that John Smith was not called by the defendant because he knew that his evidence would be against him, the consideration could but bear heavily against the degree of credence they might otherwise, and in view of the strong impeachment of the main witnesses of the prosecution, have given the case of the defendant; since it appeared without conflict that John Smith was an eyewitness of the affair, and therefore presumably knew the truth as to whether the deceased was killed by the defendant, or shot himself. The error was therefore a material one, and for it the case must be reversed. The rule is universal that it is error to permit counsel, against objection, in argument before the jury, to make statements of, or comments upon, facts not in evidence; and, unless the court can see clearly that the error was as to some matter which could not in its nature have prejudiced the defendant’s case, the judgment will be reversed. *People v. Mitchell*, 62 Cal. 411; *State v. Hatcher* (Or.) 44 Pac. 584. We find no other error in the case. The action of the court in modifying the instructions complained of was proper, and its rulings upon evidence correct. For the error above pointed out, the judgment and order are reversed, and the cause remanded.

We concur: GAROUTTE, J.; McFARLAND, J.; HARRISON, J.; HENSHAW, J.; TEMPLE, J.

121 Cal. 297

AMBROSE v. BARRETT et al. (Sac. 390.)  
(Supreme Court of California. June 27, 1898.)

## MORTGAGE—PAYMENT.

A mortgagee, residing in one state, at the request of a mortgagor in another state, forwarded his note and mortgage and a release to the express agent where the mortgagor resided, with instructions to allow the mortgagor to examine them, and to deliver them to him on payment of a stated amount. The agent did as instructed, but before he could put the money in his safe it was attached on a claim of the mortgagor against the mortgagee. *Held*, that the mortgage was satisfied.

Department 1. Appeal from superior court, Madera county.

Action by Thomas Ambrose against James R. Barrett and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Mullany, Grant & Cushing, for appellant.  
L. L. Coiy, for respondents.

GAROUTTE, J. This is an action to foreclose a mortgage upon real estate. Barrett and wife, mortgagors, resided in the town of Cazenovia, state of New York. Ambrose, the mortgagee, resided in the city of San Francisco. The note being due, and the mortgagors desiring to pay it, Barrett wrote to Ambrose at San Francisco, requesting him to send all the necessary papers by express, C. O. D., with permission to examine them as to their correctness upon their arrival, and stating that, if they were correct, he would thereupon pay the amount due upon the note. In response Ambrose executed the proper papers, and placed them in the possession of Wells, Fargo & Co., San Francisco, with the following written instructions: “San Francisco, April 19, 1894. Agent at Cazenovia, New York State: Please collect from James Russell Barrett twenty-five hundred and sixty-three dollars up to this date, and fifty cents per day from the date of this note until paid, and expense of collection of same and forwarding same to San Francisco, Cal. And don’t give papers up until money is paid, but let him examine papers. Thomas Ambrose.” These papers consisted of the note, mortgage, and release, and upon their arrival at point of destination Barrett appeared at the express office, accompanied by his attorneys, and the agent of the company passed over the papers for examination. Upon examination they were pronounced satisfactory, and thereupon Barrett handed to the agent of the express company the amount due upon the note, with \$20 additional, expense of collection. The money was counted by the agent in the presence of all parties, whereupon, finding it correct, the agent took it in his hands, and walked towards the safe for the purpose of placing it there for temporary safekeeping. At that moment the sheriff of the county, at the instance and by instruction of Barrett and his attorneys, took the money from the agent of the express company un-

der a levy and attachment upon a purported claim held by Barrett against Ambrose. The evidence in the record is very meager as to the nature of this claim and the subsequent proceedings had thereon in the state of New York. However, it does appear that this money, less costs, was eventually paid back to Barrett by the sheriff under those proceedings. Upon the foregoing state of facts the trial court found that the note was paid and the mortgage satisfied, and rendered judgment in favor of defendants. The important question presented upon this appeal is, was the note paid? or, rather, should this court disturb a finding of fact to that effect? Putting the proposition here involved in a different form, it is thus presented: At the time the money was taken by the sheriff, was it Barrett's money or the money of Ambrose? Or, again, if a robber had taken the money from the agent at the moment the sheriff took it, as between Barrett and Ambrose, who would suffer the loss? These interrogatories must be answered in line with the finding of fact made by the trial court. At the time the money was taken from the agent he had a complete and perfect possession over it. The papers had been delivered by him to Barrett, and the transaction between them was entirely closed. Everything to be done at that office had been done. It follows that if this agent of the express company was the agent of Ambrose, and acted as such in receiving the money and delivering the papers, then the money was the property of Ambrose when taken by the sheriff. When we examine the written authorization of Ambrose addressed to the agent, heretofore set out, nothing can be plainer than the fact that this agent was acting for Ambrose in the transaction had with Barrett; for by that authorization Ambrose directly instructs him not to give up the papers until the money is paid. That this agent was to receive the money from Barrett for Ambrose is perfectly apparent.

Appellant warmly insists that the whole transaction between Barrett, his attorneys, the sheriff, and the express agent, was collusive, and a gross fraud upon him. There is no evidence of it in the record, and the findings of fact are the other way. Certainly there is nothing to indicate that either the sheriff or the express agent were parties to any trick or fraudulent scheme. As to Barrett himself, it is not disclosed but that he had a perfect legal cause of action against Ambrose. He might have had such a cause of action. The record does not disprove it; and, if he had, there is no reason in law why he should not attach this money upon a claim based thereon. It may appear inferentially that Barrett adopted the plan of having this money paid to Ambrose in the state of New York for the particular purpose of giving the sheriff an opportunity to levy upon it in the action contemplated by

him against Ambrose. And we find nothing in the record indicating any deeper scheme than this. In conceding that to be the fact, such concession would not operate to set aside and nullify the payment of the money to the agent of Ambrose. There would be no fraud in the transaction which could possibly compass that result. Looking at the case from all sides, we do not see a great injustice done to Ambrose by the judgment of the trial court. If Barrett's claim against him was a fraud and a myth, he should have pursued and recovered his money. If Barrett's claim was legal and just, the money has been well applied. If the claim was a fraud and a myth, the carelessness of Ambrose in neglecting to stamp its baseness with the seal of the courts of the state of New York leaves him now where equity will not greatly concern herself in securing for him a return of the money. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

6 Cal. Unrep. 57

#### PEOPLE v. GILMORE. (Cr. 365.)

(Supreme Court of California. June 27, 1898.)

CRIMINAL LAW — INTOXICATION AS A DEFENSE — HARMLESS ERROR—INSTRUCTIONS.

1. Under Pen. Code, § 22, providing that, whenever the existence of any particular motive is necessary to constitute any particular crime, the jury may consider the fact that the accused was intoxicated at the time in determining his motive, a jury is warranted in holding accused responsible for a robbery committed while intoxicated, which he confessed to when in full possession of his faculties.

2. No prejudicial injury results from sustaining an objection to a proper question on cross-examination as to the manner of accused when intoxicated, where, by other questions to the same witness, the information sought is elicited, and the witness further testifies that accused was not intoxicated the day after the commission of the crime, when he confessed having committed it.

3. An instruction concerning intent, as an element in the commission of crime, is not objectionable because it omits to state that a conclusion adverse to defendant must be one that does not admit of a reasonable doubt, where the jury were elsewhere fully instructed as to the doctrine of reasonable doubt.

Commissioners' decision. Department 1. Appeal from superior court, Tuolumne county.

S. A. Gilmore was convicted of burglary, and appeals. Affirmed.

J. H. Daly and E. A. Rodgers, for appellant. Atty. Gen. Fitzgerald, for the People.

CHIPMAN, C. Defendant was convicted of the crime of burglary in the first degree, and was sentenced to four years' imprisonment at San Quentin. He appeals from the judgment of conviction and from the order denying motion for a new trial.

1. It is claimed by defendant that the verdict is not supported by the evidence, because



(1) It was inadequate to convict; and (2) the evidence introduced showed the defendant incapable of committing the crime. The contention is that the evidence showed that defendant, by reason of his intoxicated condition, was incapable of forming a guilty intent, and that there was not a single circumstance corroborative of his confession. Section 22 of the Penal Code is as follows: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act." The evidence tended to show that defendant was in full possession of his faculties when he made his uncontradicted confession. In it he told where some of the stolen property could be found, and it was found there. He furnished a key to the barn in which the property was found, and remarked (which is not denied), when handing it to the officer, "It may be of use to you," and it was found useful. His confession was therefore in some substantial degree corroborated by circumstances and facts. While the evidence tended to show that defendant was "crazy drunk" during Monday, and talked in an incoherent and wild sort of way, even claiming that he was "Dunham," the hunted murderer, and while it appeared that when drunk he was in the habit of talking in an irresponsible and reckless manner, it also appeared that when sober "he was a square, straight man," and that, in fact, when he made the confession "he talked as rational as any man." The jury might well conclude that if he was so drunk as to be incapable of a criminal intent when he committed the act, he could not have remembered such details the next morning as he gave of the robbery; and so might the jury refuse to attribute to mere coincidence the fact that his story told at 11 o'clock the next morning turned out to contain circumstances which no person in a condition of maudlin drunkenness or irresponsibility would have been at all likely to remember. We cannot say that the jury were not warranted in holding the defendant responsible for the part he took in the robbery.

2. On cross-examination the witness Jackson was asked the following question by defendant's attorney: "Q. You have seen him [defendant] around there [referring to witness' saloon] a great deal when under the influence of liquor. What was his manner and talk?" The question was objected to, and the objection was sustained on the ground that it was too general. We think the question was a proper one, but the subsequent answers of the witness show that counsel for defendant drew out the facts he desired, and it also appeared from this witness' testimony that defendant was not drunk the day after the burg-

lary, and did not talk like a drunken man. We cannot see that any prejudicial injury resulted from the ruling of the court.

3. We see no error in the instruction complained of. It reads: "In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence. The essence of every crime is criminal intent, without which the offense cannot be committed. It is the intent with which an act is done that constitutes its criminality. The act and criminal intent must concur to constitute the crime. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. \* \* \* As to the intent or intention, you must arrive at it from all the testimony in the case, and all the acts, conduct, or circumstances shown in the case." The objection is that the latter part of the instruction commanded the jury to arrive at a conclusion as to the intent; that there was no warning given that, if adverse to the defendant, the conclusion reached must be one which does not admit of reasonable doubt. The jury were elsewhere fully instructed as to the doctrine of reasonable doubt, and also that "where two conclusions can be drawn from a single circumstance, one tending to establish guilt and the other tending towards the innocence of the accused, the law makes it your duty to accept the conclusion tending towards innocence rather than the one tending towards guilt." These were asked by and given for defendant, and we think fully informed the jury as to how the evidence should be applied. We discover no error, and recommend that the judgment and order be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

121 Cal. 314

WILLIAMS v. VISELICH. (Sac. 338.)

(Supreme Court of California. June 30, 1898.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS  
—APPEAL—NOTICE.

Under St. 1885, p. 156 ("Street Improvement Act") § 11, providing that, on appeal from any act of the superintendent of streets to the city council, notice of the time and place of hearing, etc., shall be published for five days, a general notice of appeal from a paving assessment, not limited to any particular person, need not mention the names of persons affected.

Department 1. Appeal from superior court, San Joaquin county.

Action by one Williams, administrator, against one Viselich. From a judgment for defendant and an order denying a new trial, plaintiff appealed. Reversed.

J. H. Budd and J. E. Budd, for appellant. James A. Louttit, for respondent.

HARRISON, J. Action upon a street assessment. Upon the completion of the work

an assessment therefor was made by the street commissioner, from which the contractor appealed to the city council. The city council, after hearing the appeal, set aside the assessment, and directed that another be made, and upon this latter assessment the present action was brought, and judgment rendered in favor of the defendant. The ground presented in support of the appeal therefrom is that the notice of the appeal to the city council from the first assessment was insufficient, and that the city council acquired no jurisdiction to hear the same, and that the assessment made under its direction created no lien upon the property of the defendant. The notice of an appeal from any act of the superintendent of streets to the city council, which is required to be given, is defined in section 11 of the street improvement act (St. 1885, p. 156) as follows: "Notice of the time and place of the hearing, briefly referring to the work directed to be done, or other subject of appeal, and to the acts, determinations, or proceedings objected to or complained of, shall be published for five days." The notice which was published in the present case was as follows: "Notice is hereby given that an appeal of John E. Magary, contractor, for paving with basalt and curbing with granite curbing Washington street, from Hunter street to El Dorado street, in the city of Stockton, to the city council of said city, from the assessment for such paving and curbing made by the street commissioner of said city, and from the diagram and warrant thereto attached, on the ground that some of the lots so assessed were assessed to the wrong persons, and for informalities of said assessment, diagram and warrant, will be heard by said city council at its regular meeting to be held at the court room of department No. 1 of the superior court of San Joaquin county, California, on the 28th day of May, 1888, commencing at eight o'clock p. m. of that date, or as soon thereafter as same can be heard. Dated May 18, 1888. C. A. Campbell, Clerk of the City of Stockton." This notice sufficiently refers to the work contracted to be done for which the assessment was made, and also refers to the assessment as the act and proceeding of the superintendent objected to, and names the time and place at which the appeal will be heard, and was published for five days. It therefore complies with the above provisions of the statute, and authorized the city council to hear the appeal.

The objection made by the respondent to the sufficiency of the notice is that he is not mentioned therein by name, and that for this reason the council did not acquire jurisdiction to affect him or his property upon the appeal, and cites the case of *Williams v. Bergin*, 108 Cal. 166, 41 Pac. 287, in support thereof. That case, however, presented an entirely different state of facts from the present, and does not support his contention.

In that case the notice of the appeal was by direct terms limited "to the appellants," and we held that it could not be regarded as a notice to any other than those who were named therein, saying: "It was an express notice to the appellants alone, and by its terms implied that they only would be heard, and it must be construed as a notice only to them. By reason of its limitation to the appellants it failed to be a notice to the defendant, and the supervisors acquired no jurisdiction to act upon the appeal." But a notice which is general in its terms, as in the present case, and not limited to any particular individual, is directed to all persons in the entire world who may be affected thereby; and, if the statute under which the notice is given authorizes it to be given by publication, all persons will be bound by it when so given. What is said in *Williams v. Bergin*, in reference to the necessity of a notice indicating the person who is to be notified, is to be read in connection with the statute and with the facts of that case. The subsequent statement in the opinion, "A notice which by its terms is limited to a portion of those who may be so affected cannot be held to extend to others who may be also interested in the appeal, and is not a compliance with the statute," shows that it is not to be construed as intending to add to the terms of the notice any requirements that the statute itself has not provided for the sufficiency of the appeal. The statute does not require that the person to be affected by the appeal shall be named in the notice, and, as in many cases the persons who are affected by the assessment are named therein "unknown," it is evident that such requirement was not contemplated by the lawmakers. The judgment and order are reversed, and a new trial is directed.

We concur: GAROUTTE, J.; VAN FLEET, J.

121 Cal. 294

PAULY v. ROGERS et al. (L. A. 430.)

(Supreme Court of California. June 29, 1898.)

MORTGAGES—FORECLOSURE—RES JUDICATA.

A junior mortgagee, made a party defendant in foreclosure, filed a cross complaint, setting forth his mortgage, and asking to have it foreclosed; and a decree was rendered foreclosing the senior mortgage, without any action being taken on the cross complaint, which was treated as an answer, but containing a stipulation that any surplus after satisfying the decree should be applied to the junior claim. Held not an action to foreclose, so as to prevent him from thereafter bringing such an action, where other lands are included in his mortgage, within Code Civ. Proc. § 726, providing that there can be but one action for the recovery of any debt secured by a mortgage.

Department 1. Appeal from superior court, San Bernardino county.

Action by Frederick N. Pauly, as receiver of the California National Bank of San



Diego, against C. W. Rogers and another, to foreclose a mortgage. From a judgment for plaintiff, defendants appeal. Affirmed.

Haines & Ward, for appellants. M. A. Luce, for respondent.

GAROUTTE, J. The facts of this case may be briefly stated as follows: One C. W. Rogers mortgaged certain real estate to the Security Savings Bank & Trust Company. Thereafter he and defendant Dora I. Rogers mortgaged the same real estate, and also other real estate, by one instrument, to the Pacific Bank. This plaintiff, as the successor in interest of the Pacific Bank, has brought this action to foreclose the mortgage made to the bank. Prior to the commencement of the present action, the corporation holding the first mortgage brought its action of foreclosure, making the Pacific Bank a party defendant. In the present action these defendants, by way of defense, set out the foregoing facts, and others, to the effect that the Pacific Bank, in the action of foreclosure, where it was made a party defendant, admitted by answer all the allegations of the complaint. They also alleged that the bank at that time filed a cross complaint, in which it set out the execution of the note and mortgage sued upon in the present action, and also alleged the nonpayment of such note, and prayed for judgment of foreclosure, with interest and attorney's fees. The defendants' answer in this action further alleges that such proceedings were had in the aforesaid action that a judgment and decree were entered "as follows:" (Setting forth, by exhibit attached, a copy of the decree of foreclosure.) This decree recited the following stipulation: "It is hereby stipulated and agreed by and between the attorneys for the plaintiff and defendants in this action that, upon the sale of the property described in plaintiff's complaint for the foreclosure of the mortgage in this action, the surplus, if any there be, after satisfying the plaintiff's judgment and costs, shall be turned into court and applied in satisfaction, in whole or in part, as the case may be, of the indebtedness due by the defendant Charles W. Rogers to the Pacific Bank, as set forth in the answer and cross complaint of said Pacific Bank in this action, and that the decree directing the sale of the property described in the mortgage foreclosed by the plaintiff be drawn in accordance with this stipulation, and that findings of fact herein be waived." This stipulation is signed by the attorneys for plaintiff in that action, the attorneys for Charles W. Rogers, and by the attorney for the Pacific Bank. The court by its decree found the amount due plaintiff; that plaintiff was entitled to have his mortgage foreclosed; that Charles W. Rogers "is indebted to the defendant the Pacific Bank in the sum of \$5,993.90, with interest thereon from October 19, 1891, at the rate of 1 per cent. per

month, compounded monthly, which said sum is secured by mortgage upon a portion of the premises hereinafter described, but that the lien of the Pacific Bank is subject to, and subordinate to, the lien of plaintiff herein"; that the mortgaged premises described in the complaint be sold; that the proceeds of the sale be applied to plaintiff's judgment and costs, and that the surplus "realized from the sale of said property, if any there be, shall be deposited with the clerk of this court, and applied in satisfaction, in whole or in part, as the case may be, of the indebtedness due by the defendant Charles W. Rogers to the Pacific Bank, as set forth in the answer and cross complaint of said Pacific Bank in this action, in accordance with the terms of the stipulation hereinbefore set forth in this decree." The foregoing matters are all set out in the answer in the present action, in the nature of an affirmative defense or bar. Defendants now insist that the Pacific Bank, in setting up its mortgage by cross complaint in the former action, cannot be allowed to bring this action of foreclosure. It is claimed that such a proceeding would be violative of section 726 of the Code of Civil Procedure, which declares, "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property." The trial court did not agree with these contentions as to the law, and, upon motion of the plaintiff, struck from the answer of defendants all the matters that we have, in a general way, recited therefrom. The real question here presented involves the validity of the action of the trial court in thus treating these allegations of the defendants' answer.

There are two salient facts, which, when coupled together, defeat the claim of appellants as to the existence of a defense or bar to the prosecution of the present action based upon the facts shown by their answer. First, the decree in the former action does not attempt to foreclose this plaintiff's mortgage; and, second, under the authority of *Brill v. Shively*, 93 Cal. 674, 29 Pac. 324, there could be no such foreclosure under a cross complaint, conceding an attempt was made so to do. Again, there is no allegation that defendant Dora I. Rogers, a necessary party to the cross complaint, was served with process or appeared in the action. The stipulation upon which the decree is based is not signed by her. There is nothing whatever to indicate that the case was tried and submitted to the court upon the cross complaint as a pleading demanding affirmative relief. A junior mortgagee, made a party defendant in foreclosure, may file an answer setting up his mortgage, and asking that any surplus derived from the sale of the security be applied as a credit upon his note. By following such a course, he in no sense brings an action to foreclose his mortgage, and is not barred from thereafter bringing

such action, if other lands are included in his mortgage. This is the decision in *Brill v. Shively*, supra. In view of this principle of law, and possibly in view of this decision, the trial court, no doubt, pursued the course it did in the first foreclosure proceeding; for, from the facts shown by the present answer, it is evident that the trial court at that time treated the so-called cross complaint merely as an answer setting out the note and mortgage of the Pacific Bank, and asking an application of the residue of the proceeds of the sale to the satisfaction of its claim. The power of a court to treat a pleading simply as an answer of that character, under the circumstances here disclosed, we do not doubt. For the foregoing reasons the judgment is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

121 Cal. 391

In re MITCHELL'S ESTATE.

MATHEWSON et al. v. GEER et al. (Sac. 423.)

(Supreme Court of California. July 7, 1898.)

APPEALABLE ORDERS—EXECUTORS—PARTIAL DISTRIBUTION—ORDER—INDEMNIFYING BOND—NOTICE.

1. Under Code Civ. Proc. § 963, providing that an appeal may be taken to the supreme court from a judgment or order of the superior court refusing or allowing or directing the distribution of an estate or any part thereof, an appeal may be taken from an order directing payment of certain general pecuniary legacies, and setting aside a former order denying the petition for such distribution.

2. Code Civ. Proc. § 1663, enacts that any legatee may, at any time after one year from the granting of letters testamentary, apply by petition for distribution of the net proceeds of the share to which he will be entitled, before receiving which he shall give a bond, with security, for the payment of his proportion of the debts of the estate; provided that, where the time for presenting claims has expired and all allowed claims have been paid or are secured, and the court is satisfied that no injury can result, it may dispense with the bond. *Held*, that where debts that had been allowed were unpaid, and not secured, it was error to order payment of legacies without requiring bonds from the legatees, though the time for filing claims had expired.

3. Where a will created legacies of \$5,000 each, on which it developed that a partial payment had already been made, an order directing the executors to pay the whole of said legacies as shown by the will, with legal interest, less the inheritance tax thereon, is erroneous, as being indefinite.

4. Where, at the hearing of a petition for partial distribution, the executors appeared, and it was admitted that due notice was given to them and all parties interested, on a subsequent motion to set aside an order denying such petition notice to the executors' attorneys is sufficient.

Commissioners' decision. Department 2. Appeal from superior court, Stanislaus county.

In the matter of the estate of John W. Mitchell, deceased, a petition by Grace Mathewson and others for partial distribution was

granted, and Henry F. Geer and another, executors, appealed. Reversed.

J. F. Peck, for appellants. Earl H. Webb and C. A. Stonesifer, for respondents.

SEARLS, C. John W. Mitchell died testate, November 26, 1893. By his last will he bequeathed to Grace Mathewson, Minnie Henderson, and Charles Henderson (the assignor of Ellen Wetherbee and B. Schwartz & Co.) legacies of \$5,000 each, amounting in the aggregate to \$15,000. The will was admitted to probate December 16, 1893, and letters testamentary issued to Henry F. Geer and George S. Bloss, the executors named therein. They duly qualified, and gave notice to creditors. The decree establishing such notice was made November 21, 1895. An inventory and appraisement was filed November 21, 1895, showing the estate to be of the value of \$1,364,307.55. The time for presenting claims had expired, and secured claims amounting to say \$160,000, and unsecured claims amounting to \$18,000, had been allowed. The respondents filed their petition for a partial distribution under section 1663, Code Civ. Proc., on the 7th day of April, 1896, containing allegations which, if true, entitled them to distribution. The executors (appellants) filed their opposition to the petition, May 16, 1896, averring, in substance, that there is not sufficient funds on hand or readily attainable to pay the legacies, and that to pay them would embarrass the administration of the estate; that they had been unable to sell the real estate, although they had tried to do so, etc. A hearing was had May 16, 1896, after due notice to all parties in interest, and the cause was submitted, and taken under advisement by the court. On September 11, 1896, the court denied the application of the petitioners "without prejudice to making another application." Thereafter, and on the 17th day of December, 1896, the respondents gave notice to appellants of a motion to set aside the order of September 11th, and for a rehearing and reargument of the application for a partial distribution. This motion was based upon a stipulation between appellants and respondents, executed after the submission of the case and before its decision, viz. on May 26, 1896, whereby it was agreed that no further proceedings should be had in the application for distribution, and that the case should stand submitted, and not be decided for six months from date. In consideration thereof the executors agreed to pay to each of the three respondents the sum of \$1,166.33 $\frac{1}{3}$  on or before June 15, 1896. These several sums were paid to the respondents. This stipulation was not filed, and, so far as appears, was not brought to the attention of the court before its decision in the case. Upon the further hearing and argument the former order was set aside, and an order or decree was entered



granting the petition, and ordering "the executors of said estate to pay the legatees or their assigns their respective shares of said estate under the will of said deceased, such payments to be made, one-third on or before the 1st day of March, 1897, and the balance on or before the 30th day of May, 1897, with legal interest thereon, less the inheritance tax thereon." It was further ordered "that no bond be required of said petitioners on said distribution." The order is dated February 27, 1897. Appellants excepted to these rulings, and prosecute this appeal therefrom. The case comes up on a bill of exceptions.

The order is an appealable one. "An appeal may be taken to the supreme court, from a superior court, in the following cases: \* \* \* From a judgment or order \* \* \* refusing or allowing, or directing the distribution or partition of an estate, or any part thereof." Code Civ. Proc. § 963.

Several points are made by appellants for reversal, only one or two of which need be noticed. At the hearing petitioners introduced in evidence the admission of appellants that the unsecured claims against the estate were about \$18,000. The order of distribution to the petitioners was for the whole legacies left them by the last will, and, as before stated, it was further ordered "that no bond be required of said petitioners on said distribution." This was error. Section 1658 of the Code of Civil Procedure provides that at any time after the lapse of four months from the issuing of letters testamentary, etc., any devisee or legatee may apply to have the legacy or share of the estate to which he is entitled given to him "upon his giving bonds, with security, for the payment of his proportion of the debts of the estate." Section 1661 provides for the amount and character of the bond. Section 1663 of the same Code provides that any heir, devisee, or legatee may, at any time after the lapse of one year from the issuance of letters testamentary or of administration, apply by petition upon notice for the distribution to him of the net proceeds of the share of the estate to which he will be entitled. Before receiving his share he must give a bond, as required by sections 1658 and 1661, "provided that where the time for filing or presenting claims has expired, and all claims that have been allowed have been paid, or are secured by mortgage upon real estate sufficient to pay them, and the court is satisfied that no injury can result to the estate, the court may dispense with the bond."

The foregoing quotation shows that it is only in cases where the time for presenting claims has expired, and that all claims allowed have been paid, or are secured by mortgage, etc., that the court is authorized to dispense with the bond. It reasonably appears, in the present case, (1) that the time for presenting claims had expired; (2) that \$18,000 of claims were allowed, which

had not been paid; (3) that they were not secured by mortgage upon real estate or otherwise, and hence that the court erred in not requiring a bond.

Respondents rely upon the case of *In re Levinson's Estate*, 98 Cal. 654, 33 Pac. 726, to sustain the position that "the question as to whether a bond should be given by any of the parties to a partial distribution is entirely within the discretion of the court below." It is true, the language quoted is found in the opinion in that case, but it is not in point here, for the reason that there it appeared from the record that the time for presenting claims against the estate had expired, and that "all claims had been paid." The expression used by the learned judge was correct as applied to the facts of that case, but is not the law in a case like the present. See *In re Crocker's Estate*, 105 Cal. 368, 38 Pac. 954; *In re Hale's Estate* (Cal.) 53 Pac. 429.

2. The order of the court is quite indefinite in not enunciating the sum of money to be paid to each of the legatees. True, it refers to the will as the criterion by which to determine this question, but the will does not appear in the record. It would, to say the least, be the better practice to specify in the order the sum to be paid by the executors and the amount of the collateral inheritance tax to be deducted therefrom. Waiving this question, however, and the fact remains that there was positive error in ordering the whole of the legacies paid, as shown by the will, without deducting therefrom the sums of \$1,166 $\frac{2}{3}$  paid to each of the legatees, after the original hearing and before the final hearing, and which payments were admitted on such final hearing to have been received by petitioners.

3. It was admitted at the hearing that due notice of the application was given to the executors and all persons interested. This was sufficient to require all those interested who desired to combat the proceeding to put in an appearance, and when the order was made, and respondents desired it to be set aside, it was sufficient to give notice to the executors, who had appeared through their attorneys.

The other questions raised by appellants are not of sufficient importance to call for comment. On account of the two errors indicated we recommend that the order appealed from be reversed, and the cause remanded for further proceedings consistent with this opinion.

We concur: CHIPMAN, C.; BELCHER, C.

McFARLAND, J. For the reasons given in the foregoing opinion the order appealed from is reversed, and the cause remanded for further proceedings.

HENSHAW, J. I concur in the judgment of reversal. Upon the question of the suffi-

ciency of the notice to confer jurisdiction to make the order in question I express no opinion.

TEMPLE, J. I concur in the judgment.

121 Cal. 339

**HERNIA SAVINGS & LOAN SOC. v.  
BEHNKE. (S. F. 922.)**

(Supreme Court of California. June 30, 1898.)

**MORTGAGES—FORECLOSURE — SALES — MODE—IN-  
ADEQUACY OF PRICE—BIDS—ORDER  
OF SALE—TAXES.**

1. A foreclosure judgment embraced several parcels of land, describing each separately. On the sale the sheriff offered each parcel separately, and bids were severally made for three of them, two of which were withdrawn, and one was accepted, and one parcel struck off to the bidder. After offering each remaining parcel separately, without obtaining any purchaser, the sheriff offered them in a lump, and they were sold to the mortgagee. The judgment debtor was present, but gave no directions. *Held*, that the sale was valid.

2. Where mortgaged property was sold for \$12,000, which, for two years preceding the sale, had been assessed at said sum, and which the appraisers appointed by the probate department had appraised at \$38,000, the sale would not be set aside on the ground of inadequacy of price.

3. Where, at a foreclosure sale, the sheriff had offered the property in separate parcels, and, failing to sell it so, had sold it en masse, the sale was not invalidated by the subsequent refusal of the purchaser to fix a sum at which the different parcels might be redeemed separately.

4. At a sheriff's sale the bidder may withdraw his bid at any time before the property is struck off to him.

5. Under Code Civ. Proc. § 684, providing that a judgment requiring the sale of property may be enforced by writ reciting the material parts thereof, a foreclosure sale is not invalidated by failure of the order of sale to recite a payment made on the judgment after rendition; section 682, which requires an execution to state the amount actually due on a money judgment, not applying to an order for sale.

6. Where a mortgage was not taxed, and the owner of the premises covered by it paid the taxes assessed against the lands, she was not entitled to have them applied as a payment on the mortgage under Const. art. 13, § 4, providing that taxes on the mortgage, paid by the owner of the mortgaged premises, shall constitute a payment on the mortgage.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by the Hibernia Savings & Loan Society against Rosa Behnke, as executrix. There was a judgment for plaintiff, and a sale thereunder, and from an order refusing to set it aside defendant appeals. *Affirmed*.

T. Z. Blakeman, for appellant. A. Tobin and Thos. F. Barry, for respondent.

HARRISON, J. This is an appeal from an order of the superior court of San Francisco refusing to set aside a sale of property made by the sheriff under an order of sale issued out of said court upon a judgment rendered therein for the foreclosure of a mortgage in favor of the plaintiff. The sale

was made June 8, 1896. Notice of the motion to set aside the sale was made October 19th, and heard November 19th, and was denied December 1st.

1. One of the grounds of the motion is that several parcels of the land were sold en masse instead of separately. The judgment embraced 10 parcels of land, which were separately described and ordered to be sold in satisfaction of the plaintiff's claim. The defendant was present at the sale, but gave no directions respecting it, or the order in which the parcels should be sold. The sheriff offered each of the parcels separately, and bids were severally made for two of them, but were withdrawn by the bidders before a sale was effected. One of the parcels was sold for \$750 to Mrs. Dillon. After the sheriff had offered each of the parcels without obtaining any purchaser for them, except in the case of the one sold to Mrs. Dillon, he offered the remaining nine parcels in a lump, and they were sold to the plaintiff for \$11,954. In thus making the sale the sheriff followed the rule approved in *Marston v. White*, 91 Cal. 37, 27 Pac. 588, and no facts are presented herein which take the present case out of that rule. One of the grounds urged by the appellant for setting aside the sale is that the property was sold for much less than its actual value, but the only evidence presented to the superior court in support of this proposition was the fact that two years prior to the sale the lands had been appraised at the sum of \$38,125 by appraisers appointed therefor by the probate department of the court in the administration of the estate of the mortgagor. It was also shown that the lands had been assessed by the city and county assessor for the year 1894 at \$12,870, and for the year 1895 at \$12,490. No attempt was made to show their value in the year 1896, or at the time of the sale, and, as they were sold for \$12,704, the court was not required, under the evidence before it, to hold that this amount was so inadequate to their value as to authorize it to set aside the sale. Neither did the refusal of the plaintiff, after the sale, to fix a sum at which it would allow a redemption of either of the parcels bought afford a reason for setting aside the sale. The right of redemption is purely statutory, and, unless the defendant brought himself within the statute, he could not claim the right to redeem. The purchaser of land at a sheriff's sale acquires a right in the land which can be divested only in the mode and to the extent provided by the statute. The object of the statute in requiring a sale to be by parcels is to afford the judgment debtor an opportunity to redeem either of the parcels, but the mortgagee has a right to have the land sold in satisfaction of his claim, and, if it cannot be effected in parcels, the sheriff is authorized to sell it as a whole, unless otherwise directed by the judgment debtor. Any redemption from the sale must be of the



land sold, and according to the parcels in which it was sold. It must be assumed from the fact that the sheriff was unable to sell the several parcels, and could only sell them as a whole, that the lands were more valuable taken together than separately.

2. When the first parcel was offered by the sheriff, the plaintiff bid a certain sum therefor, but before it was struck off to it withdrew its bid. Another person present at the sale made a bid for another parcel, but withdrew his bid upon being informed by the sheriff, in answer to his inquiry, that the title to the land sold was not guaranteed. There was nothing irregular in this. The sale by the sheriff is by auction, and the rule of auction sales that the bidder may withdraw his bid at any time before the hammer falls applies to a sale by the sheriff. The contention of the appellant that there was a collusion between the sheriff and the plaintiff to bring about the sale of the land en masse, or that the sheriff sought to induce Struven to withdraw his bid, is not sustained by the record.

3. The judgment was rendered in favor of the plaintiff for the sum of \$11,434, with interest from February 23, 1894, and was entered November 30, 1894. December 10 1894, the sum of \$881.50 was paid to the plaintiff, and a partial satisfaction to that amount filed by it. The order of sale annexed to a certified copy of the judgment was issued April 28, 1896, but no reference was made therein to the amount that had been paid upon the judgment, and it is urged by the appellant that this omission vitiated the order of sale, since it required the sheriff to make more money out of the lands than the plaintiff was entitled to receive. Section 684, Code Civ. Proc., provides: "When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment by making the sale, and applying the proceeds in conformity therewith." The provision in section 682 that an execution for money shall state "the amount actually due thereon" does not apply to such order of sale. The sheriff is directed by such judgment to sell the lands, or so much thereof as may be necessary to satisfy the plaintiff's claim. After he has sold parcels enough for this purpose, his power ceases, and the sale of any further parcel would be unauthorized; but, if he is authorized to sell them as a single parcel, and they are sold for more than the amount of the judgment, the sale is not void, and the surplus belongs to the judgment debtor. In the present case, as the plaintiff bid for the property the exact amount due to it after deducting the aforesaid payment and the costs of the sale, there is no ground for the contention that the sale was unauthorized. The item of seven dollars for "printing points," etc., was not an obligation of

the defendant, and the plaintiff was not authorized to include it in its account, but this error does not justify setting the sale aside. The appellant, moreover, contends that the judgment should have been still further reduced by the sum of \$170 for taxes upon the land for the year 1894, paid by the defendant after the judgment had been rendered. It appeared by the evidence on the part of the appellant that the mortgage was not assessed for that year, and that the assessment for which the taxes were paid was upon the land, without any deduction for mortgage or other obligation. It is only the tax "levied upon the security" that the owner may pay and have the amount deducted from the amount of the security (Const. art. 13, § 4); and, as there was no assessment of the security, the defendant was not authorized to have this payment deducted. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(121 Cal. 379)

SACRAMENTO BANK v. ALCORN et al.

(Sac. 332.)

(Supreme Court of California. July 2, 1898.)

TRUST DEEDS—VALIDITY — WHAT PASSES THEREUNDER—STARE DECISIS.

1. Under Civ. Code, § 857, authorizing the creation of express trusts, a valid trust deed to secure a debt may be executed, giving the trustees power to sell the property conveyed.

2. The decisions of the supreme court upholding the validity of trust deeds to secure loans establish a conclusion which has become a rule of property, and will not be disturbed.

3. Although the title passes under a trust deed given to secure a debt, none of the incidents of ownership attach, except that the trustees are deemed to have such estate as will enable them to convey.

In bank. Appeal from superior court, Kings county.

Action by the Sacramento Bank against Israel P. Alcorn and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Freeman & Bates and Archibald Yell, for appellants. W. W. Middlecoff and J. F. Prior, for respondent.

TEMPLE, J. This action was brought to determine conflicting claims to real property. In May, 1893, defendant Alcorn and wife conveyed the property to trustees, to secure a sum of money then loaned by the bank to Alcorn, due according to the terms of a promissory note. The note, by its terms, became due one year from date. The deed of trust provided that, if the debt was paid, the trustees should reconvey to the trustors; but, if default were made, they were authorized to sell after certain designated notice, and to convey to the purchaser. The moneys realized were to be appropriated to payment of the debt and

certain charges, and the residue, if any, returned to the grantors in the deed. The interest was to be paid annually, and, in case of a default in the payment of interest, the trustees were authorized to sell. A sale was made on the 28th day of December, 1895, and it is not claimed that the proceedings for a sale or the deed are deficient. Plaintiff claims under this sale, and the questions here arise upon objections made to the introduction of the trust deed. But two points are made by appellants, and it seems to be agreed that these questions are properly presented upon the record: (1) The trust was for a purpose not authorized by section 857 of the Civil Code, and the deed is therefore void. (2) The trust deed is void because it restrains alienation for a period not dependent upon the duration of life. Civ. Code, §§ 715, 716, 771.

The appeal is supported by very elaborate and forcible briefs, which, if the questions were open for consideration, would challenge and receive serious and careful examination; but we do not think the matter can now be considered open for discussion. Our own records will disclose the fact that trust deeds have been quite frequently used as security for loans. Their validity has been upheld in numerous cases, beginning very soon after the adoption of the Code, and continuing until the present time. *Bateman v. Burr*, 57 Cal. 480; *Durkin v. Burr*, 60 Cal. 360; *Carey v. Brown*, 62 Cal. 373; *Loan Soc. v. Deering*, 66 Cal. 281, 5 Pac. 353; *More v. Calkins*, 95 Cal. 435, 30 Pac. 583; *Loan Soc. v. Burnett*, 106 Cal. 528, 39 Pac. 922. These decisions, which have been uniform, establish a conclusion which has become a rule of property, and, however thoroughly we might now be convinced that the rule is erroneous, it should not be disturbed. Doubtless, many people have invested their money relying upon this construction of the law by the highest tribunal of the state, while those who have executed such deeds have done so with the expectation that they would be held valid. Ruin and injustice would result from such a decision as is now sought. If the question as to whether the rule of *stare decisis* shall prevail be one of policy, there is here no balancing of the evil done against the good attained. The result would be evil only. It is said that in none of the cases heretofore decided was the point raised. Whether it was or not may be a matter of argument. In *Bateman v. Burr* it was contended that the deed did not pass the legal title, and that the trustees, not being the owners of the fee, could not sell as provided in the trust deed. True, the argument urged was that the deed, having been given as security for a debt, was a mortgage only, and therefore did not carry the fee. This was an argument merely. The question was whether the instrument was operative as a deed. If void, it certainly did not confer power upon the trust-

tees to sell. It was decided that it did confer such power. And if the effort to create a trust failed, because trusts for that purpose are prohibited, it would seem to follow that the instrument would be a mortgage; and the question whether it is a mortgage or a conveyance is the real question involved, and the proper one to discuss. Counsel say it does not purport to be a mortgage, but to convey a fee in trust. True, neither does an absolute deed purport to be a mortgage; but it is shown to be so when it is established that it was given to secure a debt. The trust deed purports to have been given to secure a debt, and, if the attempt to create a trust is ineffectual, it presents all the elements of a mortgage. Indeed, under the decisions it is practically, though not in legal effect, little more than a mortgage with power to convey. The legal title passes, but it conveys no right of possession, and the trustor may remain in possession, and, until the execution of the trust, may maintain an action to recover possession even when the trust deed is silent upon the subject of possession. *Tyler v. Granger*, 48 Cal. 259. Notwithstanding the deed of trust, the trustor may file his declaration of homestead, and hold the premises as such against his creditors who are not secured by the trust deed or some valid lien. *King v. Gotz*, 70 Cal. 236, 11 Pac. 656. Notwithstanding the trust, the trustor may devise or transfer the property subject to the trust. Civ. Code, § 864. And the devisee or grantee acquires a legal estate against all persons except the trustees and persons lawfully claiming under them. Id. § 865. And, when the purpose of the trust ceases, the estate of the trustees also ceases. Id. § 871. Under these decisions and statutes, it would seem that, while we must say that the title passes, none of the incidents of ownership attach, except that the trustees are deemed to have such estate as will enable them to convey. So limited, such a trust has all the characteristics of a power in trust.

As originally adopted, the Civil Code had a title authorizing and defining powers; and section 894 of that title provided as follows: "A power is a lien upon the real property which it embraces from the time the instrument in which it is contained takes effect, except," etc. The following section (895) was almost identical with the present section 858 in regard to the power to sell contained in a mortgage. The title in regard to powers was repealed, but in one respect the creation of a power is still authorized. The continuance of this power in a mortgage is as inconsistent with the general policy of requiring all forced sales to be subject to redemption as are trust deeds. The legislature has also recognized these deeds of trust as an existing mode of securing loans. We do not place much value upon the mention of deeds of trust in the constitution. It was well enough to provide for the taxation of



any property that the legislature could create, or authorize to be created. Similar remarks may perhaps be made in regard to the various provisions authorizing savings banks to deal in such securities, although this is not quite so obvious. The provisions in the Political Code (sections 3617, 3627, and 3629) cannot be so explained. These must be understood as referring to existing property, and not to something which might be thereafter brought into existence under future laws. Sections 2872 and 2924 of the Civil Code also imply the present existence of such property. Nor do we think these statutes can be understood as referring only to trusts for an immediate sale. It is possible that a trust to effect an immediate sale for the benefit of creditors whose debts are due may also be security for the debts while the sale is being made. But such trusts would not call for the regulations provided in the statutes referred to, and authority to savings banks to loan money upon such trusts would be fatuous. If these statutes are not in themselves sufficient, as against the statute defining the purposes for which trusts can be created, to authorize these trust deeds, as an exception to the rule, they nevertheless recognize and add weight to the judicial decisions which practically hold that they are authorized by section 857 of the Civil Code, and which rulings, long acquiesced in, have become a rule of property, not now to be reversed though erroneous.

We do not care to enter into a discussion of the second point,—as to whether these trust deeds are prohibited by the Code provisions against restraints on alienation. We are much impressed by the argument of counsel for appellants upon that subject. Under the decisions limiting the effect of such deeds, they are hardly within the evils to avoid which those sections were passed. The right to the possession and full enjoyment of the property is not rendered inalienable. But the legislature can correct the evil if there be one. The courts cannot do so without producing widespread distrust and confusion, and we think, upon well-established and sound principles of jurisprudence, ought not now to interfere. The judgment and order are affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; VAN FLEET, J.; HENSHAW, J.; HARRISON, J.

(121 Cal. 372)

ADAMS v. MINOR. Judge. (S. F. 1,090.)<sup>1</sup>  
(Supreme Court of California. July 1, 1898.)

#### JUDGES—DISQUALIFICATION.

1. Code Civ. Proc. § 170, provides that no judge shall sit or act as such in any action or proceeding in which he is interested. *Held*, that a judge owning stock in a bank, intervening in a proceeding before him involving the validity of bonds owned by the bank, is an interested party, within the meaning of the statute, and disqualified to sit in the case.

2. The fact that he sat throughout the trial with the consent and at the request of counsel, believing he was not disqualified, and after the cause was submitted, pending a decision, has disposed of his stock in the bank, would not remove his disqualification to render a decision.

Commissioners' decision. In bank.

Application for mandamus by John Adams against William O. Minor, judge of the superior court of Stanislaus county. Writ denied.

C. W. Eastin, for petitioner. The Attorney General, for respondent.

CHIPMAN, C. Application for writ of mandate commanding respondent to proceed to the rendition of a decision and judgment in a certain cause now pending in the superior court of Stanislaus county, wherein John Adams (petitioner here) and others are plaintiffs, and G. R. Stoddard, collector of Modesto Irrigation District, in said county, is defendant, and First National Bank of Los Angeles is intervener. The facts are to be found in an agreed statement and in the pleadings, from which it appears that the action involved the validity of certain bonds issued by the said irrigation district, of which the Bank of Modesto held a portion, of the par value of \$3,000; that the respondent was the owner of certain shares of the capital stock of said bank, the amount not shown. It is but fair to the learned judge who tried the case to add that he expressed doubt at the beginning as to his right to sit in the cause, and did so reluctantly, and only upon the assurance by both parties to the action that the validity of the bonds held by the bank would not be drawn in question. Subsequently, and at the argument upon the evidence, the validity of the entire issue of bonds, including those held by the bank, was made an issue. The cause was submitted on briefs to be filed, but shortly afterwards respondent called up the case of Adams v. Stoddard, counsel for both parties being in court, and made an order vacating the submission, and a few days later made another order refusing peremptorily to decide the case.

1. The principal question presented is, had the judge such interest as disqualified him from deciding the case? We think the answer must be in the affirmative. Code Civ. Proc. § 170, provides as follows: "No justice, judge," etc., "shall sit or act as such in any action or proceeding: (1) To which he is a party or in which he is interested." We cannot take into consideration the amount of the judge's interest in the bank,—indeed, it is not given; nor can we say that, of the entire issue of bonds, the part held by the bank was too small for judicial cognizance. It certainly was not so small as to come within the maxim, "De minimis non curat lex." Parker, C. J., in *Pearce v. Atwood*, 13 Mass. 324, said: "No man can lawfully act as judge in a case in which he may have a pe-

cuniary interest. Nor does it make any difference that the interest appears to be trifling, for the minds of men are so differently affected by the same degrees of interest that it has been found impossible to draw a satisfactory line."

Petitioner urges that the interest disclosed was not such as to disqualify the judge. The brief of counsel exhibits great industry in bringing to our attention the adjudicated cases bearing upon the question. But they fail to convince us of the soundness of his position. The meaning of the word "interested," where it occurs in section 170, *supra*, was defined in *City of Oakland v. Oakland Water-Front Co.*, 118 Cal. 249, 50 Pac. 268. It was there said: "The word 'interested,' as used in the section of the Code relied on, embraces only an interest that is direct, proximate, substantial, and certain, and does not embrace such a remote, indirect, contingent, uncertain, and shadowy interest as that asserted as a disqualification in the case at bar." The interest relied on in that case was that "all of the judges were disqualified because they were owners of property subject to taxation by the city of Oakland, and therefore 'interested' in the result of the action." The court said: "The theory of the appellant is that, if respondent should recover the land sued for, it might be so used as to produce some municipal revenue, and thus affect to some extent the rate of taxation, as a consequence of which the taxes which the said judges would have to pay on their property might to some imaginable extent be lessened, and that thus they are interested and disqualified." The meaning of the word "interested," as given above, must be understood in the light of the facts in the case where the definition is found. But that definition cannot aid petitioner, for we think the interest here in question was neither remote, indirect, contingent, uncertain, nor shadowy. See, also, *Mining Co. v. Keyser*, 58 Cal. 315, and *Heilborn v. Campbell* (Cal.) 23 Pac. 122 (not yet officially reported). See, also, *Meyer v. City of San Diego* (Cal.; opinion filed May 31, 1898) 53 Pac. 434, where the question is very fully considered and the cases reviewed.

Petitioner cites cases where the interest arose out of the question involved as distinct from any pecuniary interest in the result of the case; others where a part of a penalty went to a city in which the judge was a taxpayer; others where the interest was of such impersonal nature as a citizen has in the property of the state at large; others where there was some speculative possibility; and like cases. But of the numerous cases cited we have been unable to find one where a judge, holding the shares of a banking or other corporation, or being a partner in a business, was held qualified to try a case involving the right of such corporation or partnership to its property. It was held by Chancellor Sanford in *Insurance Co. v. Price*,

Hopk. Ch. 1, that a chancellor, being a stockholder in a corporation, cannot do any judicial act in a cause in which that corporation is a party, although he is not personally a party to the record. We can see no substantial difference in the case of a judge who is a stockholder in a corporation sitting in a case brought by or against such corporation and a case where the matter in controversy involves the property of such corporation, although it is not a party to the action.

2. Petitioner contends that because the judge sat throughout the trial with the consent and at the request of counsel, and he himself believed he was not disqualified, and because he has, since the cause was submitted, and pending a decision, disposed of his stock in the Modesto Bank, he is not now disqualified. We do not think that the belief of the judge one way or the other would change the fact of his disqualification. He might honestly believe and hold that he was qualified, but that would not qualify him any more than he could acquire jurisdiction by deciding that he had it. Nor do we think that removing the cause of his disqualification after the case was submitted to him for decision would operate to remove the disqualification. The Code says, if he is interested, no "justice, judge," etc., "shall sit or act as such." Code Civ. Proc. § 170. This does not mean that he may hear the evidence in a case in which he is interested, and may decide it, after sitting and acting in it, provided he remove the cause of disqualification before he enters judgment. As we all know, the decision of questions arising during the course of the trial often determines the final judgment itself. The statute must be held to mean what it says, and it is that he shall not sit or act as judge in an action in which he is interested. We are of opinion that the writ should be denied, and so recommend.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the writ is denied.

121 Cal. 343

#### PEOPLE v. MILLER. (Cr. 355.)

(Supreme Court of California. July 1, 1898.)

#### HOMICIDE—EVIDENCE—INSTRUCTIONS.

1. Where a man is murdered by a stranger while attempting to prevent the stranger from murdering a woman whom he was pursuing, evidence of the motive which prompted the murderer to attempt the life of the woman is admissible on his trial for killing the man, although it is not necessary.

2. Under Pen. Code, § 459, providing that a person entering a house with intent to commit any felony is guilty of burglary; and section 189, which provides that murder committed in an attempted burglary is murder in the first degree,—an instruction concerning burglary is proper in a prosecution for the murder of a man while attempting to prevent the murderer from killing a woman whom he had pursued into a house for the purpose of killing her.



Commissioners' decision. Department 2. Appeal from superior court, San Francisco county.

John Miller was convicted of murder, and appeals. Affirmed.

J. N. E. Wilson, for appellant. Atty. Gen. Fitzgerald, for the People.

HAYNES, C. Appellant was tried upon an information charging him with murder in the first degree, committed upon one James Childs. The jury returned a verdict of guilty without imposing a penalty, and he prosecutes this appeal from the judgment of death entered thereon, and from an order denying his motion for a new trial. The errors alleged relate to questions of evidence and the correctness of certain instructions to the jury. The following outline of the circumstances attending the homicide is essential to a consideration of the questions discussed by counsel for appellant: The homicide occurred November 18, 1896, on Clementina street, in the city of San Francisco. For some time prior to that date, and up to within a few days before the homicide, appellant had as a housekeeper one Mrs. Nellie Ryan, a widow. Whether any other relation existed between them is disputed and not important to be considered. A few days before the homicide, they separated; and on that day Miller went to the house of one Mrs. Burns, with whom both were acquainted, and requested her to send for Nellie Ryan, saying he had some money and a house in Texas which he wished to give her. Mrs. Burns' sister consented to go, but defendant instructed her not to tell Nellie Ryan that he was there. Nellie Ryan was sent for, and came, and, meeting Mrs. Burns at the foot of the stairs, inquired whether Miller was there, and, being told that he was, remarked, "The dirty hound; I don't want to see him," and started from the house; and, as she left, Miller came downstairs, passed out onto the street, and immediately began shooting at Nellie Ryan, who ran across the street and a little distance along it, and ran up the steps and into the house in which James Childs lived. The door was open, and Childs was standing near the top of the steps. When she entered the house, she cried out for protection; and a brother of the deceased closed the door, but did not lock it. Miller, pursuing Nellie Ryan, went up the steps, and, according to one witness, had "his hand on the handle of the door, trying to get in." James Childs put out his arm, and took hold of Miller, when the latter immediately turned, and shot Childs through the head, causing almost immediate death. As Childs fell down the steps upon the sidewalk, Miller again fired at him, but the shot did not take effect. Miller then attempted to shoot himself, but his revolver was empty. Miller and Childs were strangers, and it does not appear that anything was said by either of them. Three

or four shots were fired by Miller at Nellie Ryan as she ran, one of them passing through the rim of her hat.

1. Two days before the shooting, Nellie Ryan procured a warrant, and had Miller arrested on a charge of disturbing the peace; and his trial upon that charge had been postponed for several days. Upon the trial of Miller upon the charge of murder, the prosecution offered in evidence the complaint, warrant of arrest, and minutes of the police court in the matter of the charge of disturbing the peace, to which defendant objected; and it is contended that the court erred in admitting the evidence. The attempt to kill Nellie Ryan and the shooting of Childs were parts of one continuous transaction. Miller and Childs were strangers, and Childs was killed while he was in the act of interrupting Miller's pursuit of Nellie Ryan; and the purpose he had in pursuing her must have entered into the purpose with which he shot Childs. If he had not intended to kill her, it is not likely that he would have suddenly formed the purpose to kill Childs. The purpose or intention of Miller in the pursuit of the woman was therefore material and important evidence; and while the circumstances under which he sent for her to come to the house of Mrs. Burns, and his pursuit of her, shooting at her as she ran, were clear and sufficient evidence of his intention to kill her, and therefore the motive which induced the intention was not necessary to be shown, yet it was not irrelevant, nor was the record incompetent evidence. Motive is important to be shown only where the purpose or intention with which the act was done, or the person by whom it was done, is uncertain or in doubt. It is quite true, as said by counsel for appellant, that the commission of an independent offense is not proof of itself of the commission of another and distinct offense. But here there was no attempt to prove the commission of another offense. The evidence was simply that Nellie Ryan had charged him with an offense, and had procured his arrest thereon, and the jury were instructed by the court that these documents could not be considered as in any way establishing or tending to establish the truth of the charge, but solely for the purpose of determining whether a criminal charge had been made against him by Nellie Ryan.

2. It is also contended that the court erred in its instruction to the jury as to the purpose for which said complaint and warrant were admitted. The instruction referred to we have in substance given above. Counsel does not state wherein the court erred in giving it, and, unaided, we perceive no error in it.

3. It is also contended that the court erred in its charge to the jury upon the subject of burglary, for the reason, as stated by counsel, "that the element of burglary did not enter into this case in any way, and that such instruction could not be otherwise

than prejudicial to the defendant." I think there was evidence from which the jury might properly find that Miller went up the steps for the purpose of entering the house in pursuit of Nellie Ryan for the purpose of killing her; and entering a house for such purpose is burglary, under section 459 of the Penal Code, which provides that every person who enters any house, etc., "with intent to commit grand or petit larceny, or any felony, is guilty of burglary"; and section 189 makes murder "committed in the perpetration, or attempt to perpetrate arson, rape, robbery, burglary or mayhem," murder of the first degree. I think it clear that the evidence justified the instruction, and that the instruction is correct, as matter of law, is not questioned.

4. Appellant's last point is that "the court erred in its instructions to the jury upon the subject of insanity." No argument is made upon this point, nor are we referred to any part of the instructions upon that subject which is supposed to be erroneous. We have, however, carefully examined the instructions given upon that subject; and taken together, and as applicable to the evidence, we find no error therein. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(121 Cal. 378)

**In re HICKEY'S ESTATE.** (S. F. 1072.)  
(Supreme Court of California. July 1, 1898.)  
PROBATE—APPEALABLE ORDERS.

An order vacating a prior order settling the final account of an administrator is not appealable, since not enumerated among the appealable orders provided for by Code Civ. Proc. § 963, subd. 3.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

In the matter of the estate of Emmet Martin Hickey, deceased. From an order vacating a prior order settling the administrator's account, he appeals. Dismissed.

J. D. Sullivan, for appellant. E. C. Harrison, for respondent.

HAYNES, C. This appeal is taken by the administrator from an order vacating a prior order settling his final account. In an addendum to respondent's brief, the point is made that the order is not appealable, and that the appeal should therefore be dismissed; citing *In re Wittmeier's Estate*, 118 Cal. 255, 50 Pac. 393. It was there expressly held that "appeals in probate proceedings lie only from such orders and decrees as are enumerated in subdivision 3 of section

963 of the Code of Civil Procedure." That the order here appealed from is not enumerated among the appealable orders there provided for is clear. This disposition of the appeal is the less to be regretted, since, when the court again settles the administrator's account, if he should then feel aggrieved, he can appeal from the order then made settling it. We advise that the appeal be dismissed.

We concur: CHIPMAN, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal is dismissed.

(121 Cal. 332)

**MERY et al. v. BRODT.** (Sac. 428.)  
(Supreme Court of California. June 30, 1898.)  
PUBLIC LANDS—LOCATION UNDER TIMBER ACT—  
FRAUD—TRUSTS—EXPENSES.

1. Where one has fraudulently obtained a patent to land under the timber act, one who has made a valid location of the land as a mining claim may bring suit against the patentee to have his title declared to be held in trust for plaintiff, and for a conveyance by defendant to plaintiff, although the United States statute of 1878 (20 Stat. 89) declares that one who fraudulently obtains a patent under the timber act shall forfeit "all right and title to the same; and any grant or conveyance which he may have made except in the hands of bona fide purchasers shall be null and void."

2. One who has fraudulently obtained a patent under the timber act is not entitled to have his expenses in obtaining the patent paid by one who is a valid locator of the property under the mining laws, before the latter is entitled to have the former's title declared to be held in trust for the latter, and a conveyance decreed.

Department 1. Appeal from superior court, Butte county.

Suit by M. L. Mery and another against Lincoln Brodt. Judgment for plaintiffs, and defendant appeals. Affirmed.

John Gale, for appellant. Richard White and Park Henshaw, for respondents.

GAROUTTE, J. This action is inaugurated by a bill in equity, which asks that certain lands be declared by judicial decree to be held in trust by defendant for the use and benefit of plaintiffs, and that a conveyance thereof be made by him to them. The evidence is not in the record, and the appeal from the judgment is to be considered upon the pleading and findings. By the judgment plaintiffs were granted the relief sought.

Without detailing in full the findings of fact made by the trial court, it may be said that the material facts for our consideration are as follows: Plaintiffs were valid and legal locators of mining claims covering the land in dispute. They had been such locators for many years, were in the exclusive possession of the land all of the time, had spent \$20,000 upon the property in mining work, and had complied with all demands of the law tending to support a valid mining location. These con-



ditions being present, defendant, Brodt, filed a claim for the land under the timber act. In due time he gave his notices, made his proofs and payments at the land office, and a patent to the land was issued to him by the land department of the United States. These proceedings were all had by defendant and the government without any actual notice to plaintiffs, and, consequently, without objection upon their part. It is found as a fact that defendant and his witnesses, when making final proof before the land office upon application for the patent, testified that the said land was not occupied, and no improvements of any kind thereon; that the land contained no indications of deposits of any kind of mineral, and was chiefly valuable for the timber growing thereon; that said testimony was false and fraudulent, and was given for the purpose of misleading and deceiving the officers of the government, and that said officers were in fact deceived and misled thereby. It was further found that the material allegations of defendant's application, made under oath, were false and fraudulent, and were made with the intent to deceive and mislead the officers of the land department, and did so mislead said officers. It is also found that one of the witnesses for defendant before the land office was well acquainted with these lands, and had been upon them at various times, and examined the work being done by plaintiffs, and was familiar with such work. He knew that mining was being carried on upon the land, that such land was claimed by plaintiffs as a mining claim, and that they had expended many thousands of dollars in the development of the claim. It was further found as a fact that the officers of the land department believed all this testimony, and issued a patent to defendant for these lands based upon this showing.

The character of the action here disclosed is a very common one. The judicial reports of this state and other states contain many similar cases. The principle of law involved cannot be questioned, for courts of equity everywhere recognize it. Litigation in these matters is caused, not by any dispute of lawyers as to the elementary and basic principles of law bearing upon the case, but in the application of the facts of each individual case to those principles. And it would seem that each individual case has a state of facts peculiar to itself. This is eminently true as to the case at bar, for it is essentially *sui generis* in this: that plaintiffs base their rights upon a mining location simply, and as such locators ask that title to land under a United States timber patent issued to defendant be held by him for their benefit. Fraud of the defendant against the United States in the procurement of this patent is abundantly shown. Perjury was committed, and the officers of the government imposed upon and deceived by such perjury. Under these conditions the government had the right to have the patent canceled; for a fraud or the worst

character was perpetrated upon it, and such a fraud as has always been recognized as proper ground for the cancellation of a patent. These things being true, it may be declared to be the rule, without exception, that, when the government has grounds for canceling a patent theretofore issued by it, based upon imposition and fraud, then an individual properly connected with the paramount source of title may bring an action similar to that brought by these plaintiffs.

The important question of this case then presents itself, to wit, are these plaintiffs in such privity with the source of title as to give them a status sufficient to bring this action? And this inquiry necessarily brings us to a consideration of their status as related to the United States. In other words, what is the nature and character of their holding, they being valid locators of mining claims? The locator of a mining claim, under the laws of the United States, has the right to the exclusive possession and enjoyment of that claim; he has an estate of inheritance; he has a title which can only pass by deed. The land is withdrawn from the public domain. There is an outstanding grant from the United States, and the government has no right to pass any title to a third party. Under the circumstances here shown, it would seem that the status of these plaintiffs as to the land was the same as that of a pre-emption claimant who had made his filing, was in the peaceable and undisputed occupation of the land, and otherwise had complied with all the demands of the law. These parties have been in the adverse and exclusive possession of this property for more than five years, doing all things demanded by the law to validate their title, and far more. Under the Revised Statutes of the United States these facts alone entitled them to a patent upon application. At the time the defendant procured his timber patent these plaintiffs, as against the world, were entitled to a patent, and were in a position to defend their claims against any and all attempting to dispute them.

In the case of *Chism v. Price* (Ark.) 15 S. W. 885, the court declared: "A stranger or occupant without right cannot assail a patent for fraud practiced against the state, but an occupant with a right to purchase may attack a patent issued in fraud of his rights, and upon equitable terms may demand a conveyance from the patentee." In the case of *Noyes v. Mantle*, 127 U. S. 349, 8 Sup. Ct. 1134, in speaking to this question, the court there said: "The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued, the government held the title in trust for the locators or their vendees. The ground itself was not afterwards open to sale." In

*Smelting Co. v. Rucker*, 28 Fed. 220, Judge Brewer said: "The statutes of the United States provides that upon performance of certain conditions the discoverer of a mine becomes entitled to a patent. If all these conditions have been performed, the full equitable title is vested in the discoverer, and all that the government retains is the naked legal title in trust for the equitable owner. If only partially performed, he has an absolute right of possession, and an inchoate title which further performance will perfect and complete. Such a right, possessory in its nature, yet coupled under existing laws with further rights as to acquisition of title, is declared by the decisions of the supreme court of Colorado to be a real-estate title. Such a property passes to the heir, is subject to seizure and sale as real estate, must be conveyed by deed, and is subject to partition." We find the following language in *Haws v. Mining Co.*, 160 U. S. 303, 16 Sup. Ct. 282: "The possession under a claim established according to law is fully recognized by the acts of congress, and the patent adds little to the security of the party in the continuous possession of a mine he has discovered or bought." In *Plummer v. Brown*, 70 Cal. 546, 12 Pac. 465, this court said: "To entitle the alleged owner, however, to such equitable relief, he must show that he occupies such a status as entitles him to control the legal title." This court in *Robinson v. Forrest*, 29 Cal. 320, has declared in express terms what must be the status of a party who seeks the character of relief sought by these plaintiffs. "It is simply necessary that there shall be a privity of title between him and the United States; that is, that he shall possess some right, title, interest, or claim in or to the lands that is permitted by the laws of the United States to be acquired before the final transmission of title, and which is recognized by those laws as a valid, subsisting right, though further acts may be necessary to be performed by both parties before the title finally passes from the United States to the claimant."

Applying the law to the facts of this case, there can be but one conclusion. Indeed, it would be a hard case where a court of equity would sanction a result that would deprive these plaintiffs of their property obtained at the price of many years' labor and \$20,000 expenditure, and this labor done and money expended under authority of the laws of the United States, and in strict conformity thereto. Tested by *Plummer v. Brown*, supra, it may well be said that these plaintiffs occupy such a status as entitles them to control the legal title. Measured by *Robinson v. Forrest*, supra, it may well be said that these plaintiffs meet all the requirements laid down in that case. We are satisfied they are possessed of a status which gives them authority to bring the action.

The United States statute of 1878, which deals with parties desirous of securing pat-

ents under the timber claims act, provides: "If any person taking such oath shall swear falsely in the premises he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void." 20 Stat. 89. It is now contended by defendant that under the showing made in this case by the complaint and findings of fact he has no title; that by reason of the express declaration of the statute the patent issued to him is void, and that, consequently, he has no interest which may be conveyed to plaintiffs. No case is cited to support this contention, and we assume there is none. The very fact that the statute declares a fraudulent claimant shall forfeit his title to the land is complete evidence that the United States concedes that by the patent he has the title. If he has no title there would be none to forfeit. Again, by the statute, his grant to a bona fide purchaser vests the title in such purchaser. This could only be the case where the title rests in the patentee. The position here taken by appellant would in every case defeat a party in his efforts to secure relief of the character here desired. There is no merit in the contention. As before suggested, it is these very cases where the United States by direct attack may have the patent set aside and canceled, upon the ground of fraud, that a claimant connecting himself with the paramount source of title is authorized to ask a court of equity for the relief here sought.

It is next insisted that plaintiffs are entitled to no relief because they have failed to do equity in not paying defendant the expense incurred by him in the procurement of his patent. A court of equity is not inclined to treat the conduct of this defendant kindly. There is nothing in his conduct to commend it to the court. He has been guilty of gross fraud, and equity owes him nothing. The statutes of the United States, already noticed, declare that his money, paid to the government in the consummation of his fraud, shall be forfeited. In *U. S. v. Minor*, 114 U. S. 238, 5 Sup. Ct. 836,—a case where the government directly attacked a patent it had theretofore issued,—it was held that the fraudulent patentee was not entitled to his money, and that a repayment thereof was not a condition precedent to the cancellation of the patent. We are satisfied the same rule should be invoked in favor of these plaintiffs. The money paid by defendant being forfeited to the government by reason of his fraud, these plaintiffs should not be required to make it good. The labor and expense of prosecuting this action, necessarily entailed upon plaintiffs by defendant's fraudulent acts, may well be said to counterbal-



ance any such alleged claim of equity in his favor. For the foregoing reasons the judgment is affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

(121 Cal. 376)

EDWARDS v. WAGNER. (Sac. 245.)

(Supreme Court of California. July 1, 1898.)

GIFTS CAUSA MORTIS—DRAFTS—PASSING TITLE—DELIVERY.

1. Negotiable paper payable to order is the subject of a gift causa mortis, though it is not indorsed by the payee.

2. The title to a negotiable draft can be passed by mere delivery, since Civ. Code, § 1052, provides that a transfer may be made without writing in every case in which a writing is not expressly required by statute.

3. A judgment will not be reversed or a new trial granted for nonprejudicial error.

4. The presentation of a claim against an estate for services rendered the deceased does not preclude the right to claim certain drafts as a gift causa mortis from deceased; and the failure to prosecute the claim for services does not deprive the donee of setting up, as a defense to an action by the administrator to recover the drafts, that they were her property by virtue of such gift.

In bank. Appeal from superior court, San Joaquin county.

Action by Robert L. Edwards, as administrator, against Kate Wagner, to recover possession of two drafts. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Baldwin & Thompson and A. L. Levinsky, for appellant. W. S. Wright and J. B. Hall, for respondent.

HARRISON, J. Joseph B. Boody in his lifetime held two bills of exchange that had been drawn in his favor,—one by the York National Bank of Maine upon the Chemical National Bank of New York for \$500; and one by the Farmers' & Merchants' Bank of Stockton upon the National Bank of the Republic in New York, for \$300. He died, intestate, November 6, 1893; and the plaintiff, having been appointed administrator of his estate, brought the present action against the defendant to recover the possession of these drafts, alleging that she had taken them into her possession after the death of Boody. The defendant, in her answer, alleges that Boody in his lifetime transferred and delivered the drafts to her, and that they thereby became her property. The cause was tried by a jury, and a verdict rendered in favor of the defendant. From the judgment thereon and an order denying a new trial, the plaintiff has appealed.

The evidence before the jury was clear and convincing, and without any contradiction, that on the day of his death, and in evident contemplation thereof, Boody transferred and delivered the bills of exchange to the defendant, with the intention that they should be her property, and as a gift,

and that she so accepted them. These facts are not disputed by the appellant, but he contended that as the bills of exchange were made payable to the order of Boody, and were not indorsed by him, the title to them did not vest in the defendant, but remained in him at the time of his death, and to this effect the court below instructed the jury. The rule is well settled that the holder of negotiable paper, payable to his order, may negotiate the same by a mere delivery or indorsement, and the person to whom it is so negotiated acquires all the title thereto that his transferor had. It was always held that by such delivery the equitable title to the bill, and the right to recover its amount, would pass, although the legal title might remain in the payee, and, under the rules of procedure at the common law, the transferee be compelled to bring his action thereon in the name of the payee; but, under the rules of procedure prevailing in states which require an action to be brought in the name of the real party in interest, he may sue the maker in his own name. Story, Prom. Notes, § 120; Daniel, Neg. Inst. § 741; Davis v. Lane, 8 N. H. 224; Coombs v. Warren, 34 Me. 89; Holly v. Holly, 94 N. C. 670; Thompson v. Onley, 96 N. C. 9, 1 S. E. 620; Billings v. Jane, 11 Barb. 620; Van Riper v. Baldwin, 19 Hun, 344. See, also, 4 Am. & Eng. Enc. Law, 252. It is also well settled that negotiable paper payable to order is the subject of a donatio causa mortis, even though it is not indorsed by the payee. Druke v. Heiken, 61 Cal. 346; Vandro v. Roach, 73 Cal. 614, 15 Pac. 35. Civ. Code, § 1052, provides that a transfer may be made without writing in every case in which a writing is not expressly required by statute; and, as there is no requirement by statute that a negotiable promissory note can be transferred only by writing, its title can be passed by a delivery. The instruction to the contrary by the court was erroneous; but as the plaintiff failed to show any right to the bills of exchange, and as it clearly appeared that they became the property of the defendant prior to the death of Boody, the jury would not have been justified in rendering a verdict except in favor of the defendant, and their disregard of the instruction was without injury to the plaintiff. A judgment will not be reversed or a new trial granted for mere error when it clearly appears that the appellant has sustained no injury therefrom. See Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386.

The defendant was not precluded from claiming the drafts by reason of her presentation of a claim against the estate for services to the deceased; nor did her failure to prosecute that claim deprive her of her defense to the present action. The judgment and order are affirmed.

We concur: VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.

GAROUTTE, J. I add my special concurrence to the views of Mr. Justice HARRISON expressed in the foregoing opinion, for the reason that I have never considered as sound law the doctrine laid down in *Emerson v. Santa Clara Co.*, 40 Cal. 543.

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121 Cal. 362

CARPENTER v. JONES, Judge. (S. F. 1494.)

(Supreme Court of California. July 1, 1898.)  
STATUTES — REPEAL — PAYMENT OF JURY FEES — CIVIL "CASES."

1. Acts 1871-72, p. 188, providing, *inter alia*, that where, in a civil case, the jury is discharged without finding a verdict, the jury fees must be paid by the party demanding the jury before further proceedings shall be allowed in the action, is not repealed *ipso facto* by Civ. Code, § 20, providing that, "in all cases provided for by this Code," all statutes heretofore in force, whether consistent or not, unless expressly continued in force by it, are repealed, since there is no legislation in the Codes bearing on the subject of the first-named statute.

2. Nor is said provision of the statute repealed by implication by the general fee bill (Acts 1895, p. 267), providing as to fees payable to jurors, since the later act is not amendatory of the former act, and is not in conflict with any of the various subject-matters involved in the former act, except in regard to the provision as to the amount of fees payable to jurors, which it repeals.

3. Acts 1871-72, p. 188, relating to payment of jury fees in a civil "case" by a party as a condition to bringing other proceedings, embraces a trial arising on an application to revoke the probate of a will, though a special proceeding, since it is a civil "case," though not a civil "action."

In bank.

Petition by Clinton H. Carpenter against Edward B. Jones, as judge of the superior court of San Joaquin county, for a writ of mandate. Denied.

Elliott & Elliott and A. H. Carpenter, for petitioner. The Attorney General, for respondent.

GAROUTTE, J. This is an application for a writ of mandate to be directed to Edward I. Jones, judge of the superior court of the county of San Joaquin, requiring him to set a certain cause pending in said court for trial. The facts upon which the application is based are briefly these: One Bailey was the executor of the estate of C. W. Carpenter, deceased. This petitioner and others filed a petition and contest asking that the probate of the will of deceased be set aside, and that Bailey's letters testamentary be annulled and vacated. Upon the issues thus made the contestants demanded a jury trial, and upon such trial the jury failed to agree upon a verdict. These contestants thereupon demanded that the cause be placed upon the trial calendar to be set for a second trial. This application the court refused to grant until contestants paid the jury fees of the previous trial, and also the reporter's fees accruing at that trial. No law has been placed before us in any way justifying the court's action as based upon a nonpayment of the reporter's fees, and, under the circumstances, we assume the action of the court to that extent unjustified.

To support the action of the court as to the jurors' fees, the respondent relies upon an act of the legislature found in the



statutes of 1871-72, p. 188. That act, among other matters, provides: "If in any trial in a civil case the jury be for any cause discharged without finding a verdict, the fees of the jury shall be paid by the party who demanded the jury, but may be recovered as costs if he afterwards obtain judgment; and until they are paid no further proceedings shall be allowed in the action." It is contended upon the part of the petitioner that this act of the legislature was repealed ipso facto by the adoption of the Codes. To support this contention, that section of the various Codes is invoked which provides: "No statute, law or rule is continued in force because it is consistent with the provisions of this Code on the same subject; but in all cases provided for by this Code all statutes, laws and rules heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed or abrogated." Civ. Code, § 20. There is no legislation in any of the Codes bearing upon the matter covered by that portion of the act above quoted from the Statutes of 1871-72. And, there being an entire absence of legislation in the Codes upon the subject, that part of the act of 1871-72 is not repealed by the above law, invoked to accomplish that purpose. By that general provision the Codes only repealed existing statutes "in all cases provided for by this Code." The legislation before us embraces a "case" not provided for by "this Code."

The act of 1871-72 not being repealed by the Codes, has it been repealed by the legislature subsequent thereto? We find no law which accomplishes that result. In St. 1895, p. 267, there is found a general fee bill, which, among other matters, fixes the fees of trial jurors; and, if not repealed prior to the act of 1895, that portion of the act of 1871-72 fixing the fees of trial jurors was, by the act of 1895, undoubtedly repealed. But that act is in no sense an act amendatory of the act of 1871-72, and therefore does not repeal the earlier act by implication. Again, that portion of the act of 1871-72 here under consideration is not in conflict with any of the provisions of the act of 1895, and consequently there is no direct repeal of the earlier act. The act of 1871-72 embraces various subject-matters of legislation. The act of 1895 embraces one of these subject-matters of legislation. The later act not dealing with the subject-matter of legislation here under consideration, that subject-matter has all the vitality it ever had.

It is further contended by petitioner that a trial arising upon an application to revoke the probate of a will is a special proceeding, and therefore does not come within the provisions of the act of 1871-72, which deals with a trial in a "civil case." While it may be conceded that a special proceeding is not a civil action, and there are many authorities from this court to that effect (In re

Joseph's Estate, 118 Cal. 660, 50 Pac. 768), still it has never been decided that a special proceeding is not a "civil case." Especially is this true in those particular special proceedings where issues are made and trials authorized to be conducted as in civil actions. Under such circumstances the proceeding may well be termed a "civil case." Indeed, the law bearing upon the contest of the probate of wills has so christened it. "When a jury is demanded, the superior court must impanel a jury to try the case in the manner provided for impaneling trial juries in courts of record." If the proceeding be a "case," it certainly is a civil case. For the foregoing reasons the application for the writ is denied.

We concur: TEMPLE, J.; VAN FLEET, J.; McFARLAND, J.; HARRISON, J.; HENSHAW, J.

121 Cal. 365

REDLANDS, L. & C. DOMESTIC WATER CO. v. CITY OF REDLANDS et al.  
(L. A. 209.)

(Supreme Court of California. July 1, 1898.)

WATER COMPANIES—REASONABLENESS OF RATES—  
APPEAL—REVERSAL—PRESUMPTIONS.

1. The value of the property of a water company which is necessarily used in furnishing the water is the basis for determining the reasonableness of rates, and not its liabilities, and their reasonableness cannot be determined in the absence of evidence of such value.

2. Where an appeal is brought upon the judgment roll alone, a reversal will be conditioned on error appearing on the face of the judgment, or an erroneous consideration of the facts found, or error in making the findings of fact.

3. Where the evidence is not submitted, it will be presumed that it is sufficient to support the findings of fact.

In bank. Appeal from superior court, San Bernardino county.

Action by the Redlands, Lugonia & Crafton Domestic Water Company against the city of Redlands and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Bicknell & Trask, for appellant. C. C. Bennett, for respondents.

HARRISON, J. The plaintiff is engaged in furnishing water to the city of Redlands and its inhabitants for domestic purposes and for irrigation, and seeks by this action a judgment annulling the ordinance or resolution adopted by the board of trustees of that city, in February, 1895, fixing the rates to be charged or collected therefor during the year commencing July 1, 1895, and requiring the board to fix rates therefor "so as to assure an annual income to the plaintiff sufficient to pay the interest on its indebtedness, its running expenses, taxes, and to pay the plaintiff's stockholders a dividend of not less than 7 per cent. per annum upon the par value of said stock, and also sufficient to keep the works of said plaintiff used in business in repair." At the trial of the

cause, the court found that the plaintiff had expended the sum of \$314,000 in the acquisition of the plant used by it in so furnishing the water; that its capital stock is divided into 5,000 shares of the par value of \$100 each, of which 2,260 shares have been subscribed, and the full amount of \$226,000 paid to the plaintiff by the stockholders subscribing therefor; that the plaintiff has issued its bonds amounting to \$75,000, bearing interest at 7 per cent. per annum, payable semiannually, all of which are outstanding, and has also executed to various persons its promissory notes, amounting to \$19,000, and bearing a like rate of interest, but that it has bills receivable, bearing interest, so that the net amount of its annual interest is \$5,600; that the maximum amount of revenue from the rates fixed by the ordinance will yield to the plaintiff the sum of \$18,158.51, and the minimum amount of said revenue \$14,526.40; that the necessary expenditures to be made by it during said year will be as follows: Operating expenses, \$5,150; taxes, \$1,350; for maintenance and repairs, \$1,562.06. Upon these findings the court refused the plaintiff the relief it sought, and rendered judgment in favor of the defendants. From this judgment the plaintiff has appealed, bringing the appeal upon the judgment roll alone without any bill of exceptions.

Many of the questions involved in this appeal are considered in the case of *San Diego Water Co. v. City of San Diego*, 118 Cal. 556, 50 Pac. 633, and the propositions then determined are applicable to the present case. It was held in that case by a majority of the court that, for the purpose of fixing the rates to be charged or collected for furnishing water to the inhabitants of a city, provision should not be made for the bonded or other indebtedness of the company, or of the interest thereon; that the rates should be the same whether the works are acquired or constructed by the company from its own resources, or with money borrowed from others; that the value of the property which is necessarily used in furnishing the water is the basis upon which to determine the amount of revenue to be provided by the ordinance fixing the rates; and that, while the cost of the plant is an element proper to be considered in determining its value, it is not conclusive thereof. Since the decision of that case, the supreme court of the United States has decided the case of *Smyth v. Ames*, 169 U. S., 466, 18 Sup. Ct. 888; and in the opinion rendered by it this subject received further consideration. The question there presented was the reasonableness of the rates that had been fixed by the state of Nebraska for transportation by railroads; and the court held that "the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by

it for the convenience of the public." Under the principles determined by these cases, the amount of the capital stock paid in to the plaintiff by its stockholders, as well as the amount of its bonded and floating indebtedness, and the interest payable thereon, become immaterial factors in the question. In the case last cited, the court, in considering the principles to be observed in determining the reasonableness of the rates of compensation that had been fixed, said: "It cannot be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. \* \* \* What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." In *Turnpike Co. v. Sandford*, 164 U. S., 578, 17 Sup. Ct. 198, the same court had previously held that an act fixing rates could not be declared unconstitutional merely because under its provisions the company could not earn more than 4 per cent. on its capital stock, and what it then said upon this subject is repeated in the later case of *Smyth v. Ames*, and is pertinent to certain allegations of the complaint herein, viz.: "It cannot be said that a corporation is entitled as of right, and without reference to the interests of the public, to realize a given per cent. upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders, but that involves an inquiry as to what is reasonable and just for the public. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them, which the constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike, upon payment of such tolls as, in view of the nature and value of the services rendered by the company, are



reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable. \* \* \* The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature when exerting its general powers is that it receive what under all the circumstances is such compensation for the use of its property as will be just both to it and to the public."

To authorize a reversal of the judgment appealed from, it is incumbent upon the appellant to show that the judgment is erroneous upon its face, or that the superior court either gave an erroneous consideration to the facts found by it, or committed some error in making its finding of those facts. As the evidence upon which the facts are found is not before us, we must assume that it fully supports the findings of fact. The ordinance of the board of trustees which the plaintiff seeks to annul was regularly adopted, and is in proper form, and whatever grounds there may be for asserting its invalidity must be shown by extrinsic facts. It was therefore incumbent upon the plaintiff to present to the superior court, and to have incorporated into the record upon this appeal, the facts upon which it would claim such invalidity. The invalidity urged by it is that the rates fixed thereby will not yield a reasonable compensation for its service, in addition to the amount necessary to be expended by it in performing the service. But, as the value of the plant is the basis upon which the court was to determine the sufficiency of the compensation, it was essential to present that fact to the court before the plaintiff was entitled to a judgment that the rates are unreasonable.

The court finds that the operating expenses, taxes, and cost of maintenance and repairs to be incurred by the plaintiff during the year amount to \$8,062.06. Deducting this sum from the minimum amount of revenue which the rates will yield, the plaintiff will receive a net income of \$6,464.34, while the maximum amount of this revenue would yield a net income of \$10,096.45. As the value of the plant is an essential element in determining whether either of these amounts will be a reasonable compensation to the plaintiff for its services, and as there was no averment or showing upon this point before the superior court, we cannot say that it appears from the record that the rates fixed by the ordinance will not yield a fair compensation, or that the court erred in refusing to the plaintiff the relief it asked. It cannot be determined as a matter of fact what portion of the maximum amount of this revenue the plaintiff will receive, nor can it be said as a matter of law that it is entitled to receive the maximum amount of whatever rates may be fixed. Neither can it be stated as a proposition of law that the amount which the court finds that it will in either instance receive in excess of the above expenditures is not a fair compensation for its service. As

we have before seen, the amount of income it is entitled to receive is not to be determined by merely considering the value of the property used in rendering the service; but the value of the service which the public receives is also an element to be determined in considering whether the rates are reasonable. The supreme court of the United States said in *Turnpike Co. v. Sandford*, supra: "Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are as an entirety so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law." The record herein fails to show that the court did not give proper consideration to all the elements forming the plaintiff's right to any greater compensation for its service than it will receive from the rates fixed by the board of trustees, and we cannot say that the court erred in refusing to annul the ordinance. The judgment is affirmed.

We concur: GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.

I concur in the judgment: VAN FLEET, J.

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making punishable an attempt to corruptly influence a juror, or one drawn as a juror, by means of any paper exhibited otherwise than in the regular course of proceedings.

4. An attorney may be disbarred where transactions in which he was not employed professionally show him to be so wanting in integrity that the legal business of others cannot be safely intrusted to him.

In bank. An application was made at the instance of the Bar Association of San Francisco to disbar Edgar B. Haymond. Accusation dismissed.

William Fifield, for Bar Ass'n. Crittenden Thornton, for respondent.

TEMPLE, J. Application at the instance of the Bar Association of San Francisco. It is charged that the accused has violated his oath of office and his duty as an attorney, in that he has failed to maintain the respect due to the courts of justice, and has not discharged his duty as an attorney and counselor to the best of his ability. It is recited that one Albert F. G. Veresenecock-hoff was being tried in department 12 of the superior court of the city and county of San Francisco upon a charge of the crime of murder. He was being defended by three counsel, one of whom was B. W. McIntosh, Esq., who had been duly admitted to practice law. Several days were occupied in impaneling a jury, during which time, though some jurors had been accepted and sworn, the panel was incomplete. The Daily Examiner was a newspaper published daily in San Francisco, and was a paper of general circulation in the city, and likely to be read by the judge and jury which were engaged in said trial. During the trial, and while McIntosh was defending the said defendant, he informed respondent that Veresenecockhoff had been approached by a representative of the Examiner, and offered \$10,000 for a confession of guilt on the part of the said defendant, to be published while the trial was pending. Respondent did not believe such a price had been offered, but thought such a confession could be sold to the newspaper for \$2,000 or \$3,000. "Thereupon respondent and McIntosh entered into a scheme, whereby said McIntosh should procure a confession of guilt from his client, the said Albert Hoff, and the respondent should negotiate, or attempt to negotiate, a sale thereof for money to the said Daily Examiner for publication in said newspaper while said trial was in progress." The next day McIntosh procured what purported to be such a confession, and which respondent believed to be such. Respondent undertook to attempt a sale of it to the newspaper for \$2,000, to be published while the trial was in progress. The respondent accepted the employment, and attempted to effect a sale, but failed to do so. During the negotiations the respondent was informed that the Daily Examiner would purchase no confession "unless it were

121 Cal. 385

In re HAYMOND. (Cr. 436.)

(Supreme Court of California. July 6, 1898.)

DISBARMENT OF ATTORNEY—EVIDENCE—GROUNDS.

1. An accusation charging an attorney with conspiring with the attorney for a defendant accused of murder to sell to a newspaper, during the trial, a confession from defendant, to be procured by his attorney, and attempting to sell a purported confession, which he said he could have attested by the district attorney and the judge, is not sufficient to disbar him.

2. An accusation against an attorney in disbarment proceedings is in the nature of a criminal charge, and all intendments are in favor of the accused.

3. Conspiring with the attorney of one charged with murder to publish, during the trial, a confession of defendant secured by his attorney, is not an offense under Pen. Code, § 95,

hedged about with all the formalities of law, attested by the district attorney and a judge of the superior court, to which the respondent replied that he (respondent) was authorized to comply with such conditions." Respondent was then informed that the Examiner would pay \$750, and no more. This closed the negotiations. So far as appears, Haymond never did receive the confession, and certainly did not sell it, or cause it to be published. Although Haymond never did receive or sell a confession,—and, so far as appears, no confession was ever made,—the fact that he attempted to make such a sale was published during the said trial in all the daily newspapers published in the city and county of San Francisco. No doubt such publication tended to some extent to embarrass the court in the trial. Such a publication was not intended by the respondent. No answer has been made by the accused, but the matter was presented on demurrer. The committee insist with the greatest earnestness upon the charge that the accused offered to sell the confession, and agreed that it should be attested by the district attorney and a judge of the superior court, as a ground for expulsion. They say: "It amounts to saying that the district attorney and a judge of the superior court will attest or certify a confession of guilt of the man on trial for his life, which is to be then sold to a newspaper for publication while the trial is going on. A more gross imputation upon a court or judge cannot be imagined." In this they charge respondent failed to maintain the respect due to courts and judicial officers. This accusation is in the nature of a criminal charge, and all intendments are in favor of the accused. The accusation is not sufficient if, all its statements being true, the accused could be innocent. It does not appear, and is not charged, that Haymond offered to procure such a certificate, or asserted that he could do so. It is simply charged that a representative of the Examiner demanded such a confession, and that Haymond was willing to comply with the condition. A construction favorable to innocence must be given to this, if possible; and I think it naturally indicates no more than that Haymond and his principal were willing. This charge cannot, therefore, be sustained.

The most plausible ground upon which a disbarment is asked, in my opinion, is that respondent entered into a scheme or conspiracy with McIntosh, in which the latter was to do an act violative of his duty to his client and to the court. They were to publish a confession which would increase the difficulty of the court to get a jury, and would also be placing before jurors already sworn evidence not introduced at the trial and in court. It is contended that this would be violative of section 95 of the Penal Code. But, plainly, other facts would have to be

shown in addition to those already alleged to bring the case within that section. It would certainly be unprofessional for one engaged to defend a person accused of crime to attempt to get evidence before a jury in that mode, whether it were favorable or not. And it would constitute a gross violation of his duty to his client to publish in that mode evidence which would be injurious to his client. It must be remembered, however, that Haymond was not an attorney in this case, that he was not acting as an attorney and was not employed because of his professional character. True, if the transaction showed him to be so wanting in integrity that the legal business of others cannot be safely intrusted to him, he should be disbarred. But not every reprehensible transaction will be ground for disbarring an attorney. This matter was very thoroughly considered in *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, and particularly in the dissenting opinion of Justice Field. Upon this general proposition I do not understand that there was a difference in that case. All agreed that an attorney could be disbarred, not only for professional misconduct, but for such misconduct outside of his profession as shows want of integrity and trustworthiness. But Justice Field contended that when the alleged misconduct involved the commission of a public offense, for which the attorney might be prosecuted criminally, that respondent should not be required to make any answer by which he might criminate himself, and that he could not be disbarred for an act constituting a crime involving moral turpitude, but outside of his professional duty, until he had been tried and convicted. Does the accusation charge the respondent with an offense involving such moral delinquency as would affect his trustworthiness as an attorney? It certainly was not wrong for Haymond to receive the confession of Vereseneckockhoff—sometimes called Hoff—if no inducements or threats were used to obtain it. Having it, no law would prevent him from publishing it. It might have made it more difficult to obtain a jury. But so does every publication of the evidence that a crime has been committed. Yet newspapers are permitted to publish such news. I see no more objection to the publication by Haymond than by a daily newspaper.

The accusation does not show a conspiracy to procure a confession from Hoff. Haymond's first connection with the affair is upon the proposition that Hoff desired to make it. We are not at liberty to suppose that it was obtained by dishonest practices, or that Haymond knew that a defense was being made which was inconsistent with the confession. There is no such charge in the accusation, and our present knowledge as to what defense was made is not to be attributed to Haymond. Suppose Hoff was defended by honest and able counsel, as we



must presume he was, and that upon a full statement of his case, and a consideration of the evidence, he had been advised, and himself believed, that he had no defense except the plea of insanity. Suppose his line of defense had been fully determined upon, and also that it involved a full admission of the fact of the homicide. Upon that supposition, it would be difficult to specify what there was wrong in the conduct of the respondent. True, most attorneys would scorn to act as brokers in such a case. But we are not trying questions of taste. It is true, no such facts are stated in the accusation, but the question on demurrer is, does the accusation negative the possibility of innocence? And then we are not to attribute knowledge to the accused of the wrong on the part of McIntosh unless it is so averred. Why should we presume that Hoff had been imposed upon, or that the alleged confession was bogus, or that its publication would interfere with any defense that would be made; or, if all these possible facts were true, that Haymond knew of them? It is always an unpleasant thing to disbar an attorney. The committee have stated their reluctance to move in the matter. They have presented their views fairly, and with malice to none. And, although convinced that the charge should not be sustained, I think the committee deserve the gratitude of the courts and of the profession for the manner in which they have performed their unpleasant duty. The accusation is dismissed.

We concur: BEATTY, C. J.; HARRISON, J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.; GAROUTTE, J.

(121 Cal. 317)

PERKINS v. FISH et al. (S. F. 958)<sup>1</sup>

(Supreme Court of California. June 30, 1898.)

APPEAL—OBJECTIONS WAIVED—INSURANCE COMPANY—LIABILITY OF OFFICERS—FRAUD.

1. After plaintiff introduced a large amount of evidence, defendant suggested that, as there were more than 100 causes of action requiring evidence, it then be determined whether plaintiff's evidence in the causes already tried would warrant the expenditure of time necessary to hearing all causes of action. Thereupon, by consent of plaintiff, argument was had on the case as it stood. Defendant objecting to introduction of other evidence, the objection was sustained. It did not appear that plaintiff desired to introduce other evidence. *Held*, that plaintiff's consent concluded him from objecting that the court stopped the introduction of further evidence.

2. The agents and directors of a co-operative life insurance society chosen by the members of the society to conduct its affairs cannot, in the absence of fraud, be held responsible by a member after the insolvency of the society for money paid to the society, and paid out by it under its articles and rules.

3. Where the directors of a co-operative life insurance society honestly believe it to be incorporated, and so represent it, such a representation is not fraudulent, although the society be not legally incorporated.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Daniel H. Perkins against Charles H. Fish and others. From a judgment for defendants, plaintiff appeals. Affirmed.

T. C. Spelling (Reddy, Campbell & Metson, of counsel), for appellant. Chickering, Thomas & Gregory and Edward R. Taylor, for respondents.

CHIPMAN, C. This action is brought to recover the sum of \$83,704.15, alleged to have been paid by plaintiff and his assignors to defendants while acting as the agents and managers of the so-called "Home Benefit Life Association." Defendants had judgment, from which this appeal is prosecuted on bill of exceptions. The cause was tried by the court without a jury. Plaintiff introduced a large amount of testimony, oral and documentary, covering over 450 folios of the printed transcript. The bill of exceptions then contains a statement as follows: "At this point it was suggested to the court by counsel for the defendants that as there were more than one hundred causes of action, each one of which would require evidence on the part of plaintiff to sustain it, that it might be well to determine at this stage whether or not it was advisable to further proceed in the trial until ascertaining whether plaintiff had made such proof on the causes of action already tried as would warrant the consumption of time necessary to hearing all the causes of action. Thereupon, plaintiff's counsel assenting thereto, argument was had by counsel on both sides of the case as presented; the counsel for defendants, in order to get the matter properly before the court, then and there objecting to the introduction of any further evidence; and on the 31st day of August, 1896, the court filed and caused to be filed in said action, and entered in the minutes of said court, an order in words and figures following, to wit: 'The objection of defendants to the introduction of any further evidence is sustained, and the action is ordered dismissed,'—to which order and ruling of the court plaintiff by his attorney then and there objected and duly excepted."

1. It is now claimed as error that the court stopped the introduction of any further evidence by plaintiff, and ordered a judgment of dismissal. The record discloses no formal motion for nonsuit by defendants, nor does it show that plaintiff had other testimony to offer, or desired to offer other testimony, either before argument upon defendant's suggestion, or after the ruling of the court; nor did plaintiff assign any reasons for objecting to the order. The situation is anomalous, and yet we do not think the court erred in acting on the suggestion as though plaintiff had closed his testimony, and was willing

<sup>1</sup> Rehearing denied.

to have the court pass upon its sufficiency to support the complaint. Whether the court rightly decided the merits of the case as presented is another question presently to be noticed. We concur with plaintiff that where there is a good cause of action stated, as the court here must have held there was in overruling the demurrers, the plaintiff cannot be arbitrarily stopped against his consent in the midst of the introduction of admissible evidence in support of his allegations. No appellate court ever laid down a rule that would thus leave litigants at the mercy of trial courts. Nor do we think the trial court in this case did any such thing. It is manifest from the record, we think, that counsel and court all proceeded upon the understanding that the court might, upon the evidence as it then stood, determine the merits of plaintiff's case. Plaintiff's consent must be held to conclude him; and to hold otherwise would be to hold that plaintiff intentionally led the court into the commission of the error of which he now seeks to take advantage. We are unwilling to impute to counsel for plaintiff any such motive. The cases cited in relation to nonsuiting a plaintiff before concluding his evidence, or upon an opening statement, are not in point.

2. The theory upon which the complaint proceeds is that this association was never legally incorporated, for the reason that there was no statute law authorizing its organization as a corporate body. It is claimed that the association never became even a *de facto* corporation, because it failed to do the acts required by section 437 et seq. of the Civil Code; and that defendants, in assuming to form a so-called "corporation," as they undertook to form it, acted wholly outside any statutory permission or authority, and their efforts were utterly abortive and void. It is claimed that plaintiff (and plaintiff's assignors) paid to defendants at sundry times certain sums of money, induced thereto by the false and fraudulent representations of defendants, and under the belief, willfully and falsely engendered and created by defendants, that the association was a legal corporation organized under the laws of the state. It is hence contended that defendants became and are individually liable for the money thus received by them. Defendants claim to have organized the corporation under the provisions of section 593 of the Civil Code and the sections immediately following; that section 451 of the same Code was in force at the date of the organization by which the corporation thus formed was declared not to be an insurance company in the sense and meaning of the insurance laws of this state, as set forth in section 437, *supra*, et seq., and was exempt from the provisions of all existing insurance laws of the state; and that, if any doubt existed theretofore, it was entirely removed by the act of March 19, 1891 (St. 1891, p. 126), and particularly section 3 of that act, which, it is claimed, validated the said corporation, and

recognized its existence as a legal corporate body.

The questions involved in these conflicting contentions are numerous, and lead into a very wide field of corporation law, where the decisions are not by any means harmonious. From the view we have taken of the case, we do not find it necessary to follow counsel in their somewhat extended excursion. The evidence shows that defendants formed a corporation whose declared purposes and objects were both lawful and commendable; and it is not questioned that the articles of incorporation were in due form in all respects. The articles declared: "That the purposes for which it is formed are to associate together persons for the purpose of equalizing the risk of death, and to pay to the nominees of such members as may die stipulated sums of money, to be collected from surviving members upon the assessment or co-operative plan; to do any and everything requisite, necessary, or convenient for accomplishing the said purpose." Immediately upon filing certified copy of the articles with the secretary of state, officers were elected, by-laws adopted, and circulars containing the same, in which a full statement of the plan upon which the business of insuring the lives of members was to be conducted was embodied, as well as other forms of advertising literature, giving the names of the officers and directors, were given broadcast to the public and intending members. It was clearly stated in the articles and appeared in many of these documents what were the purposes and objects; that the company had no capital stock, and was not organized for profit; that the cost of the insurance was to be met by assessments, and these would depend upon the number of deaths and the age of the insured; that the directors were to be chosen by the members, and had the management of the affairs of the corporation. The members were kept informed from time to time by printed annual statements of the business affairs of the company, and they had access to its books at all times. A similar organization was formed in 1880, of which the present corporation was spoken of as a re-incorporation. The tenth annual statement for 1890 showed as follows:

Total income .....	\$804,747 07
Death losses paid.....	\$575,000 00
Expenses, including salaries, commissions, advertising, and all other items .....	178,021 14
Reserved fund in bank.....	41,713 01
Cash in bank.....	10,012 92
	<hr/> \$804,747 07

This income was paid to the corporation by members by way of assessments to meet losses accruing by the death of members and for expenses. It was paid out by the corporation for these purposes in accordance with its plan, and pursuant to the direction of its governing board of directors who were chosen by the members. The directors were themselves



members, and paid their assessments as did others. They received no compensation except a small sum for per diem attendance at each regular meeting, and pay for actual services rendered in any other special capacity. They derived no benefit, with this exception, different from any other member. The money was all paid to the treasurer, and deposited in bank, and paid out only upon proper vouchers. The directors personally handled no money of the corporation. The certificate of membership issued to each member was signed and assented to by him, and it made the by-laws a part of the contract of membership, and they were printed on the back thereof. Plaintiff testified that a policy was issued to him in 1880, and he paid assessments until 1894, having twice renewed his membership after reincorporation in 1885. It appears that the association continued business up to 1893, when it found itself unable to go on owing to the falling off of membership and lack of funds, and passed into the hands of a receiver.

Conceding that there was neither a *de jure* nor a *de facto* corporation behind these defendants, which is the most favorable view for plaintiff, we cannot see upon what principle plaintiff should be permitted, in the absence of fraud on the part of defendants, to recover back money voluntarily paid by him to an association of which he was a co-equal member. The allegation of the complaint is that he paid the money to defendants; but the evidence is that the contract of membership was with the association as such, and that the defendants personally neither received nor handled any of the money, and that it was paid to the association, and disbursed by the association as such. It was paid in and paid out under articles of association and rules and regulations framed by plaintiff and other members, or assented to by them in advance of any payment by them; and they must be held to be bound by their own acts. Whether the association be regarded as a partnership, a joint-stock company, or a voluntary association, its promise to insure the lives of its members imported a good consideration; and the defendants, as the chosen agents of the members, in causing the association to enter into such contracts, cannot be held liable for duties honestly and faithfully performed.

Plaintiff cannot now be heard to say that his money was improvidently invested or illegally paid out. It would, we think, be a perversion of law to hold that after doing business for several years in the way this was done, and after having paid out large sums of money for death losses and necessary expenses, the members who had the good fortune to survive the enterprise could, upon the insolvency of their association, or its inability to continue business, compel their directors and immediate agents to pay back to them out of their own pockets what the members had themselves caused to be disbursed for losses and expenses. We think this is so

obviously the just view of the matter as to make the citation of authorities superfluous.

The only ground upon which, in our judgment, plaintiff could recover is the alleged ground of fraud. The gravamen of the charge is that defendants falsely represented that the Home Benefit Life Association was a legally organized corporation, and was authorized to do business as such. The particulars in which it is alleged that the representations were false consisted in the failure of the association to have any capital stock or guaranty fund, and its failure in other respects to comply with the provisions of the Civil Code (section 437 et seq.). It is only by inference that defendants are charged with representing that this was such a corporation as is contemplated by these sections. The evidence is that they never represented that the corporation had any capital stock or reserved fund. On the contrary, all the representations were that there was no capital stock, and that the organization was not formed for profit. The scheme set forth in the published circulars and in the articles contemplated such a corporation as is provided for in the sections under which defendants claimed to be operating. A comparison of these sections of the Code with 437 et seq. will disclose an essential difference in the two plans of insurance. Sections 437 et seq. contemplate a "mutual insurance" corporation, with a paid-up capital of not less than \$100,000, with a guaranty fund of not less than \$250,000. In the other case, where the purpose is "mutual insurance on the assessment plan," and the corporation is formed not for profit, no capital or capital stock was required, and no guaranty fund, except by the act of 1891 a deposit of \$5,000 was required to be paid in by not less than 200 members. However, the evidence shows that the directors organized the corporation and conducted its affairs in the honest belief that the association was legally formed. Whatever was done, and the manner in which it was done, was made known to the members; and they were in possession of all the facts as completely as were the directors. There is no evidence of any misrepresentation of facts such as could have misled persons to become members. The directors did represent that the association was a corporation organized under the laws of California, and they so believed. If the association was not a corporation, it was a mistake of law upon the part of all the members for which the courts afford no relief to them. If in fact it was a mistake of law (which we do not think necessary to decide), it was shared in by the defendants at the beginning, and also by the secretary of state, and by all the members, for the consequences of which defendants are not liable. We do not attach any importance to the evidence of plaintiff as to what he thought was the character of the corporation, or what he supposed the

directors were doing. They are not more responsible for his misconceptions of law than they were for their own honest beliefs. Nor do we attach importance to the evidence of plaintiff and his assignors that if they had not believed the corporation to be legal, and that it had a guaranty fund, and had capital stock, and if they had not had faith in the directors as men of wealth and honor and high standing, they would not have become members. They knew all about the corporation, or had that means of knowledge, which is the equivalent of knowledge. They dealt with the association as a corporation, and were bound to take notice of the articles as well as the statutes of the state. *Mor. Priv. Corp.* § 591. The certificates of membership showed on their face the very contrary to what some of the witnesses testified they understood to be the fact. There is absolutely no evidence from which the court could find fraud either in the organization of the corporation or in the conduct of its affairs. With all this knowledge and means of knowledge, plaintiff continued to be a member, paying assessments and receiving statements until the company failed, and must be held to have acquiesced in the acts of which he now complains. *Id.* § 630 et seq. *Mr. Justice Brewer, in Coal Co. v. Maxwell*, 22 Fed. 197, said: "Where persons knowingly and fraudulently assume a corporate existence, or pretend to have a corporate existence, they can be held liable as individuals; but where they are acting in good faith, and suppose that they are stockholders in a valid corporation, and where the corporation assumes to transact business for a number of years, and the assumed corporate existence is not challenged by the state, then they cannot be held liable as individuals." *Mor. Priv. Corp.* § 748. The principle that shields the members from the claims of persons dealing with the corporation under such circumstances is equally efficacious to protect the members as between themselves. There being no fraud shown to have been committed by defendants, the members were all parties to whatever was done, and stood in equal relations to all the facts. Neither should now be permitted to take advantage of his own wrong; and, so far as any wrong was done, the members were in *pari delicto*.

The essential inequity of this action lies in the undisputed fact that plaintiff and his assignors knowingly and advisedly contributed from time to time for several years to the payment of large sums for mutual insurance through agents of their own selection. They stood by all this time, and saw this money paid out for death losses and expenses, and at no time called in question the legality of the proceedings under which this was done; and, now that the association can no longer continue business, they seek to establish a rule by which to compel ten of their number to restore to the other four or five hundred the money they paid in, and

which has been paid out upon contracts and under regulations to which they were themselves willing parties. There is, in our opinion, no principle of law or equity warranting any such claim. The errors alleged to have occurred during the course of the trial do not seem to call for special comment. The judgment and order should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

121 Cal. 347

GARTON v. STERN et al. (L. A. 408.)

(Supreme Court of California. July 1, 1898.)

NEW TRIAL—WHEN PROPER—APPEAL—REVIEW—  
FRAUDULENT CONVEYANCES—EVIDENCE.

1. It is the province of the superior judge, on motion for a new trial, to inquire into the sufficiency of the evidence to support the verdict, and, if insufficient, to grant a new trial, whether the original trial was held before him or not.

2. Where a new trial was granted by a judge other than the one who tried the case, on the ground that the evidence was insufficient to support the verdict, and such evidence was conflicting, the ruling will not be disturbed on appeal.

3. Where both buyer and seller testified to lack of knowledge on the buyer's part of the seller's fraudulent purpose in selling a stock of merchandise, or of her insolvency, and though the fact of a sale of the entire stock tended to throw suspicion on the transaction, and the seller had for several months offered to sell the goods to the buyer and others, it was not an abuse of discretion to grant a new trial on the ground that a finding that the buyer had reasonable cause to know of the fraud was unwarranted.

Department 2. Appeal from superior court, Orange county.

Action by Charles N. Garton, assignee, against Jacob Stern and another. There was a judgment for plaintiff, and from an order granting a new trial, on motion of defendants, plaintiff appeals. Affirmed.

L. M. Graff and J. G. Scarborough, for appellant. Max Loewenthal, for respondents.

McFARLAND, J. This is an appeal by plaintiff from an order granting a new trial, made on motion of defendants. The action was brought by the appellant, as assignee of Mrs. E. M. Sprague, an insolvent debtor, to recover certain goods alleged to have been sold by the insolvent to the respondents for the purpose of hindering and delaying her creditors, etc. The court below, in the first instance, rendered a judgment for the plaintiff, and upon defendant's motion for a new trial the same was granted by the court while a superior judge other than the one who originally tried the case was presiding. The motion for a new trial was made upon various grounds, and, among others, that the evidence was insufficient to



support certain findings of the court; and it incidentally appears from the opinion of the judge of the court below who granted the motion, which opinion appears in the brief of the respondents, that the motion was granted mainly upon the ground that the evidence was insufficient to justify the seventh finding that, at the time of the sale, the defendants had reasonable cause to believe that the said Sprague was insolvent, and reasonable cause to believe that the transfer was made with a view to preventing her property from coming to her assignee in insolvency, etc. It is the province of the trial judge, upon motion for a new trial, to inquire into the sufficiency of the evidence upon which a verdict or finding was found, and it is his duty to grant a new trial when, in his judgment, the evidence was insufficient to support the decision; and his power and duty in the premises are not affected by the fact that the original trial was not had before him. And when there is an appeal here from an order granting a new trial, upon such grounds, the question presents the same aspect as that which would be presented upon an appeal from the original judgment. In either case the ruling of the trial court will not be disturbed here, if there was a fair and substantial conflict of evidence on the issue involved. In *Jones v. Sanders*, 103 Cal. 678, 37 Pac. 649, the decision has been made by one judge, and a motion for a new trial, upon the ground that the findings were not justified by the evidence, had been granted by another; and it was there claimed that the findings of the first judge should be treated as conclusive. But this court said: "We do not understand this to be the rule applicable to a case like this. It is true that this court will not review findings where there is a substantial conflict in the evidence, but it has been repeatedly held that upon motion for a new trial it is the duty of the trial court to examine the evidence, even though it be conflicting, and, if dissatisfied with the conclusion reached, to grant a new trial. And the rule is the same whether the motion is heard by the judge who tried the case, or by some other judge, whose only knowledge of the facts is obtained from the record." Cases cited. In the case at bar there is certainly a substantial conflict of evidence as to the point above cited, on which the judge who granted the new trial mainly based his decision. Counsel for appellant very vigorously and strongly argues that the evidence was sufficient to support the findings, but it cannot be said that there was no substantial evidence against the correctness of that finding. It is sufficient to point out, for instance, that the defendants themselves positively swore that they had no knowledge that there was any intent upon the part of the insolvent to hinder her creditors by making the sale, or that they knew of her insolvency, and the insolvent herself testifies to the same

thing. The fact that there was sold at the time all of the small stock of goods which the insolvent had was undoubtedly a fact tending to show to the buyers that there was something suspicious about the sale; but, on the other hand, it was shown that these goods had been continuously offered for sale for three months before the occasion on which they were sold; that the insolvent had offered them for sale during that time to the respondents, who had made a standing offer of a certain amount of money for them, and that they had been offered to others, preceding that time, for sale. These are some of the facts which appeared in the case, and, under these circumstances, we cannot certainly say that there was so little evidence in favor of the decision of the court below as to make it apparent that there was a gross abuse of discretion. The order appealed from is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

121 Cal. 350

WITTER v. MISSION SCHOOL DIST. et al.  
(L. A. 275.)

(Supreme Court of California. July 1, 1898.)

STREET IMPROVEMENTS—ASSESSMENT OF SCHOOL LANDS.

Land belonging to school districts is only liable to assessment for street improvement when not used for school purposes, and a complaint seeking to subject such land to an assessment must allege that it was not so used.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county.

Action by W. G. Witter against the Mission school district and others. From a judgment sustaining a demurrer to plaintiff's complaint, he appeals. Affirmed.

G. F. Witter, Jr., for appellant. W. H. Spencer, for respondents.

CHIPMAN, C. Action to enforce payment of assessment for constructing a sidewalk in front of certain lots in the city of San Luis Obispo, of which defendant Mission school district is alleged to be the owner in fee. Judgment passed for defendants on demurrer to the sufficiency of facts alleged, from which this appeal is prosecuted. The complaint does not show whether the lots in question were or were not used by the district for school purposes, nor that any provision was made by the district for the payment of the debt out of its funds raised during the year the debt was created. The only question presented by appellant is whether these lots were subject to assessments under the act of March 31, 1891 (St. 1891, p. 196). The act makes no exception as to owners or lots. The distinction between the term "assessment" and the term "taxation" was clearly pointed out in *City of San Diego v. Linda Vista Irr. Dist.*, 108

Cal. 189, 41 Pac. 291; and it was there shown that there might be exemption from "taxation," under the constitution and the provisions of the Political Code (section 3607), where there would not necessarily be exemption from "assessments" of lands. Appellant relies upon this distinction and upon this case to support his claim. It was held in *Mayrhofer v. Board*, 89 Cal. 110, 26 Pac. 646, that the term "any building," in the mechanics' lien law, did not include a public schoolhouse. In *Whittaker v. Tuolumne Co.*, 96 Cal. 100, 30 Pac. 1016, it was held that the word "person," used in section 1050, Code Civ. Proc., giving a right of action in a certain case, did not include a county or authorize it to be sued. In *Skelly v. School Dist.*, 103 Cal. 652, 37 Pac. 643, it was held that, while a school district may be a "person," within the meaning of subdivision 5, § 542, Code Civ. Proc., it could not be garnished, "because laws made primarily to provide for individual rights will not be presumed to include the state when the effect might be to authorize a suit against the state, or embarrass it in the discharge of its functions." The principle of construction was stated in *Mayrhofer v. Board*, supra, to be "that the state is not bound by general words in a statute, which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it."

The proceeding here is to foreclose the lien of plaintiff on the property of a school district, and, in default of payment, to sell the property. If this property is used for school purposes, the inevitable result would be to injuriously affect the capacity of the district to perform its functions, quite as effectually as by the foreclosure of a mechanic's lien as was attempted in *Mayrhofer v. Board*, supra. In the case of *City of San Diego v. Linda Vista Irr. Dist.*, supra, the lands were alleged to be pueblo lands of the city of San Diego, and were "vacant, unoccupied, and uncultivated agricultural lands, susceptible to cultivation, and would be largely benefited by irrigation; that they could not and cannot be profitably cultivated without irrigation, and are practically valueless for any other uses than agricultural and horticultural"; and that they were held and devoted to the private uses of the city, and were not incidental to the performance of any public or municipal function. A demurrer was sustained in the lower court, but the judgment was reversed on appeal. No such state of facts appears in the complaint here. So far as shown, the lots in question may have school buildings upon them, and may be used and occupied exclusively for school purposes, in which case we do not think this action could be maintained. As a private owner, however, of land not used exclusively for school purposes, but held as an investment, or from

which to derive rentals, as property of an individual is held and owned, we see no reason why the lands of a school district should not be assessed for improvements the same as those of any other private owner. But we think, as land belonging to school districts is liable for such assessments only when it is not used for school purposes, the complaint should allege the facts necessary to bring the case within the exception. This it failed to do, and as plaintiff did not ask leave to amend in the court below, and does not suggest now that he can amend in the particular referred to, the judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

121 Cal. 353

In re MILLER'S ESTATE. (S. F. 1,203.)

(Supreme Court of California. July 1, 1898.)

#### WIDOW'S ALLOWANCE—LIFE INSURANCE.

Under Code Civ. Proc. § 690, providing that the life insurance of a debtor is exempt from execution where the annual premiums paid do not exceed \$500, and section 1465, providing that the court may set apart to the surviving wife of a decedent all property exempt from execution, the court may set apart decedent's life insurance to the widow, where the annual premiums paid do not exceed \$500, and where the insurance was payable to decedent's executors or administrators.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

In the matter of the estate of Samuel Miller, deceased. Appeal from an order setting apart property to the widow of deceased. Affirmed.

E. C. Chapman and E. Ames, for appellant. C. S. Barkeford and J. K. Johnson, for respondent.

TEMPLE, J. This is an appeal from an order setting apart property to the widow of deceased as exempt from execution. The facts appear in the petition of the widow for the order, all of which are admitted by the demurrer. No answer was filed or evidence taken at the hearing. Samuel Miller died in 1896, intestate, and Lillian Miller was appointed administratrix, December 14, 1896, and duly qualified. An inventory and appraisalment was filed March 15, 1897. It is averred that the administratrix has received \$5,000 on account of a policy of insurance on the life of Samuel Miller, deceased, dated February 22, 1888, and payable, by its terms, to the executors or administrators of the insured. The annual premiums did not exceed the sum of \$500. The heirs at law of decedent were the petitioner and two daugh-



ters of the deceased, both over the age of majority, and resident in the state of New York. It is claimed that the said sum of money so received is exempt from execution, and petitioner asks that it be set apart to her under the provisions of the statute. The two daughters, Marian E. Whitcomb and Grace E. Miller, appeared, and resisted the application, but, as stated, they did not controvert any of the allegations as to the facts. They object that (1) the money is not exempt from execution; or (2) it is not exempt as against the heirs; and (3) the daughters are each entitled to a one-fourth interest in the proceeds of the policy.

Section 690 of the Code of Civil Procedure, so far as material here, reads as follows: "The following property is exempt from execution, except as otherwise specially provided: \* \* \* (10) All moneys, benefits, privileges or immunities accruing or in any manner growing out of any life insurance on the life of the debtor, if the annual premiums paid do not exceed five hundred dollars." Section 1465 provides that the court may set apart for the use of the surviving husband or wife of the decedent all the property which is exempt from execution. It is contended that the policy being made payable to the administrator, and not to the insured, the policy did not belong to the deceased, and never could have been sequestered for the benefit of his creditors, even though there had been no statutory exemption. Therefore the money did not accrue to the deceased out of such policy, and it is not within the description of property referred to in section 1465 of the Code of Civil Procedure.

But to make a policy payable only to the insured after death is to make it payable only to his administrator, executors, or assigns; and I think it is the invariable practice of all life insurance companies, where no other beneficiary is named, to make all policies payable to the insured, his executors, administrators, or assigns. The legal effect would have been the same (provided the policy is assignable) if it had been made payable to himself only, or to his executors and administrators. If the insured had assigned the policy in his lifetime, the administrator would have had no vested beneficial interest which would have been affected and which would have warranted his being heard to object.

At common law the administrator or executor was the legal beneficiary in all policies payable to the insured. Cooke, Life Ins. § 57. The policy descended to him. Our system differs, in that personalty descends to the heirs, with a special interest in the administrator. But, so far as affects this question, the difference is purely ideal. In either case, the personal representative must collect and administer upon it. Although set apart under the statute, the money is administered upon, and until so set

apart is a part of the estate. The order setting it apart is a species of distribution.

Yore v. Booth, 110 Cal. 238, 42 Pac. 808, is not in point. The real question there was whether a policy payable to the heirs generally was not the same in legal effect as when payable to the executors or administrators. A rule had been made in those jurisdictions where property which goes to the heirs rather than to the administrators is not, except under special circumstances, subject to administration, to the effect that such a designation was intended to take the proceeds out of the estate, and vest it at once in the heirs as beneficiaries. The rule had become general,—in fact, universal,—and after discussion was adopted here. I can think of no reason for holding that, when the money is made payable to the executors or administrators generally, they are vested with any interest in, or right in reference to, the policy. I think, therefore, the policy was the property of Samuel Miller in his lifetime, and was properly set apart to his widow. The order is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

6 Cal. Unrep. 60

SAN FRANCISCO SAV. UNION v. LONG  
et al. (S. F. 1,041.)

(Supreme Court of California. July 1, 1898.)

MUTUAL LIFE INSURANCE—SPECIAL FUNDS—LIENS  
—EXTINGUISHMENT—LIMITATIONS—SURETIES—  
SUBROGATION—INTERPLEADER—PARTIES—PLEADING—  
SPLITTING DEMANDS—ASSIGNMENT.

1. Under St. 1891, p. 126, § 2, compelling mutual assessment life insurance companies to deposit a fund for the protection of policy holders; and section 4, providing that the beneficiaries shall have a lien on all property of the corporation, with priority over all indebtedness thereafter incurred,—one who was entitled to payment of a death benefit at the time the statute became effective had a lien on such deposit as soon as it was made, the protection of the lien being not restricted to after-incurred debts.

2. Where sureties for a life insurance company were obliged to pay a death benefit, they are entitled to be subrogated to a lien in favor of the beneficiary on a fund created for the protection of policy holders.

3. Where the holder of a deposit created under St. 1891, p. 126, § 2, providing that assessment life insurance corporations shall deposit a certain sum for the protection of policy holders, had brought an action to interplead various claimants to such fund, it was proper to permit a party who claimed the right to enforce a beneficiary's lien on such fund to assert such lien in the same action, and not to relegate him to a creditors' bill or a writ of execution.

4. The right of sureties to be subrogated to a lien on their principal's property may be assigned.

5. Where sureties had paid part of a judgment against the principal, which had paid the balance itself, and were entitled to be subrogated to a lien against the principal, the enforcement by their assignee of such lien to the amount paid by them is a single demand, and not obnoxious to the rule against splitting demands.

6. A surety who has not contributed to the payment of the principal's judgment debt is not a necessary party to the determination of a right of lien claimed by the assignee of his co-sureties by subrogation to the rights of the judgment creditor.

7. Allegations that a judgment out of which defendant's claim grew was based on a certificate of life insurance issued by a named life association to one L. M. on May 1, 1896, and in favor of M. M., who was then the wife of said L. M.; that said certificate was for the sum of \$6,000; that on a certain date said M. died, and at the time the said certificate was in full force and effect, and by reason of his death, there became due and payable, etc.,—in the absence of demurrer or objections to their sufficiency below, sufficiently plead such policy, performance of conditions thereof, and accrual of the right of action thereon.

8. Where a lien on a fund created to secure payment of death benefits under St. 1891, p. 126, §§ 2, 4, relating to assessment life insurance corporations, attached pending an action on a policy, the establishment of such indebtedness by final judgment gave the right to enforce such lien, and it attached to the judgment, and continued until same was satisfied; and hence such lien did not, by virtue of Civ. Code, § 2911, providing that liens shall be extinguished on the expiration of the time within which an action may be brought on the principal obligation, become extinguished on the lapse of such period of limitation from the time the lien attached.

9. Where a lien on a fund created to secure payment of death benefits under St. 1891, p. 126, §§ 2, 4, relating to assessment life insurance corporations, attached pending an action on a policy, the establishment of such indebtedness by final judgment gave the right to enforce such lien; and, such enforcement being sought in an action begun thereafter within the time prescribed for bringing an action on the policy, the claim of lien was not barred by limitation, though more than the period of such limitation had elapsed since the lien attached.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by the San Francisco Savings Union against E. B. Long and others. From a judgment in favor of defendant Guy Shoup and another, and from orders denying a new trial, the other defendants appealed. Affirmed.

Dorn & Dorn, Chas. S. Perry, Theo. Savage, T. Carl Spelling, and Guy Shoup, for appellants. H. C. Campbell, Lane & Lane, Byron Waters, and Van Ness & Redman, for respondents.

BELCHER, C. The plaintiff is, and at all the times mentioned in the complaint was, a savings bank, duly incorporated, and doing business as such under the laws of this state. The defendant Home Benefit Life Association was organized as a corporation under the laws of this state in 1880, and from that time until on or about September 26, 1894, was continuously engaged doing a life insurance business upon the assessment plan.

In March, 1891, an act was passed by the legislature, entitled "An act relating to life, health, accident and annuity or endowment insurance on the assessment plan,

and the conduct of the business of such insurance" (St. 1891, p. 126), which contained the following provisions:

"Sec. 2. Corporations may be formed under the general laws of this state to carry on the business of mutual insurance upon the assessment plan, and shall be subject only to the provisions of this act. No such corporation shall issue contracts of insurance until at least two hundred persons have applied, in writing, for membership or insurance therein, and have paid to the treasurer of such corporation the sum of five thousand dollars. This sum shall be invested in bonds or securities, approved by the insurance commissioner of this state, or deposited in some bank in this state, where it will earn interest. Said bonds or securities, or evidences of such deposit, shall be placed, through the insurance commissioner of this state, with the state treasurer, and the principal sum shall be held in trust for the contract holders of such corporation," etc.

"Sec. 3. Any existing corporation engaged in transacting the business of life, health, accident or endowment insurance on the assessment plan may re-incorporate under the provisions of the Civil Code of this state and under the provisions of this act: provided, that it shall not be obligatory upon such corporation to re-incorporate; and any such existing corporation may continue to exercise all rights, powers and privileges conferred by this act the same as if incorporated hereunder.

"Sec. 4. The contracts of insurance issued by such corporations shall specify the sum or sums to be paid upon the happening of the contingency insured against, and when such payments will be made. Unless the contract shall have been invalidated by fraud or by breach of its conditions, the corporation shall be obligated to pay the beneficiary the amount or amounts specified in its contract at the time or times therein named, and such indebtedness shall be a lien upon all the property of such corporation, with priority over all indebtedness thereafter incurred," etc.

In compliance with the requirement of said act the Home Benefit Life Association on March 15, 1892, deposited in the San Francisco Savings Union, plaintiff herein, the sum of \$5,000 as a term deposit, and took a "special certificate of term deposit" therefor. This certificate the said association, on the next day, by an indorsement written on the back thereof, assigned and transferred to the insurance commissioner of the state for the protection of its certificate holders; and thereupon the said commissioner, in pursuance of the requirements of the said act of 1891, caused the said certificate to be placed and deposited with the then state treasurer, and the plaintiff was notified of the assignment at or about the time it was made. In September, 1894, the said association became insolvent, and ceas-



ed to do business. At that time the association was indebted upon contracts of insurance of deceased members in the sum of more than \$50,000, and nearly all the property applicable to the payment of these claims was the said \$5,000 on deposit in the plaintiff's bank. There were also more than 100 living contract members of the association. Prior to and about the time it suspended business, several suits upon the death claims were commenced against the association, some of which had gone to judgment before this case was tried, and some were still pending. Various remedies were resorted to by said claimants for the purpose of realizing wholly or in part upon their claims, and each sought to establish a first lien upon the said deposit. Under these circumstances, the plaintiff brought this action against the conflicting claimants of the said money to compel them to interplead and litigate their several claims among themselves. The said association, the state treasurer, the insurance commissioner, and about 130 certificate holders, including the judgment creditors, were made parties defendant. The complaint set out the facts and stated that the plaintiff was ignorant of the respective rights of the defendants; that it had and made no claim to the said money, and was ready and willing to pay the same into court upon the surrender and cancellation of said certificate. And the prayer was that the defendants be required to interplead; that the state treasurer and insurance commissioner be required to deposit the said certificate in court; and that thereupon plaintiff be permitted to pay into court the sum of \$5,000, with the accrued dividends thereon; and that, upon so doing, the certificate be canceled by the clerk, and the plaintiff be discharged from all liability to each and all of the defendants in relation thereto. Answers and cross complaints were filed by the defendants, setting up their respective claims and rights to the said money, and controverting the alleged rights of others thereto. When the cause came on for trial, the said certificate of deposit and the money in controversy, then, with the accrued dividends thereon, aggregating \$5,743.16, were, in pursuance of an order of court duly made and entered in its minutes, deposited in court. The cause was then tried and submitted, and thereafter the court made and filed its findings of fact and conclusions of law, whereby it was found and determined that the defendant Guy Shoup had the first lien upon the money deposited in court by the plaintiff, to the extent of \$4,310.10, with interest thereon, and was entitled to be first paid out of said money the sum of \$4,735.87, and that the defendant Sophia Koneke had the second lien upon the said money, superior to that of all claimants except said Shoup, and was entitled to the balance of said money, less a small

amount of costs, namely, the sum of \$997.20; that the remaining defendants were not entitled to anything by reason of the action; and that the plaintiff was entitled to be released and discharged from all liability to any and all of the parties to the action for and on account of the said money. A decree was accordingly so entered, from which, except that portion thereof awarding a part of the money to Mrs. Koneke, nearly all of the defendants have appealed, and two of them have also appealed from orders denying their motions for a new trial.

The record presented covers more than 300 pages of the printed transcript, and there have been several suggestions of a diminution of the record, and some of the omitted parts have been since supplied. Ten briefs have been filed on behalf of the contesting parties, and the questions discussed are numerous, and some of them complicated. The principal question relates to the rights of respondent Shoup, and to that we shall chiefly give our attention. It is earnestly contended that Shoup had no interest in or right to any of the money, and that the court erred in awarding to him any part of it. The facts upon which the alleged rights of Shoup were based are as follows: On May 1, 1886, the Home Benefit Life Association executed and delivered to Lemuel T. Murray its certificate of membership, by the terms of which it promised to pay to his wife, Miranda E. Murray, the sum of \$6,000 upon his death and upon the prior performance by him of all the conditions of the said certificate. Murray died September 29, 1886, and meantime he had complied with and performed all the conditions of the certificate of membership. Mrs. Murray made due proof of his death and of her claim under said certificate, and, by reason of his death, there became due and payable to her from the said association the sum of \$6,000. In due time she demanded of the association payment of the said sum of money; but it refused to pay the same, or any part thereof, and claimed that said certificate was not in force at the time of Murray's death. In July, 1888, Mrs. Murray commenced an action in the superior court of the city and county of San Francisco against the association to recover the sum of \$6,000, with interest, alleged to be due her on the said certificate. The action resulted in a judgment, rendered May 17, 1892, in favor of the plaintiff (then, by reason of her second marriage, known as and called Miranda E. Mills), and against the defendant, for the sum of \$8,255.08, and \$215 costs of suit. From that judgment, and an order denying a new trial, an appeal to this court was taken by the defendant association; and a stay bond or undertaking was executed and filed by it, on which W. H. Chickering and F. C. Havens were sureties. On December 26, 1894, the judgment and order were affirmed by this court (Mills v. As-

sociation, 105 Cal. 232, 38 Pac. 723); and in due time a remittitur was sent to the clerk of the court below. At the time of the affirmance there was due and owing from the defendant to Mrs. Mills the sum of \$10,130.22, and of this sum the said Chickering and Havens, by reason of their liability as sureties under the stay bond, were compelled to, and did, pay from their own funds, to Mrs. Mills, in the months of April and September, 1895, \$4,310.10, the balance of the judgment being paid from other funds of the association. On October 8, 1896, said Chickering and Havens sold, assigned, and transferred in writing to respondent Shoup all their right, title, and interest in and to the said judgment, so partially paid and satisfied by them, and also all their interest in and claim of lien upon the money paid by the plaintiff into court in this action. Upon these facts, the court found: "That the said Miranda E. Mills acquired a lien securing her claim arising as aforesaid upon the money paid into court by the plaintiff immediately upon its deposit with the plaintiff by said Home Benefit Life Association, as above found, by reason of the provision of the act of 1891, above referred to; that the lien thereby acquired was then, and ever since has been, the first lien upon said money or fund, and was and is superior and prior to all others"; and "that by reason of the partial payments made by said sureties as aforesaid, and the said assignment made by them to defendant Shoup, he (the said defendant Shoup), ever since the date of said assignment, has had, and now has, the first lien upon said sum or fund of money, to the extent of said sum of \$4,310.10, with interest thereon from the dates of payment thereof, as before found."

It is claimed that these findings were mere conclusions of law, and were not supported by the facts proved or found by the court. But we think it must be held that, under the provisions of the act of 1891, the indebtedness due Mrs. Mills became a lien on the money deposited with plaintiff as soon as the deposit was made. The act does not seem to limit the lien to indebtedness arising after the act was passed, but makes it apply to all indebtedness upon certificates of insurance, whether it became due and payable before or after the passage of the act. And, if this be so, then it is clear that, so far as is shown by the record, Mrs. Mills had the first lien upon the said money to secure payment of her claim; and, when Chickering and Havens paid a part of her judgment, they were subrogated to all her rights as to the amount paid. "The general rule is that a surety who pays the debt of his principal will be subrogated to all the securities, liens, and equities, rights, remedies, and priorities held by the creditor against the principal, and entitled to enforce them against the latter in a court of equity or of equitable jurisdiction."

24 Am. & Eng. Enc. Law, p. 194. And see the numerous authorities cited in support of the proposition. Chickering and Havens were therefore entitled to claim and enforce the lien which Mrs. Mills had, and, when they assigned to Shoup, he succeeded to all their rights.

But say appellants: "At any rate, neither the sureties nor their assignee may entertain any other action based upon the substitution than a creditors' bill. They may, by a supplementary proceeding, discover equitable assets, and, having discovered them, may resort, first, to garnishment or other legal process, and, upon that proving ineffectual, bring an action in equity in the nature of a creditors' bill to subject them to the satisfaction of the judgment. But, if such action and such proceeding are not needed, they can only resort to an execution." This proposition cannot be sustained. Evidently, Shoup was compelled to assert his rights in this action, if he would assert them at all. The action was one of interpleader, in which all the claims to the money in controversy were to be disposed of. It admitted necessarily the assertion of equitable as well as legal rights, and the court was authorized and empowered to adjust them all.

It is next urged that the right of the sureties was a mere equity, and was not assignable; and, in support of this proposition, *Sanborn v. Doe*, 92 Cal. 152, 28 Pac. 105, is cited. That case has no bearing upon the question in hand. It related to a question of fraud, and it was simply held that "a right to complain of fraud is not assignable."

"The rule against splitting demands" is also invoked, and it is claimed that under it respondent was not entitled to recover. But that rule does not apply here. The association paid a portion of the judgment, and the sureties paid the balance of it. After the judgment was paid, there remained but one demand, and that was held by the sureties. No question, therefore, as to "splitting demands" could be involved.

Appellants further say: "Even if a part of such claims were assignable, there would still exist a defect of parties; and there could be no final determination of the rights of the parties unless the judgment creditor and the other obligor on the bond were before the court." But the judgment creditor, Mrs. Mills, was before the court, and the other obligor, Mr. Allen, paid nothing, and had no claim to be satisfied.

It is also claimed that the answer and cross complaint of defendant Shoup stated no cause of action entitling him to any equitable relief; and it is said: "There is not a single allegation upon which to base a claim to this or any form of equitable relief, even if that act covered the Mills claim"; that "the terms of the certificate or policy of life insurance are not set forth or even mentioned"; and that the pleading "does not allege the performance of any of the condi-



tions of any certificate or policy of life insurance" by Murray, nor the furnishing of any proofs of his death. The answer and cross complaint, after setting out the facts in relation to the judgment recovered by Mrs. Mills, the appeal therefrom, etc., alleged "that the said judgment so rendered in favor of said Miranda E. Mills was based upon a certificate or policy of life insurance issued by said Home Benefit Life Association to one Lemuel T. Murray, on May 1, 1896, and in favor of said Miranda E. Mills, who at said last-named date was the wife of said Murray; that said certificate was for the sum of \$6,000; that thereafter, and upon the 29th day of September, 1896, the said Murray died; and that at said time the said certificate was in full force and effect; and that, by reason of his said death, there became due and payable," etc. No demurrer to the pleading was filed, nor, so far as appears, was any objection to its sufficiency raised in the court below. We think, therefore, it must be held to have stated all the facts necessary for the purposes of this action, and that the objections to it cannot be sustained.

It is objected that, at any rate, respondent had no lien on the deposited money, and counsel say: "I know of no law which gives one whose life is insured a lien on the property of the insurer, or which makes the insurer a debtor to the insured." But that, in cases like this, the beneficiary of the insured may have a lien on the property of the insurer was expressly declared by the act of 1891; and it was so held in *Kruger v. Association*, 106 Cal. 98, 39 Pac. 213.

It is further objected that the Shoup claim was barred by the statute of limitations; and, in support of this objection, counsel cite section 2911 of the Civil Code. That section is as follows: "A lien is extinguished by the lapse of the time within which, under the Code of Civil Procedure, an action can be brought upon the principal obligation." The section is not a statute of limitation, but relates alone to the extinguishment of liens. The question, then, is, had the lien of the Mills-Shoup claim become extinguished before Shoup filed his answer and cross complaint? We do not think it had. An action upon the principal obligation was brought in 1888, and was pending when the act of 1891 was passed. The deposit was made March 15, 1892; and thereupon, under section 4 of the act, Mrs. Mills' claim became a lien upon the money deposited, which might be thereafter enforced, provided the claim should be established as a valid indebtedness. When judgment was recovered in the action, the judgment became a lien on the money, and continued to be so until the amount thereof was or shall be paid. It was not necessary for Mrs. Mills to change her pleading, and ask for an enforcement of the lien, as it did not become merged in the judgment, but was

attached to it and accompanied it to the end. It is evident, therefore, that the lien claimed by Shoup had not become extinguished.

Nor do we think, if the statute of limitations had been properly pleaded, as it was not, that Shoup's claim of lien would have been barred. The lien is statutory, and exists until the indebtedness which it secures is satisfied. Mrs. Mills' claim was not finally established until December, 1894, when her judgment was affirmed by this court, and she was not required to assert any right to a lien before that. This action was commenced March 31, 1896, and Shoup's answer and cross complaint was filed October 9, 1896. This was in time, and his claim was not then barred.

Many other points are made and very elaborately and ably argued by counsel, but to review them would require this opinion to be extended to a very great length. We have carefully considered all the points made, and are of the opinion that no error calling for a reversal is shown; and as the judgment and order must be affirmed, if we are right in what has already been said, any discussion of the other points presented seems unnecessary. We advise that the judgment and order appealed from be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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RUGGLES v. CANNEDY et al. (Sac. 244.)  
(Supreme Court of California. June 16, 1898.)

CHATTEL MORTGAGES—RECORDING OF—RIGHTS OF CREDITORS—SUIT BY ASSIGNEE IN INSOLVENCY.

1. Civ. Code, § 2957, provides that a mortgage of personal property is void as against creditors unless recorded in like manner as grants of real property. *Held* that, since recordation has been made by the Code the equivalent of an immediate delivery and continued change of possession, a chattel mortgage not immediately recorded is void as to creditors whose claims arose between its execution and recordation.

2. Under Civ. Code, § 2957, providing that a mortgage of personal property is void as against creditors unless recorded, a creditor may sue to set aside as fraudulent a mortgage not seasonably recorded, though he has not acquired a lien by judgment or attachment before the recordation of such mortgage.

3. A chattel mortgage not seasonably recorded is valid as between the parties, and as against creditors whose claims arise after recordation.

4. For the purpose of enforcing their rights against fraudulent or void acts of an insolvent, the allowance and approval of creditors' claims in an insolvency court are equivalent to a judgment.

5. In a suit to declare an unrecorded mortgage void, it is not necessary for a creditor to show that he cannot make good his debt out of property not covered by such mortgage

when his averment of his debtor's voluntary insolvency is not denied.

6. Under the insolvent act (sections 18 and 21), all the estate of the insolvent passes to the assignee in insolvency, and the latter may maintain a suit to set aside a transfer void as to creditors, since, as between the debtor and creditors, the debtor is regarded as holding the title to property which he has fraudulently transferred, and such title therefore passes to his assignee in insolvency.

7. A judgment setting aside a chattel mortgage because not seasonably recorded, and therefore void as to creditors, will be sustained, though there was no finding that the recordation was not seasonably made, where it was averred, and not denied, that six months elapsed between the making and recording thereof.

Department 2. Appeal from superior court, Yolo county.

Action by J. B. Ruggles against W. J. Cannedy and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Chas. W. Thomas, for appellants. Philip Benton, for respondent.

HENSHAW, J. This action is brought by the assignee in insolvency of one Wilgus, seeking a decree declaring void against creditors a chattel mortgage executed by Wilgus to defendant Cannedy. The appeal is from the judgment upon the judgment roll alone. The findings of fact negative all claim of actual fraud and of a violation of the provisions of the insolvency act. The mortgage was made upon February 17, 1893, for a valuable consideration, and, for a like consideration, was assigned to the defendant bank, which took without knowledge of Wilgus' contemplated insolvency. It was not recorded, however, until August 26, 1893, six months later, and two days before Wilgus, under his voluntary petition, was declared an insolvent. Intermediate the time of giving and the time of recording the mortgage, Wilgus incurred debts, some of which were proved and allowed in the insolvency court. The creditors knew nothing of the mortgage until its recordation. The court, under the facts, adjudged the mortgage to be null and void to these creditors at the suit of the assignee.

Two leading questions are thus presented: (1) Is a chattel mortgage, withheld from record beyond a time reasonably necessary for its prompt recordation, void against creditors whose claims have arisen between the date of its execution and the date of its recordation? (2) May such a mortgage be declared void at the instance of the assignee in insolvency on behalf of such creditors whose claims have been proved and allowed against the estate of the insolvent mortgagor? Respondent, of course, maintains that both these interrogatories should be answered in the affirmative. Appellants oppose this, insisting that our recordation laws do not compel nor contemplate an immediate recordation of a chattel mortgage; that, if the mortgagee delays recordation, he merely

takes the risk of losing his lien by a sale to an innocent purchaser, or of having it subordinated to that of creditors who have acquired superior rights by judgments, attachments, or executions; that, whenever recorded, the mortgage is valid against all creditors, saving those who have themselves acquired prior liens; and, finally, that, at all events, the mortgage recorded before insolvency, and not in violation of the insolvency law, may not be set aside at the instance of the assignee, who represents the insolvent, and who has no rights in the matter which the insolvent himself did not possess. As the unrecorded mortgage is valid between the mortgagee and the insolvent, as in its execution and delivery there was no fraud upon the insolvency law, and as no creditor has acquired a lien upon the mortgaged property before recordation, it is argued that the contract of mortgage is valid as to the assignee.

The determination of the first question must depend upon the language of our Codes, and upon the policy of the law deducible therefrom. In the early jurisprudence of the state the law touching sales and mortgages of personal property was found in one and the same "act concerning fraudulent conveyances and contracts." St. 1850, p. 266. By section 15 of that act it was provided: "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change in possession of things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith." In section 17 it was declared: "No mortgage of personal property hereafter shall be valid against any other persons than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee." Recordation at that time was unknown. Delivery and possession of the mortgaged chattel were required. But it is to be noted that while, as to sales, the statute expressly demanded an immediate delivery, there was no such explicit exaction in the terms of the law governing mortgages. At a very early day this fact was called to the attention of the court, and upon it was attempted an argument of some substantial difference between the law governing sales and that governing mortgages. Thus, in *Chenery v. Palmer*, 6 Cal. 119, we find the appellant complaining of an instruction by the lower court that, to render a chattel mortgage valid against creditors, there must be an immediate delivery. In *Hackett v. Manlove*, 14 Cal. 85, it is argued that such a mortgage is good against those who were not creditors, even after delayed possession



taken. Finally, in *Woods v. Bugbey*, 29 Cal. 467, this court treated the question at length, and held that, as to delivery and change of possession, the same principle and rule applied whether the sale was absolute or conditional by way of mortgage. First quoting from *Lay v. Neville*, 25 Cal. 552, to the effect that the delivery must be immediate, it continued: "The rule which our statute prescribes admits of no excuse dispensing with an actual and continued change of possession of the property sold, assigned, or mortgaged." There is thus no room left for doubt but that the law of 1850 rendered void, at the instance of creditors, a chattel mortgage, unless it was accompanied by an immediate delivery, and by an actual and continued change of possession of the property affected.

In time, this statute of 1850 was repealed, and in place of the sections we have been considering were substituted the following Code provisions: "Every transfer of personal property, \* \* \* and every lien thereon, other than a mortgage, when allowed by law, \* \* \* is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer." Civ. Code, § 3440. "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith, and for value, unless: (1) It is accompanied by the affidavit of all the parties thereto that it is made in good faith, and without any design to hinder, delay or defraud creditors; (2) it is acknowledged or proved, certified and recorded in like manner as grants of real property." Civ. Code, § 2957. Thus, in the case of the articles of personal property enumerated in section 2955 of the Code, recordation became a substitute for delivery and change of possession. "The recording of the mortgage is therefore made by the Code the equivalent of an immediate delivery and continued change of possession." *Berson v. Nunan*, 63 Cal. 550; *Martin v. Thompson*, 63 Cal. 3.

But here it is argued that, while the law makes recordation the substitute for an immediate delivery, it does not mean or require immediate recordation, but only provides that, when effected, recordation is the equivalent of immediate delivery and continued and actual change of possession. Considering that the law demands immediate delivery, and that recordation is but a sub-

stitute for it, it is not easy to see how an indefinitely delayed recordation may be said to take the place of an actual, immediate delivery. One being designed as a substitute for the other, what is the condition, in the one case, if the property be not immediately delivered? Indisputably, the mortgage is void as to creditors. What, then, is the condition in the other case for the indefinite period during which there has been no recordation? While recordation is lacking, there is not only no equivalent for an immediate delivery, but there is no delivery at all. Recordation itself is the substitute for delivery. A prompt recordation most obviously takes the place of an immediate delivery, and a delayed recordation of a tardy delivery. How, then, can a recordation effected one year or ten years after the execution of the mortgage be said to be the equivalent of the delivery which by the law is required to be made with all reasonable dispatch? Even more untenable does this argument seem when consideration is had for the manifest policy of these laws. The very object of them all—the reason for their being—is to prevent secret liens upon and interests in personal property. Says Chancellor Kent (2 Kent, Comm. \*523): "The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the visible owner. The law will not stop to inquire whether there was actual fraud or not, for it is against sound policy to suffer the vendor to remain in possession. \* \* \* It necessarily creates a secret incumbrance as to personal property, when to the world the vendor or mortgagor appears to be the owner, and he gains credit as such, and is enabled to practice deceit upon mankind." In *Palmer v. Howard*, 72 Cal. 293, 13 Pac. 858, it is said: "It must be remembered, in general, that the policy of the law is against upholding secret liens and charges to the injury of innocent purchasers or incumbrancers for value, and, in particular, that mortgages of personal property are permitted only in certain specified cases, and this only upon the observance of certain formalities designed to secure good faith, and to give notice to the world of the character of the transaction." This language has very recently been quoted with approval in *Society v. Purvis*, 112 Cal. 236, 44 Pac. 561.

With this for the unquestioned policy of the law, how can it successfully be urged that an interpretation which fosters and encourages the very evil which the law was destined to check can be the true one? A mortgage without immediate delivery would create a secret lien, admittedly void against creditors. Is a mortgage without immediate recordation any less a secret lien, or any less an evil to be avoided? Prior to the amendment to section 2955 of the Civil Code, adopted in 1895, as counsel well instance,

if a person had desired to borrow money upon his farming implements he would have been compelled to transfer possession immediately under section 3440 of the Civil Code. By the amendment these implements are placed in the list of those upon which statutory chattel mortgages may be given. Therefore he may now make such a mortgage upon them without delivery. Did the legislature intend to accommodate the farmer by enabling him to retain possession and use of his property, while at the same time protecting the public by recordation? Or did it design to make fraud easier by framing an ever-increasing list of articles upon which might be placed secret liens? The mortgagor holding possession could thus obtain credit upon the strength of his apparent untrammelled ownership, while the mortgagee could defeat the creditors' recovery by recording his mortgage at any time before the levy of an attachment. *Fassett v. Wise*, 115 Cal. 316, 47 Pac. 47, 1095, which appellants cite, is not in point upon the proposition we have been considering. This court was there called upon to construe the sections of the Civil Code (2959 and 2965) dealing with the "place" of recordation. It was insisted that the mortgage having been executed in Kings county, and the sheep having been removed thence to Tulare county before recordation anywhere, there was allowed, under section 2965, 30 days after such removal in which to record in Tulare county. It was decided that this section did not apply, that the mortgage was not recorded, and therefore not a mortgage at all as to creditors until after it had been placed on record both in Kings county and Tulare county. The effect as to creditors of the tardy recordation in Kings county was not determined.

We conclude upon this question that our law requires immediate recordation in lieu of immediate delivery, and that, when such recordation is not effected, the mortgage "is void as against creditors of the mortgagor." The penalty for a failure to record promptly in the case of a mortgage is identical with the penalty under section 3440 for a failure to deliver promptly in the case of a sale. In either case the failure results in a legal fraud against those whom the statute enumerates and protects. Section 3440 excepts a "mortgage when allowed by law" from the requirement of immediate delivery, because, and only because, the recordation takes the place of delivery. It certainly cannot be said that it was the design of the legislature to exclude the articles of personal property affected by such mortgages from the operations of the laws forbidding secret liens. But this, it is to be noted, does not mean that such a mortgage between the parties, and as to all the world, is absolutely void, like an unrecorded builder's contract under the mechanic's lien law. It does mean, however, that it may be avoided at the instance of any one in the enumerat-

ed classes—creditor, purchaser, or incumbrancer—whose right accrues during the time the recordation is withheld. Between the parties the unrecorded mortgage is, of course, valid. It is likewise valid against any creditor, purchaser, or incumbrancer whose claim arises after recordation. So, too, the mortgagee's interest in or title to the chattel affected by the unrecorded mortgage may be successfully asserted against a mere trespasser. Whether it is void against a creditor who extended credit before the making of the mortgage does not here call for decision. Suffice it to say that, upon this as well as upon many other questions concerning chattel mortgages, an irreconcilable conflict in the decisions of the courts upon statutes practically identical in language will be discovered. *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11; *Dempsey v. Pforzheimer*, 86 Mich. 652, 49 N. W. 465.

But it is insisted that, even if an unrecorded mortgage is void at the instance of creditors, only those creditors may take advantage of the law who by judgment and execution levy, or at least by attachment levy, have acquired a lien upon the property before recordation. In this appellants place reliance upon section 237 of Jones on Chattel Mortgages, and upon the authorities which the learned author cites in support of his text. He speaks as follows: "The only effect of delay in recording or filing a mortgage is to render it void as against intervening purchasers or mortgagees, or creditors obtaining liens by attachment, judgment, or execution. If the time within which a mortgage must be recorded or filed be not expressly prescribed by statute, it is sufficient that this be done at any time before possession is taken, or interest or liens are acquired by others, no matter how long this be after the execution of the mortgage. The record of a mortgage being only a substitute for the mortgagee's possession, it follows that, in the absence of any record, possession taken by the mortgagee before others have acquired any interest in the property makes his mortgage lien complete." To this the answer is that such is not the law of this state. In terms, this rule is limited to those cases where immediate recordation is not required by law, and in our state, as has been discussed, as well as in other states under similar and well-nigh identical statutes, as will be shown, immediate recordation is exacted. Again, as we have seen, a perfect analogy exists in our law between the case of sales and the case of mortgages of personal property. In both instances immediate delivery, or its equivalent,—immediate recordation,—must take place. In each the result of a failure in this particular is to render the contract absolutely void as to creditors. In *Watson v. Rodgers*, 53 Cal. 402, it is held that a sale of personal property unaccompanied by an immediate delivery is void as



to creditors, notwithstanding the delivery was effected before the creditors acquired a lien by attachment levy. In *Chenery v. Palmer*, 6 Cal. 119, it is decided that, whether the contract is a sale or a mortgage, in either event, not being followed by immediate delivery, it was void as to creditors, though delivery was made before levy. In other words, two distinct propositions have thus been decided,—the first, that neither in the case of a sale nor of a mortgage would a delayed delivery validate the contract against creditors; and, second, that it was not necessary that these creditors should have acquired rights by judgment or attachment before delivery of the chattel sold or mortgaged to warrant their setting aside the transfer. Our recordation laws, admittedly being but a substitute for such immediate delivery, certainly have not changed the principles here announced, and should not be said to have changed the rule which elsewhere finds abundant support.

It is recognized that the authorities are in conflict upon this proposition, and that in some states it is held that a creditor must have acquired a lien before recordation of the mortgage, else it is valid against him. Such, we have said, is not the rule in this state. It is not the rule in Washington, whose law provides: "A mortgage of personal property is void as against creditors of the mortgagor \* \* \* unless it is recorded in the same manner as is required by law in conveyances of real property." Gen. St. § 1648; *Willamette Casket Co. v. Cross Undertaking Co.*, 12 Wash. 190, 40 Pac. 729. The same may be said of Wisconsin, whose statute is as follows: "No mortgage of personal property shall be valid as against third persons unless the property be delivered to and retained by the mortgagee, or unless the mortgage or a copy thereof be filed." Rev. St. § 2313; *Drugstore Co. v. Hvambzahl* (Wis.) 61 N. W. 299. The Michigan statute provides (Howell's Ann. St. § 6193): "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the thing mortgaged, shall be absolutely void as against the creditors of the mortgagor, \* \* \* unless the mortgage or a true copy thereof shall be filed in the office of the township clerk," etc. In *Crippen v. Fletcher*, 56 Mich. 386, 23 N. W. 56, and in *Dempsey v. Pforzheimer*, 86 Mich. 652, 49 N. W. 465, it is held that such mortgages, under the law as quoted, are absolutely void against creditors whose claims have arisen during the time they were withheld from recordation, notwithstanding the fact that they had acquired no lien upon the specific property until after recordation or possession taken. Without further quotations, it is sufficient to cite additionally upon this point the cases of *Noyes v. Brace* (S.

D.) 65 N. W. 1071; *Thompson v. Van Vechten*, 27 N. Y. 581; *Karst v. Gane*, 136 N. Y. 316, 32 N. E. 1073; *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11; *Roe v. Meding*, 53 N. J. Eq. 350, 33 Atl. 394; *Simpson v. Harris*, 21 Nev. 353, 31 Pac. 1009; *Bank v. Anthony*, 39 Neb. 343, 57 N. W. 1029; *Kimball Co. v. Kirby*, 4 S. D. 152, 55 N. W. 1110. Of course, it is true in general that a creditor at large of the mortgagor cannot set aside a mortgage for lack of recordation, any more than can such a creditor set aside a sale void for want of immediate delivery. He must come first with his judgment lien, execution levy, attachment, or some other process or right by which he has acquired a specific interest in or claim upon the particular property. But since, as has been discussed, he may acquire this lien or right after recordation, and since, when acquired, the mortgage is void as to him, it makes little difference whether it be stated as the rule that the law requires immediate recordation, or whether it be said that, while it does not require immediate recordation, the mortgage is void as to creditors who have become such during the time recordation has been delayed. It is but a change in the form of words, while all of the legal effects are the same. The law may be said to contemplate or require immediate recordation because the rights of creditors arising before recordation are superior to those of the mortgagee, or it may be said that, while the law does not exact immediate recordation, it renders the mortgage void as to such creditors, unless it be so recorded. In both cases the results are identical, and over any precise form of expression there need be no haggling.

In this case the creditors had not obtained judgments against the mortgagor; nor, indeed, had they instituted any proceedings against him at the time he was adjudged an insolvent. After that judgment, by force of the insolvency act itself, they were prevented from resorting to any proceeding in law or equity for such purpose. They were limited to the presentation of claims in the insolvency court. This they did, and, when those claims were allowed and approved, the questions involved in them became res judicata. The presentation, allowance, and approval of the claim, while not in strictness a judgment, had much of the force and effect of a judgment, and was the only thing in the nature of a judgment which creditors so situated could obtain. For the purpose of enforcing their rights against fraudulent or void acts of the insolvent, it is the equivalent of a judgment. *Roan v. Winn*, 93 Mo. 503, 4 S. W. 736. We are not advised, nor do we understand it to be the rule in this state, that a judgment creditor must exhaust all other property before avoiding a sale, transfer, or mortgage by his debtor, which by the law is declared as to him void or a fraud upon his rights. But, if it should be said that it is necessary for the creditor

to show that he cannot otherwise make good his debt, we think a sufficient showing to that end is made in this case by the undenied averment of the debtor's voluntary insolvency. Insolvency in the law has two distinct and well-defined significations. Anderson, in his *Law Dictionary*, defines an "insolvent" as "a person who is not pecuniarily able to pay his debts as they fall due; also a person whose property, if distributed among his creditors, would not be sufficient to pay their claims in full." Our insolvency act recognizes these distinct meanings. In proceedings for involuntary insolvency (Insolvent Act, § 8), aside from the acts of fraud therein enumerated, one may be cast into insolvency who is shown to be unable to meet his debts as they fall due; yet his assets may be ample for the full payment of his debts, though not immediately available for their prompt payment. But, where one voluntarily seeks the benefit of the act, he may not aver his inability to pay his debts as they fall due, but, by verified petition, must allege "his inability to pay all his debts in full," and the adjudication in insolvency is made pursuant to that allegation. In such a case, certainly, the adjudication of insolvency, in the absence of a showing to the contrary, is sufficient proof of the inadequacy of the property to pay the debts in full. *Turner v. Adams*, 46 Mo. 95; *Case v. Beauregard*, 101 U. S. 688.

2. We are come now to consider whether the assignee representing these creditors whose claims have been proved and allowed may institute on their behalf an equitable action to avoid the mortgage, an action which, but for the insolvency of the debtor, the creditors themselves unquestionably could have maintained after pressing their debts to judgment. The assignee's right so to do is combated upon two grounds, the first, because, while section 3440 of the Civil Code declares that a transfer or lien upon personal property may be avoided at the instance of the creditor, or of him upon whom the estate of the debtor devolves in trust, no such expression is found in section 2957, which declares merely that a mortgage of personal property is void as against creditors, not expressly including either successors in interest or trustees; second, it is contended that, in any event, the assignee in insolvency can attack the acts of the insolvent on behalf of the creditors only for actual fraud, and that the act here contemplated is but a constructive legal fraud. It may here be suggested that this so-called "legal fraud" was, if anything, a fraud not of the mortgagor, who is to suffer nothing by it, but of the mortgagee, who may be compelled to lose his lien for his own remissness and neglect. Says Mr. Justice Cooley, in *Putnam v. Reynolds*, 44 Mich. 114, 6 N. W. 199: "Even creditors, it is said, cannot attack the mortgage except indirectly, through a seizure of

the property by attachment or other scorable process. This is, doubtless, true where the invalidity of the mortgage arises from the fraud of the mortgagor; but whether the same rule will apply when the mortgage was originally valid, but is made void by the neglect of the mortgagee, may well be questioned. It would be easy to suggest weighty considerations arising in such cases, but not existing in the case of a fraudulent mortgage, and which it might well be thought should control." We do not regard the omission in section 2957 of the Civil Code to declare that those upon whom the estate of the debtor may devolve in trust have the right to avoid the mortgage as being at all important. It was early held under the English statutes of George the Fourth (1 Geo. IV. c. 119; 7 Geo. IV. c. 57), which conferred no right upon the assignee in insolvency to avoid conveyances of the assignor, and in cases where this fact was pressed upon the attention of the court, that the assignee had this right by virtue of the fact that he represented the creditors. *Butcher v. Harrison*, 4 Barn. & Adol. 129; *Grimsby v. Ball*, 11 Mees. & W. 531; *Norcutt v. Dodd*, 1 Craig & P. 100. In *Holmes v. Penney*, 3 Kay & J. 90, a bill was brought by the assignee in insolvency. Vice Chancellor Wood, discussing his right so to do, said: "I have no doubt of the right of the assignee in insolvency to sue in this case. In *Grimsby v. Ball*, Baron Parke and the present lord chancellor decided that an assignee in insolvency might properly represent all the creditors in proceedings to set aside an instrument which any of the creditors might have instituted." The failure to observe the well-defined distinction between the powers of the assignee in insolvency, who thus represents the creditors, and those of an assignee for the benefit of creditors, who is the representative of the assignor, has led to much conflict of authority upon this question. In this state it is held that an assignee for the benefit of creditors may not maintain such an action, but the distinction between such an assignee and the assignee in insolvency is clearly pointed out. Thus, in *Francisco v. Aguirre*, 94 Cal. 180, 29 Pac. 495, in discussing the conflict of authority which exists upon the question, it is said: "In other states the assignee for the benefit of creditors has been held to have such right, upon the ground that, by virtue of statutory provisions, the assignment partakes so far of the nature of a proceeding in bankruptcy that the assignee succeeds to the same rights as does an assignee in bankruptcy." *Merrill v. Hurlburt*, 63 Cal. 496, and *Brown v. Bank*, 77 Cal. 544, 20 Pac. 71, were both cases by the assignee in insolvency to set aside a sale of personal property for legal fraud. In both the action was upheld. It is determined, therefore, in this state, that the powers of the assignee in the premises are not limited to cases of fraud in fact.



But, independent of these reasons, there is still another consideration by which such an action as this upon the part of the assignee in insolvency is justified and upheld. By sections 18 and 21 of the insolvent act all of the estate of the insolvent passes to the assignee. As is said in *Brown v. Bank*, supra: "The assignee has the right to sue for and recover everything due to the estate for the benefit of the creditors." While, as between the assignor and his vendee or mortgagee, the transaction is valid, as between him and his creditors it is void, and the title still remains in him. This title passes to the assignee in insolvency for the benefit of the creditors, and justifies him in maintaining an action in their behalf to reduce the property to possession. "The statute provides for the assignment of property by insolvents, to the end that it may be appropriated to the payment of debts. It authorizes proceedings to subject the property of debtors to the payment of their debts. As between the creditors and the debtor who fraudulently conveys property to defeat them, he is regarded as holding the title to or an interest in the property conveyed, and it may for that reason be made subject to his debts. If he holds no such interest, the law will not permit the creditors to appropriate the property, for it would not suffer the property of another to be taken for his debts. It thus appears that the debtor did hold as to the creditors an interest in the property, and that it passed to the assignee. It is said that the assignee takes the derivative title from the debtor, and stands in his shoes. This is correct so far as persons other than creditors are concerned. As we have seen, as to creditors the assignee is regarded by law as holding an interest in and title to the land." *Schallier v. Wright*, 70 Iowa, 667, 28 N. W. 460; *Jones v. Yates*, 9 Barn. & C. 532; *Pillsbury v. Kirgou*, 33 N. J. Eq. 287. By reason of the title which is thus vested in him, we hold that the assignee may maintain this action.

It is said that the judgment should not be upheld because of the absence of a finding that the recordation was not seasonably made. It is averred, and not denied, that six months elapsed between the making and the recording of the mortgage. This unexplained delay would, as matter of law, and without a finding, be sufficient to show that the recordation was not seasonable. Or, taking it in the other view which has been presented, even if it be said that the law does not require immediate recordation, still the mortgage is void as to those who, during the time that the mortgage has been withheld from the records, have given credit to the mortgagor; and it is in favor of these that the mortgage has been set aside. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

(121 Cal. 466)

# APPRATE v. FAURE. (Sac. 291.)

(Supreme Court of California. July 19, 1898.)

## HOMESTEAD—DECLARATION—STIPULATION.

1. Recitals in a declaration of homestead of the facts required by the statute to establish a right of homestead in lands are no evidence of the truth of such facts, which must be proved aliunde.

2. A stipulation "that there was a homestead filed" is insufficient to prove that a homestead was acquired.

In bank. Appeal from superior court, Kings county.

Action by Marianna Apprate against Jean Faure. From judgment for defendant and from an order denying a new trial, plaintiff appealed. Reversed.

W. D. Foote, W. D. Crichton, H. L. Smith, and Rowen Irwin, for appellant. Archibald Yell, for respondent.

GAROUTTE, J. This is an action to quiet title to a certain tract of land. The defendant, Faure, in his answer claims an interest therein. Judgment went for the defendant, from which, and from an order denying the motion for a new trial, this appeal is taken. Plaintiff should recover in the action unless defeated by reason of the claims of defendant founded upon a homestead. The defendant rested his case upon the introduction in evidence of a declaration of homestead duly filed for record, and containing all the recitals demanded by the statute, coupled with the additional evidence found in the stipulation of counsel to the effect "that there was a homestead filed on the premises in dispute by Mrs. Marguerite Belard for the benefit of herself and husband, and that the mortgage by F. Belard was executed and is a lien upon said premises." Based upon this stipulation and the declaration of homestead, the trial court made a finding of fact to the general effect that said premises constituted the homestead of Marguerite Belard and F. Belard. It is now insisted that this finding of fact has no support in the evidence, and this position of counsel is well taken. The recital of the facts stated by the homestead claimant in her declaration is no evidence of the truth of such recitals. The statements there made by Mrs. Belard are mere ex parte statements, not under oath, and it would be a violation of all of the rules of evidence to allow such statements to be received as evidence against third parties. The introduction in evidence of the declaration of homestead alone served the purpose of showing a compliance with the law which demands the filing for record of a declaration containing certain recitals. The truth of these recitals must be proven aliunde whenever the validity of the homestead is attacked. The rights of the homestead claimant are created by the filing of a declaration of homestead in the form specified by the statute, coupled with

the actual present existence of the facts recited in the declaration. The existence of these facts at the time the declaration was filed was not attempted to be proved by defendant, and unless the stipulation, heretofore quoted, fills the breach in the evidence created by such failure of proof, the evidence is fatally weak. This stipulation is totally inadequate to meet the demands made upon it. The stipulation is to the effect that "a homestead was filed on the premises by Mrs. Marguerite Belard for the benefit of herself and husband." This language can only mean that a declaration of homestead was filed, for nothing else can be filed. Giving the stipulation a broad interpretation, it can only mean that a valid declaration of homestead was filed. A valid homestead and a valid declaration of homestead are widely different. We conclude the evidence fails to support the finding of fact as to the existence of a homestead upon the premises. For the foregoing reasons the judgment and order are reversed.

We concur: TEMPLE, J.; HARRISON, J.; VAN FLEET, J.

(121 Cal. 431)

PEOPLE v. STREUBER. (Cr. 416.)

(Supreme Court of California. July 16, 1898.)

CRIMINAL LAW—INSTRUCTIONS—PRESUMPTIONS—FAILURE OF ACCUSED TO TESTIFY.

1. A court is not, on any state of the facts, authorized to instruct the jury that a defendant's innocence conclusively appears.

2. It is not necessary or incumbent on a defendant to explain suspicious or incriminating circumstances, and no presumption can be indulged against him for failure to do so.

3. On a trial of accused for allowing and permitting his wife to remain in a house of prostitution, a refusal to charge that there must be a union of act and intent is harmless error in view of a charge given which defined the legal significance of the words "allow" and "permit."

Department 1. Appeal from superior court, Alameda county.

Ludwig A. Streuber was convicted of a felony, and from the judgment and from an order denying a new trial he appealed. Reversed.

F. W. Fry, for appellant. Attorney General Fitzgerald, for respondent.

GAROUTTE, J. The defendant has been convicted of a felony, and appeals from the judgment and order denying his motion for a new trial. By the appeal he attacks the law given and refused by the trial court.

Complaint is first made because the court refused to instruct the jury to the effect that in a case otherwise doubtful upon the evidence, evidence of good character was conclusive of defendant's innocence. This instruction was properly refused, one reason justifying this refusal being that upon no conceivable state of facts is the court au-

thorized to instruct a jury that the defendant's innocence conclusively appears. Other good reasons are plentiful to support the action of the court.

The court gave to the jury the following instruction: "It is not incumbent upon the defendant to prove his innocence, nor is it incumbent on him to explain suspicious circumstances unless they shall tend in some degree to establish his guilt." This instruction does not contain a satisfactory statement of the law. We believe it may be said that in no case, except in those cases where the burden of proof shifts to the defendant, is it necessary or even incumbent on the defendant to explain anything. He has the right to stand mute, and demand that the people make the case against him beyond a reasonable doubt. However strongly incriminating circumstances of his guilt may come from the mouths of witnesses when testifying upon the witness stand, it is a mere matter of choice upon his part, either to attempt an explanation of those circumstances or remain silent. No presumption against him is raised by the law if he does not make the attempt to explain, and remains silent. It is elementary law that the defendant is not required to take the witness stand, and that no presumption can be indulged in against him by reason of his failure to testify in the case.

The defendant was charged and convicted of a felony which consisted in allowing and permitting his wife to remain in a house of prostitution. It is now claimed that a substantial error was committed by the trial court in refusing to give an instruction to the effect that in every crime there must be a union of act and intent. This instruction could well have been given. But, in view of the fact that the court gave to the jury the signification of the words "permit" and "allow," as used in the statute, no substantial grounds of complaint are found in this contention. The information states an offense. For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

(121 Cal. 458)

BERLINER v. TRAVELERS' INS. CO. (S. F. 1048.)<sup>1</sup>

(Supreme Court of California. July 18, 1898.)

ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—CONVEYANCES FOR PASSENGERS—OCCUPATION.

1. A provision of an accident insurance policy that the insurer shall not be liable for injuries or death caused while the insured is trying to "enter or leave a moving conveyance using steam as a motive power, [or is] in or on any such conveyance not provided for transportation of passengers," does not defeat recovery

<sup>1</sup> Rehearing denied.



for death from an injury received while riding by invitation in a locomotive drawing a passenger train, the locomotive and train together constituting a "conveyance" for transportation of passengers.

2. A proviso of an accident insurance policy that the insurer shall not be liable "if the insured is injured in any occupation or exposure classed by this company as more hazardous than that here given" refers to classes of occupation, and not to particular acts not embraced in the occupation given, and hence does not defeat recovery for the accidental death of one insured as a mining expert while casually riding on a locomotive.

3. Under a clause of an accident insurance policy providing for payment of double the specified benefit should the insured be injured or killed "while riding as a passenger in any passenger conveyance using steam \* \* \* as a motive power," the beneficiary may recover for the death of insured, who, on invitation of the railroad superintendent, left a railway passenger coach in which he was a passenger, and rode on the engine, and, while so riding, was injured, and died; since he did not thereby lose the character of a passenger.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Mary I. Berliner against the Travelers' Insurance Company. From a judgment entered on a nonsuit, plaintiff appealed. Reversed.

Daniel Titus, for appellant. Olney & Olney, for respondent.

HAYNES, C. Action upon a policy insuring George Berliner, the husband of plaintiff, against death caused by accident. At the conclusion of plaintiff's evidence, defendant moved for a nonsuit. The motion was granted, and, from the judgment entered thereon, the plaintiff appeals.

Said policy insured said Berliner against loss of time resulting from bodily injuries effected through external, violent, and accidental means, and classifies the injuries and the compensation for loss of time. It then provides: "(e) Or if death results from such injuries alone within ninety days, will pay ten thousand dollars to Mary I. Berliner, his wife, if surviving; in event of her prior death, to the legal representatives or assigns of insured. (f) If such injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable, or electricity as a motive power, the amount to be paid shall be double the sum above specified; provided, if insured is injured in any occupation or exposure classed by this company as more hazardous than that here given [that of mining expert], his insurance shall be only for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." The policy then proceeds to qualify its liability by specifying what is not covered by it, as follows: "This insurance does not cover disappearance \* \* \* nor accident nor death \* \* \* resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or affected: Dis-

ease or bodily infirmity; \* \* \* violating law; voluntary exposure to unnecessary danger; \* \* \* entering or trying to enter or leave a moving conveyance using steam as a motive power (except cable and electric street cars), being in or on any such conveyance not provided for transportation of passengers, or on a railway bridge or roadbed (railway employes excepted)." The insured received injuries in a railway accident in Mexico, from which he died four days afterwards. The only evidence as to the circumstances connected with the accident was the testimony of S. W. Ferguson, who accompanied Mr. Berliner to Mexico, and was traveling with him at the time of the accident. The witness and Mr. Berliner were invited by the superintendent of the railroad to go from the City of Mexico to Pueblo, and return. Mr. Cokefield, superintendent of motive power on that road, an old acquaintance of Mr. Berliner, was with the party. On the return trip the train consisted of a locomotive, a baggage car, and three or four passenger cars, and the superintendent's car, which was at the rear end of the train. While at a station, Mr. Cokefield invited Mr. Berliner to go with him to the engine, that he might better see the country, and they started towards the engine, and the witness returned to the superintendent's car. In going down the grade, the train acquired a great velocity, and, leaving the track, was wrecked. The engineer, fireman, and conductor were killed, and, he thought, about a half dozen of the passengers. He found Mr. Berliner in the wreck of the engine, near the fire box, and burned by escaping steam, and believed Berliner was on the engine at the time of the accident. On cross-examination he testified that he advised Mr. Berliner not to go on the engine, that he would get his clothes dirty, that he could see as well from the car, and that he thought it was not a safe place, but that he might or might not have used the word "safe," that the conversation was jocular, but he desired to detain him. The foregoing is the substance of the testimony relating to the accident.

The ground of the motion for a nonsuit was "that the contract itself did not provide for the death of a party by an accident while riding upon a locomotive, but only in a conveyance intended for passengers." Assuming that Mr. Berliner was upon the engine at the time of the accident,—and we think the court might properly find that he was,—defendant's contention is that Mr. Berliner was at the time of the accident on "a conveyance not provided for the transportation of passengers," and that, therefore, the defendant is not liable, while appellant contends that the train on which the insured was riding was a regular passenger train composed of a locomotive and cars, and formed a conveyance for the transportation of passengers, and that the policy

did not exclude him from any part of it. It is well settled that policies of insurance should be liberally construed in favor of the insured; that, where its terms permit of more than one construction, that will be adopted which supports its validity. In *Insurance Co. v. Osborne*, 90 Ala. 201, 207, 9 South. 869, 870, it was said: "Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy." In *Insurance Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685, it was held that "a policy of insurance against 'bodily injuries, effected through external, accidental, and violent means,' and occasioning death or complete disability to do business, and providing that 'this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide, or self-inflicted injuries,' covers a death by hanging one's self while insane." It was there said that "the insane suicide no more dies by his own hand than the suicide by mistake or accident," and that the words "bodily infirmities or disease" do not include insanity, and that it is "the fundamental rule of interpretation that policies of insurance are to be construed most strongly against the insurers who frame them." To this we may add that the general rule is that exceptions and conditions are to be construed strictly against the party in whose favor they are made. In a New York case it was said: "It has become a rule of law that if it be left in doubt whether words of the contract were used in an enlarged or restricted sense, other things being equal, the construction will be adopted which is most beneficial to the promisee." *Darrow v. Society*, 116 N. Y. 537, 22 N. E. 1093. In *Healey v. Association*, 133 Ill. 556, 25 N. E. 52, it was held that a death caused by accidentally taking and drinking poison is a death produced by bodily injuries received through external, violent, and accidental means. Many other cases might be cited illustrating and applying the rule of construction above stated, but the rule is so well settled that we deem it unnecessary.

The policy here in question, though of a preferred class, was not special, covering only accidents to the insured while engaged in a designated employment, pursuit, occupation, or situation, but covered any possible accident which might happen to any one under any or all circumstances, provided it did not fall within an exception expressed in the policy. The term "conveyance" applies as well to the means of transporting freight as of passen-

gers, and in the clause exempting the insurance company from liability for accidents occurring in "entering or trying to enter or leave a moving conveyance using steam as a motive power" is so applied; while the clause here under consideration distinguishes a "conveyance provided for the transportation of passengers" from those used for the transportation of freight. Neither clause specifies railroad trains, and each includes as clearly vessels propelled by steam. If the insured had met with an accident upon a passenger steamer instead of a railroad train, upon what part of the vessel must he have been at the time of the accident to be within the protection of his policy? Must he be seated in the cabin, or occupy a state room? The policy does not say so. It restricts him to no part of the vessel, and therefore, if the insurance company sought to escape liability by showing that at the time of the accident he was not in the cabin or a state room, it must import into the contract a qualification or provision which is not expressed or even implied. That the locomotive is part of the "conveyance" provided for the transportation of passengers upon a railroad is not disputed. If the deceased had been killed in trying to enter or leave the engine of a freight train, the defendant here would hardly concede its liability upon the ground that it was no part of "a moving conveyance," and therefore not within the clause exempting it from liability. Upon the theory that the engine is not part of the conveyance, it would follow that, if A. were killed in attempting to get on a car of a moving passenger train, the insurance company would not be liable, while, if B. were killed in attempting to get upon the engine of the same train at the same moment, the insurer would be liable. If it had been intended to restrict the insured to any particular part of the conveyance, apt words to express such intention could have been readily found and used; as, for example, in *Hull v. Association*, 41 Minn. 232, 42 N. W. 936, the policy contained the following provision: "Standing, being, or riding upon the platform of moving railway coaches (other than street cars), or riding in any other place not provided for the transportation of passengers, \* \* \* are hazards not contemplated or covered by this certificate." The same provision is found in the policy considered in *Anthony v. Association*, 162 Mass. 354, 38 N. E. 973; and a similar provision is found in a policy issued by still another company. See *Sawtelle v. Assurance Co.*, 15 Blatchf. 216, Fed. Cas. No. 12,392. That "a conveyance using steam as a motive power" includes railroad trains cannot be controverted. If, then, we insert "railroad trains" for or instead of "conveyance," the meaning becomes clear. Thus: "Entering or trying to enter or leave a moving railroad train (except cable and electric street cars), being in or on any such moving railroad train not provided for transportation



of passengers, or on a railroad bridge or road-bed (railway employes excepted)." Thus paraphrased, the only distinction made is in the character of the trains, and not as to different parts of a train. In the first clause in regard to entering or leaving trains, all trains are included; while, under the second clause, passenger trains are distinguished from freight, repair, wrecking, and other trains "not provided for the transportation of passengers." These exceptions, therefore, literally interpreted, have no application or reference to passengers or passenger trains except as to entering or trying to enter or leave, any train, whatever its character, while in motion; and therefore some term or condition not expressed in the policy must be imported into it to work a forfeiture and relieve the defendant from liability, and that is not permissible.

It follows from this conclusion that plaintiff's right to recover under clause (e) or (f) of the policy is clear, unless such right is barred by No. 1 of the provisos. That proviso is as follows: "If insured is injured in any occupation or exposure classed by this company as more hazardous than that here given, his insurance shall be only for such sums as the premiums paid by him will purchase at the rates fixed for such increased hazard." In *Stone's Adm'r's v. Casualty Co.*, 34 N. J. Law, 375, a similar provision in an accident policy was considered. It was there said: "The injuries excluded from the compensation of the policy are described as those that are 'received in any employment, or by any exposure either more hazardous in itself, or classified by the company as more hazardous.' These terms, literally rendered, require that the assured, to come within their effect, must, at the time of the injury, be in an employment more dangerous than his own. The language has reference to employments, and not to individual acts. It is true that a certain degree of ambiguity is introduced by the expression 'other exposure'; but, looking at the body of the policy, we find these terms used in the sense of the risks arising from a business or occupation. By adhering to the literal signification of the terms employed, these indorsements prefixed to the several classes of employments lose all force as independent stipulations, and serve the simple purpose of graduating such employments for the service of that provision of the policy which prohibits the assured from passing, at his own option, from one business to another. Understood in this view, they are properly a part of the classifications; but, if they are to be received as containing new terms of the contract, they are entirely out of place. If the company intended to say to the assured that if he did any act which did not strictly belong to his own occupation, but was embraced more properly in some other business, and if thereby any harm to him accidentally resulted, that in such event he

could claim nothing under his policy, it was easy for them to do so in plain language. \* \* \* A qualification so restrictive of the rights of the assured ought not to be admitted unless the terms of the indorsement will bear no other rational interpretation." In that case the occupation of the insured was stated to be that of a teacher. While unemployed, he was superintending the erection of a building for himself, and fell from the building by the breaking of a joist, and was killed, and the judgment against the company was affirmed. In the case at bar the policy did not provide that it covered only those accidents which might occur to the insured while actually engaged in the direct duties of a mining expert, but covered all accidents not excluded by the terms of the policy, the occupation being inserted only to show that it was within a specified class of risks. See, upon this point, and supporting the case last above cited, *Insurance Co. v. Fennell*, 49 Ill. 180, and *Insurance Co. v. Burroughs*, 69 Pa. St. 43.

Under the evidence contained in the record, I think it perfectly clear that the plaintiff was at least entitled to judgment for \$10,000 under clause (e) of the policy, and the only remaining question is whether she was entitled to judgment for \$20,000 under clause (f), which provides: "If such injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable, or electricity as a motive power, the amount shall be double the amount above specified." If Mr. Berliner had been riding on the train in any other capacity than that of a passenger,—that is, as an employe of the railroad company, or an express or mail agent, or a tramp stealing a ride upon a brakebeam,—the defendant would not be liable under clause (f). But he occupied no such relation to the railroad company or the train. Though upon the engine, he was a passenger. That he did not lose his character as a passenger by going upon the engine at the request of an officer of the road, see *Railroad Co. v. Brown*, 123 Ill. 186, 14 N. E. 197; *McGee v. Railway Co.*, 92 Mo. 216, 4 S. W. 789; and *Railroad Co. v. Erwin*, 3 Am. & Eng. R. Cas. 465. These were cases that involved the liability of the railroad company for injury to its passengers while rightfully upon the engine, and were not cases of accident insurance; but the word "passenger," as here used, is evidently intended to designate the character or relation the insured sustained to the proprietor of the conveyance, and are therefore in point. That the defendant cannot import into this clause of the policy conditions as to the part of the conveyance in which the insured must be, and thus, by construction, work a forfeiture, need not be further discussed. All that is required is that the insured shall be "riding as a passenger" in any passenger conveyance using steam, cable, or electricity as a motive power. That

portion of the judgment from which the present appeal is taken should be reversed.

We concur: BRITT, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, that portion of the judgment from which the present appeal is taken is reversed.

(121 Cal. 451)

BERLINER v. TRAVELERS' INS. CO. (S. F. 1,146.)<sup>1</sup>

(Supreme Court of California. July 18, 1898.)

INSURANCE — PREMIUMS — WAIVER — PLEADING — ANSWER — EVIDENCE — CONCLUSIONS — WITNESSES — CREDIBILITY — OBJECTIONS — INSTRUCTIONS — PROVINCE OF JURY — HARMLESS ERROR.

1. Where plaintiff makes out a prima facie case, the question whether defendant's testimony overcomes it is for the jury.

2. A policy and the application therefor required payment of the first premium while assured was in good health. It was delivered without payment of the premium, insured informing insurer's agent at the time that he was unable to pay. No demand for the premium was ever made, and, a month and a half after issuance, insured informed the agent that he intended traveling in a foreign country, and asked if the policy would be vitiated thereby. The agent said, "No." Held, that the condition as to payment of the premium had been waived.

3. Where relevant, though incompetent, testimony is objected to as being irrelevant alone, it is not error to receive it.

4. Declarations by insured as to his opinion that the premium had been paid are incompetent to prove a waiver of payment of the premium.

5. The repetition of erroneous testimony already in the case is not reversible error.

6. Under a complaint alleging payment of insurance premiums and compliance with the conditions of the policy, a waiver of the premiums may be proved.

7. An answer which denies a waiver of a condition in an insurance policy declared on treats the complaint as if it pleaded a waiver.

8. Where a complaint sets out the policy, it is not necessary to set out the application, that containing no conditions precedent not in the policy.

9. On an issue as to waiver of an insurance premium, testimony that insurer's agent had excused insured from paying it is a conclusion, and inadmissible.

10. It is error to charge that there is only one circumstance tending to prove a certain fact, when such fact may be inferred from several circumstances in the case.

11. Under Code Civ. Proc. § 2049, prohibiting a party from impeaching the credibility of his own witness, but permitting him to contradict his evidence, one does not vouch for the truthfulness of a witness produced by him.

12. An instruction that there is no evidence impeaching a certain witness is erroneous.

13. The question as to what weight is to be given to particular evidence is for the jury.

14. It is not error to refuse to repeat an instruction already given.

Commissioners' decision. Department 1. Appeal from superior court, San Francisco county.

Action by Mary I. Berliner against the Travelers' Insurance Company to recover on two policies. Plaintiff was nonsuited on one

policy, and had a verdict and judgment on the other, and both parties appealed. Heard on defendant's appeal from the judgment for plaintiff, and from an order denying its motion for a new trial. Affirmed.

Daniel Titus, for appellant. Olney & Olney, for respondent.

HAYNES, C. The plaintiff brought this action against the defendant to recover upon two policies of insurance, the first cause of action being upon an accident policy, and the second upon a life policy, each issued to George Berliner, and each policy being payable to the plaintiff (then the wife, now the widow, of the insured) in case of his death. Upon the trial the plaintiff was nonsuited upon the first cause of action, and had a verdict and judgment upon the second cause of action based upon the life policy. The plaintiff appealed from the judgment of nonsuit upon the first cause of action (S. F. 1048, 53 Pac. 918); and the defendant takes this appeal from the judgment against it on the life policy, and from an order denying its motion for a new trial. These appeals are separate, and are separately considered.

The defendant is a corporation having its principal or home office at Hartford, Conn. W. W. Haskell is and was its general agent at San Francisco. Mr. Berliner made his application for insurance to Mr. Haskell, who forwarded it to the home office, and the policy was there made and sent to Mr. Haskell. It bore date at Hartford, June 25, 1895, and was received by Mr. Haskell, July 1st. Among other things, the policy contained this provision: "This policy shall not take effect unless the first premium is paid while the insured is in good health;" and the application for the policy, signed by Berliner, contained the following: "That the policy applied for shall not take effect unless the advance premium is paid while I am in good health." Mr. Berliner and Mr. Haskell had adjacent offices in the Mills Building, and were personal friends. Berliner was a mining expert, and the general manager of the International Gold Syndicate, in which Mr. Haskell was a stockholder. About August 20, 1895, Mr. Berliner and S. W. Ferguson left San Francisco, and went to Mexico, where Mr. Berliner died, on September 17, 1895, from injuries received in a railroad accident. The defense to the action is that the premium on said policy was never paid, that its payment was not waived, that the policy was never delivered, and for these reasons never took effect as a contract between the parties; and it is contended that the verdict of the jury, which necessarily includes a finding that the policy was a valid and subsisting contract of insurance at the time of Mr. Berliner's death, is not justified by the evidence.

That the general agent of defendant could

<sup>1</sup> Rehearing denied.



waive the payment, deliver the policy, and thereby make it a valid and subsisting contract of insurance, notwithstanding the provision that it should "not take effect unless the first premium is paid while the insured is in good health," is well settled, and is not disputed. *Griffith v. Insurance Co.*, 101 Cal. 627, 36 Pac. 113; *Farnum v. Insurance Co.*, 83 Cal. 246, 23 Pac. 869. Nor is it questioned that possession of the policy by the insured or by the beneficiary is prima facie evidence of its delivery as such valid and subsisting contract. The policy was produced by the plaintiff, and put in evidence; and there being no controversy as to the death of the insured, or as to the identity of the plaintiff as the beneficiary named in the policy, a prima facie case was made, and the defendant's motion for a nonsuit was properly denied. At this stage of the case, if the defendant had refused to introduce any evidence, a verdict for the plaintiff could have been properly directed, and, if so, it cannot be said that the verdict afterwards rendered is without evidence to support it. The burden of overcoming the prima facie case made by the plaintiff rested upon the defendant, and whether defendant's evidence, afterwards introduced, did or did not overcome plaintiff's prima facie case, was for the jury to determine. A prima facie case may, of course, be overcome by evidence of so clear and convincing a character as to require the trial court, in the proper exercise of its discretion, to set the verdict aside, and grant a new trial. A new trial was denied by the court below in this case, and we think the court did not err, so far, at least, as that ground of the motion is concerned. It is true, Mr. Haskell testified that the premium was not paid; that no arrangement had been made for credit; that payment had not been waived; and that the delivery of the policy was for the purpose of examination, and not as an absolute or unconditional delivery. The policy, however, was received by Mr. Haskell about July 1st, and the plaintiff testified that she received it about eight or nine days after that date. The policy was not reported to the home office until after Mr. Berliner's death, either as a paid or unpaid policy. Mr. Berliner and Mr. Ferguson left San Francisco for Mexico about August 20th, and a day or two before their departure both inquired of Mr. Haskell whether traveling in Mexico would make their policies void, and were told that it would not. Upon this point Mr. Haskell testified explicitly: "Q. In that conversation, did Mr. Berliner ask you concerning this policy, if he traveled in a foreign country, it would void it? A. I remember of his talking with me about traveling in Mexico, and I told him if he resided in Mexico he would have to have a permit from any life company, as well as mine; but, to travel through there, the life policy would cover there as well as any place." This inquiry of Mr. Berliner plainly implied an un-

derstanding or belief on his part that the policy was delivered to him, and was in force, and that his doubt only related to the effect that traveling in Mexico might have upon it, and must have been so understood by Mr. Haskell. It is therefore incredible, if the premium had not been paid, or credit given by some understanding or agreement, express or implied, that instead of informing him that his policy was not in force, and that he was laboring under a misapprehension, he permitted him to go upon his journey with the assurance of its validity. There can be no mistake or failure of memory on the part of Mr. Haskell as to this conversation, as it is testified to by Mr. Ferguson and Dr. Bird, who were both present. Without laying too much stress upon the corroborating circumstances that Mr. Haskell and Mr. Berliner were intimate and confidential friends, that from as early as July 10th until after Mr. Berliner's death, more than two months thereafter, no inquiry was made about the policy by Mr. Haskell, or any request for its return, the evidence is ample to sustain the verdict, notwithstanding the testimony of Mr. Haskell that the delivery of the policy was only for the purpose of examination, and that the premium was not paid nor its payment waived. The waiver of payment was a purely personal matter with Mr. Haskell. When policies were prepared at the home office, the first premiums were charged to Mr. Haskell, and these charges could only be canceled by payment or by the return of the policy. The premium on this policy was payable quarterly (amounting to \$47.48); and Mr. Haskell was informed by Mr. Berliner, at the time the policy was handed to him, that he could not pay for it then, and Mr. Haskell testified that he knew he could not; and there was no evidence that payment was afterwards requested. These facts, taken in connection with Mr. Berliner's inquiry as to the effect his traveling in Mexico might have upon the policy, and Mr. Haskell's reply thereto, constitute evidence of a waiver of payment that could not be well made more conclusive save by an express admission of the fact.

It is also contended that the court erred in the admission of certain testimony, and in its subsequent refusal to strike it out. Mr. Haskell, having been called by the defendant, was asked by the plaintiff upon cross-examination what conversation he had with Mr. Ferguson on the occasion of his application to him, after his return from Mexico, to get the policy in question; but Mr. Haskell did not seem to remember more than that he asked Mr. Ferguson if he had access to Mr. Berliner's safe, and expressed his desire to get the policy. Mr. Ferguson was afterwards called in rebuttal, and, being asked to state what conversation he had with Mr. Haskell on the occasion referred to, testified that Mr. Haskell said he "would like to get that life policy because he did

not pay the premium on it"; that he replied, "Mr. Haskell, whatever papers Mr. Berliner left will be turned over to Mrs. Berliner, and you will have to consult her about it, because I could not think of delivering any papers; and, besides, it is a great surprise to me that the premium is not paid, because the plaintiff thought it was, and so expressed himself in his dying conversation." The witness was then asked: "Did you repeat to Mr. Haskell the conversation you had with Mr. Berliner? A. I think I told him, substantially, that Mr. Berliner thought the policy was in force, and so told me. I told him that Mr. Berliner died thinking the policy was in force. Q. What did you communicate to Mr. Haskell as coming from Mr. Berliner?" Counsel for defendant objected to the question as "incompetent, irrelevant, and immaterial, and also objected to the testimony of the witness relating to his conversation with Mr. Haskell being received in evidence, because it was intended for the purpose of impeaching Mr. Haskell's statement, and therefore cannot be admitted, for the reason that Mr. Haskell was examined—First by the plaintiff as her own witness; and, second, because the statement he made was on cross-examination, and was in regard to collateral matters, and his testimony is binding and conclusive; and also that Mr. Haskell's attention was not called to any such conversation, and he was not asked about it when he was upon the stand." There was no ruling upon this objection, and the question was not answered. The plaintiff then withdrew Mr. Ferguson, and recalled Mr. Haskell for plaintiff in rebuttal, and, having answered that he heard the statement of Mr. Ferguson, he was asked: "Did Mr. Ferguson state to you in that conversation what Mr. Berliner had said to him, when he was dying in Mexico, about this life policy? Thereupon counsel for the defendant objected to the question, on the ground that it was irrelevant; that it relates to matters having no bearing upon the question whether or not this policy has been paid for." The objection was overruled, and the defendant excepted. The witness then testified: "I think he made the statement as he made it on the stand here," and repeated substantially the language of Mr. Ferguson. "Q. That is what Mr. Ferguson said to you? A. Yes, sir. Q. As a statement made to him by Mr. Berliner? A. Yes, sir; I remember that is what he said to me." "Thereupon the counsel for the defendant moved to have the foregoing questions and answers stricken out as immaterial, irrelevant, and incompetent." The motion was denied, and defendant excepted.

Only the two rulings made by the court need be considered, the first question to which objection was made not having been ruled upon or answered. The first question objected to upon which a ruling was made

did not call for a statement of what Mr. Berliner said to Mr. Ferguson in Mexico about the policy. It was: "Did Mr. Ferguson state to you in that conversation what Mr. Berliner had said to him, when he was dying in Mexico, about this life policy?" This question was preliminary, should have been answered "Yes" or "No," and did not call for the conversation. But, assuming that it called for the statements made by Mr. Berliner, it was not irrelevant, though it was incompetent. A mere waiver of payment operates as an estoppel,—that is, that the defendant by its agent so acted as to induce Mr. Berliner to believe that the policy was valid and in force, and hence it was relevant to the issue to show that he so believed; but his statement of his belief made to a third party was hearsay, and not competent to prove the relevant fact of his belief. The circumstance of Mr. Berliner going to Mr. Haskell, and inquiring whether his going to Mexico would vitiate his policy, and Mr. Haskell's reply that it would not, was competent and sufficient for that purpose. The court therefore correctly ruled upon that question. The motion to strike out the "foregoing questions and answers" can only be construed to extend to the examination of Mr. Haskell, as that covered all that had been received against defendant's objection. Whether this motion should have been granted, in view of the prior objection and ruling, need not be considered, as all the facts here sought to be stricken out were, in substance, received without objection, and were not embraced in the motion to strike out. Under these circumstances, the defendant was not prejudiced by the rulings complained of. The mere repetition of improper testimony already before the jury is not a sufficient ground for reversal.

It is also contended that evidence of a waiver of payment was not admissible under the complaint; that payment of the premium is alleged; and that, if the policy was delivered without payment, the facts showing that defendant was estopped from relying upon the failure to pay should have been alleged. It is true that payment is alleged, but it is also alleged that the insured performed all the conditions on his part, and defendant accepted performance thereof, and delivered the policy. This was certainly sufficient as a pleading, and, the policy having been delivered, it is immaterial, so far as plaintiff's right to recover is concerned, whether the premium was paid or a credit given, the delivery of the policy as an executed contract being all that it was essential to allege or prove. In *Richards v. Insurance Co.*, 89 Cal. 170, 26 Pac. 762, it was objected that the complaint did not aver notice and proofs of death as required by the policy; but this court held that the averment that "plaintiffs have duly complied with all the terms and conditions of said



policy and renewal by them, or either of them, to be kept or performed," was a sufficient pleading of conditions precedent. And in May on Insurance (section 589) it is said: "The weight of authority seems to be that, under an allegation of the performance of a condition, proof of a waiver is admissible without alleging the waiver." Besides, the answer denied a waiver, and therefore treated it as though alleged.

The defendant objected to the sufficiency of the complaint, upon the ground that it set out the policy, but did not set out the application upon which it was issued, and also objected to the admission in evidence of the policy and application upon the same ground. As the application contained no condition precedent which it was necessary for the plaintiff to aver or prove, except that in relation to the payment of the premium, which condition was also stated in the policy which was set out in full, and proper allegations made thereon and denied in the answer, defendant's objections were properly overruled. This conclusion is not inconsistent with the case of *Gilmore v. Insurance Co.*, 55 Cal. 123, cited by appellant. In that case the application contained promises as to future acts and conduct of the insured, and the only authority cited was *Bobbitt v. Insurance Co.*, 66 N. C. 70, where the application contained a promise as to future acts. Such promises constitute an agreement on the part of the assured to be performed in the future, and are conditions precedent, the performance of which must be alleged by the plaintiff, either specifically or by the general allegation that he has performed all the conditions on his part. But this question we regard as settled by the case of *Cowan v. Insurance Co.*, 78 Cal. 181, 20 Pac. 408, where the court, speaking of warranties in præsentia,—that is, of past or existing facts,—said (at page 185, 78 Cal., and page 410, 20 Pac.): "Where there is nothing in the representation or statement to be performed by the plaintiff, there is no necessity of setting forth such representation or statement. Whereas, in the case of a promissory warranty, the assured has warranted that he will do something during the existence of the risk, the requisition of averment of such stipulation and of its performance is required." See, also, *Herron v. Insurance Co.*, 28 Ill. 238.

The question put to Mr. Haskell by defendant, "Did you ever, in any way, excuse Mr. Berliner from making payment of the first premium upon the life policy?" clearly called for the conclusion of the witness, and was properly excluded.

The remaining questions relate to instructions to the jury, given and refused.

The instruction to find a verdict in favor of defendant, as requested, was properly refused, as we have determined that the evidence supports the verdict for the plaintiff.

The defendant also requested an instruction that "there is no evidence that the first

premium was paid, except the fact that the plaintiff is in possession of the policy." This would have taken from the jury the consideration of the relations of the parties, the circumstances connected with the transaction, including the conversation as to the effect upon the validity of the policy Mr. Berliner's visit to Mexico might have, and, if given, would have been error.

Defendant also asked to have the jury instructed as follows: "It is your duty to decide this case upon the evidence produced. The plaintiff has introduced Mr. Haskell as her witness. By so doing, she vouches for his truthfulness as a witness." This instruction was properly refused. Section 2049, Code Civ. Proc., states the rule thus: "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section 2052." This rule was not violated upon the trial, while the instruction requested would necessarily have influenced the jury in determining the credibility of the witness by establishing a test that is inconsistent with that prescribed by the Code.

Defendant's proposed instruction "that there has been no testimony in any way impeaching or discrediting Mr. Haskell" was a request for an instruction upon a question of fact, and as to the credibility of a witness, and was properly refused.

The modification of the requested instruction beginning at folio 225 was proper. The part stricken out was an instruction upon the weight which should be given to certain evidence, and also contained an express instruction that it had "been proven that the premium was not paid," notwithstanding there was at least prima facie evidence that it had been paid.

The court properly refused to instruct the jury as requested at folios 229 and 230, to the effect that the only evidence which the jury were entitled to take into consideration was the fact that the policy was found among the papers of the deceased, and that the evidence was clear and positive that the premium was not paid. That such instruction would have been erroneous does not require argument. The further words, "Upon that proposition [the payment of the premium] the burden of proof is upon the plaintiff," stated a correct proposition of law, and had been given to the jury. It was not error to refuse to repeat it.

The objections made by defendant to the fourth and sixth instructions given at the request of the plaintiff cannot be sustained. These instructions related to the waiver of payment of the premium, and the objection is not that they do not state the law correctly, but that the evidence did not justify the court in giving them. This point is fully covered by what has been said touching the

sufficiency of the evidence to justify the verdict, and need not be further noticed. We find no error which would justify a reversal of the judgment and order appealed from, and advise that they be affirmed.

We concur: BRITT, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

121 Cal. 396

RUSSELL v. AGAR. (S. F. 991.)

(Supreme Court of California. July 7, 1898.)

SPECIFIC PERFORMANCE—INDEFINITE AGREEMENT.

Under Civ. Code, § 3390, subd. 6, providing that no agreement may be enforced, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable, an agreement to continue in testator's employ in consideration of his promise to make good to the employé, by testamentary provision, such amount as the employé would lose by declining an offer of a partner's interest in a competing firm, is not specifically enforceable against testator's executors.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Coleridge Russell against one Agar, executor. There was a judgment for defendant, and plaintiff appealed. Affirmed.

E. L. Campbell and J. S. Spillman, for appellant. Freeman & Bates, for respondent.

HENSHAW, J. Plaintiff brought his action against defendant, Agar, as executor of the estate of Joseph McDonough, deceased, and for cause of action averred the following facts: For several years prior to the 14th day of September, 1894, he had been in the employ of Joseph McDonough in the capacity of salesman and collector. McDonough's business was that of a wholesale and retail dealer in coal in the city and county of San Francisco. By reason of his experience, extended acquaintance, and personal influence, plaintiff had created and controlled a large amount of McDonough's business. A short time prior to the 14th day of September, 1894, plaintiff was offered a fifth interest as partner in the business, good will, property, and profits to accrue in a firm engaged in the business of dealing in coal in said city and county. Plaintiff was not required by the firm to contribute any money or other property to the partnership, but was offered the one-fifth partnership interest in consideration of his devoting his time and attention to the business, and of giving to the firm the advantage of his experience, extended acquaintance, and control over a large amount of coal trade in the city. Plaintiff believed that it would be to his interest to accept the offer, and explained it and its circumstances to his employer, McDonough, to prevent plaintiff's

acceptance of the proposition, on the 14th day of September, 1894, entered into a contract with him as follows: "Plaintiff promised and agreed to and with said Joseph McDonough that he, said plaintiff, would reject the offer of the aforesaid firm, and would remain with and well and truly and faithfully serve the said Joseph McDonough in his said business as wholesale and retail dealer in coal for such length of time as he, said Joseph McDonough, should continue to carry on said business, in consideration whereof the said Joseph McDonough promised and agreed to and with plaintiff that he, the said Joseph McDonough, would by his last will and testament leave and bequeath unto plaintiff such a sum of money as would make good to plaintiff any and all loss he might at the time of said Joseph McDonough's discontinuance in said business have sustained by reason of rejecting the offer of said firm, and remaining with and serving said Joseph McDonough; said bequest by last will to be in addition to, and independent of, the salary to be paid to plaintiff for his services." Plaintiff further averred the fulfillment upon his part of all the terms and conditions of his contract, the discontinuance of McDonough in business by reason of his death, and his failure to make any bequest to plaintiff in his will. He further averred "that the said firm hereinbefore referred to established a successful business, and that the value of the assets, good will, and business of the firm was, at the time of the death of said Joseph McDonough and his discontinuance of said business, of great value, to wit, of the value of \$60,000." It is next averred that the loss sustained by plaintiff is the sum of \$12,000. The prayer of the complaint is for a decree compelling the executor of the estate of Joseph McDonough specifically to perform his testator's contract. The demurrer was both general and special. It was sustained, and from the judgment entered in defendant's favor plaintiff appealed.

Many propositions are urged in argument against this complaint,—propositions presented under special demurrers for uncertainty and ambiguity. A point of some importance is made upon a variance between the contract set forth in the claim presented to the executor and the contract pleaded in the complaint. Upon none of these questions do we deem it important to touch, for the reason that the contract is not one for a breach of which a recovery may be had at law, nor one which may be enforced in equity, as is here sought to be done, and therefore the general demurrer was properly sustained. There is no question but that a man may make a valid agreement binding himself to dispose of his property by last will and testament in a particular way, and a court of equity will, under certain circumstances, enforce such an agreement. That



question has recently been considered at some length by this court, and it is not necessary to do more than refer to the case of *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710. No agreement may be enforced, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable. Civ. Code, § 3390, subd. 6. Before any such contract as this will be entertained by a court of equity, its terms must not only be fair, but free from doubt. Here it may not be determined what the liability of McDonough was; assuming, as of course we do, the truth of all issuable matters which are well pleaded. If plaintiff had represented to McDonough that he intended to commence business for himself, and McDonough had answered, "You remain with me, and I will make good to you whatever you may lose by not leaving me," no one would doubt that McDonough's offer was one which could not be measured or enforced. It could not be told whether the prospective business would or would not prove successful. The actual case here presented is not essentially different. McDonough was to make good all loss which plaintiff might sustain by not entering the firm. How can that be measured, determined, or ascertained? Partnership dissensions might have arisen the next day, and a dissolution might have followed. Plaintiff, as a partner, might have increased the volume and value of the business enormously, or by some unfortunate venture he might have wrecked it. The fact that the partners succeeded in establishing a successful business does not lead to any logical conclusion that the same result would have followed had another member been admitted to the firm. Appellant relies upon the case of *Bayliss v. Prieture's Estate*, 24 Wis. 651, but the differences between that and the case at bar are too radical to make it of assistance to him. There plaintiff sued for the reasonable value of his services under an agreement with his employer by which he was to be compensated in part by a testamentary bequest. The court took evidence, fixed the value of the services, and rendered judgment for the difference between what they were worth and what plaintiff had received. In this no doubt or uncertainty existed. But here plaintiff is not suing for the value of his services, but to enforce a contract whereby he was to be paid some undetermined and undeterminable sum of money. The same reasons of uncertainty and doubt which prevent equitable relief forbid the recovery of damages at law. Since plaintiff can never show how much he lost, or that he lost anything, he never can show that he has been damaged. The case is more like that of *Graham v. Graham's Ex'rs*, 34 Pa. St. 475, where the parol agreement was to give to plaintiff, for services to be rendered, "as much as to any relative on earth." The

court asks: "How much did decedent promise to give? The amount is uncertain, and, from the nature of the arrangement, is incapable of being rendered certain." The judgment is affirmed.

We concur: MCFARLAND, J.; TEMPLE, J.

121 Cal. 425

BARBOUR v. FLICK. (L. A. 580.)

(Supreme Court of California. July 14, 1898.)

APPEAL—BRIEFS—TIME FOR FILING.

Where, by stipulation, cross appeals were to be heard on the same transcript, which was prepared and filed by defendant, who also filed his opening brief in 30 days, and plaintiff filed no brief within that time, thinking that the stipulation provided that he could print his opening brief on his cross appeal under the same cover with his answer to defendant's opening brief, which he did, and no delay or inconvenience was occasioned, the rule dismissing the appeal for failure to file a printed brief within 30 days will not be enforced.

Department 2. Appeal from superior court, San Diego county.

Action by one Barbour against one Flick. There was a judgment for plaintiff, from a part of which he appeals, and from an order denying a motion for a new trial defendant appeals. On motion to dismiss plaintiff's cross appeal. Denied.

Patterson Sprig and McDonald & McDonald, for Barbour. Puterbaugh & Puterbaugh, for Flick.

PER CURIAM. There are cross appeals in this case,—by the plaintiff from a part of the judgment, and by the defendant from an order denying his motion for a new trial. By stipulation, both appeals were to be heard on the same transcript, and defendant's attorneys prepared and filed it. They also filed their opening brief within 30 days after filing the record here, but plaintiff did not within that time file any brief in support of his cross appeal; and defendant has moved, under the rule, to dismiss it. Plaintiff excuses his failure to comply with the rule by showing that he was under the mistaken belief that the stipulation as to the single record for both appeals also provided that he should print the opening brief on his appeal under the same cover with his answer to defendant's opening brief, which he has done since notice of the motion to dismiss was served. Defendant's attorneys admit that this method of presenting the cross appeal is convenient, and that they would very willingly have consented to it if they had been requested. They also admit that no delay in the hearing of the appeal has been or will be occasioned. Under the circumstances, we think it would be too severe a penalty to enforce the rule by dismissing the appeal. Motion denied.

121 Cal. 405

In re TYLER'S ESTATE. (Sac. 304.)  
(Supreme Court of California. July 11, 1898.)

## WILLS—EXECUTION—EVIDENCE—SUFFICIENCY.

The evidence as to the execution of a will proved the signature of testatrix, the signatures of the subscribing witnesses, and the fact that they signed it in her presence and in the presence of each other. No evidence impeaching the execution of the will in any respect was offered. One of the attesting witnesses was dead, however. The other did not remember whether testatrix signed the instrument or acknowledged her signature to it in his presence, or whether she declared it to be her will in the presence of the attesting witnesses, or whether she requested him to sign as an attesting witness, but he did not testify that these things did not take place. *Held*, that there was sufficient proof of the execution.

In bank. Appeal from superior court, Sacramento county.

F. D. Ryan and Jas. B. Devine, for appellants. C. W. Baker and Albert M. Johnson, for respondent.

McFARLAND, J. This is a contest of the will of Anna Tyler, deceased, instituted by certain of her heirs. The court below held the will good, and the contestants appeal.

The appellants make no contention that the testatrix, at the time the will was made, was of unsound mind, or under undue influence, or that she did not knowingly sign it, or that it does not clearly express her evident intentions as to the disposition of her property, or that the will is not properly attested, or that on its face it does not comply with all the statutory provisions touching the making of wills. The sole contention of appellants is that the execution of the will was not sufficiently proved. And as to this point appellants did not themselves introduce any evidence to show that the will was not duly executed. They rely entirely upon the asserted insufficiency of the evidence of respondent. Indeed, the appellants offered no evidence at all on any material issue in the contest. They rest solely upon the proposition that the respondent did not prove enough. The closing part of the will is all that need be quoted here, and it is as follows: "In witness hereof I have hereunto set my hand and seal in the presence of John Heard and —, who I request to sign their names hereto as subscribing witnesses. [Signed] Anna Foster. [Seal.] [Signed] John Heard. Fred B. Berger." The objections made by appellants to the sufficiency of the evidence are that it does not sufficiently show that the testatrix signed the will in the presence of the subscribing witnesses, or acknowledged her signature in their presence, or that she declared to them that the instrument was her will, or that she requested the subscribing witness Berger to sign his name as a witness. The evidence and the facts proved were substantially as follows: The signature of the testatrix was proved. The attesting witness Heard was dead, and his signature was proved. The

other subscribing witness, Berger, did not live in the county; and, if he had not been called as a witness at all, proof of his signature to the will, together with proof of the signature of Heard and of the testatrix, would clearly have made a prima facie case of its due execution. Code Civ. Proc. § 1315. But respondent (unfortunately, it seems) brought him from another county to testify at the trial; and it turned out that, although he remembered signing the will, and swore to his signature, he had no definite recollection of certain things which occurred at the time he attested the will. He could not remember whether the testatrix actually signed the instrument or verbally acknowledged her signature to it in his presence, or whether she declared the document to be her will in the presence of the attesting witnesses, or whether she requested him to sign as an attesting witness. He did not testify, however, that these things were not done; nor was there any evidence to impeach the execution of the will, or to throw upon it the shadow of any kind of suspicion. Appellants contend that the will must fall merely because the memory of the witness failed. The court held that as one attesting witness was dead, and the other unable to recollect, as above stated, and as there was no evidence tending in any way to invalidate the will, proof of the signatures of the testatrix and the attesting witnesses was, under the circumstances described, sufficient to establish the due execution of the instrument. We see no valid reason for disturbing this conclusion.

The witness Berger gave his testimony a dozen years after the making of the will; and as he went hurriedly from his business to be an attesting witness, and stayed only a short time at the place where the will was signed, it is not surprising that he had forgotten some of the things that happened on that occasion. He had not, however, forgotten all that occurred. He remembered that he was called as an attesting witness; that he went to a room in a certain house; that there were present there the testatrix, the other attesting witness (Heard), Mr. Tyler (husband of the testatrix), and a little girl (the beneficiary in the will), then too young to remember what occurred; that the testatrix, whom he well knew, was in her usual health; that he heard part of the will read; that Heard and the witness Berger signed the will as witnesses, and that when they did so the testatrix was there present; that witness then partook of some refreshments at the invitation of the testatrix, and immediately afterwards left; and that the testatrix and Heard were both there all the time that witness was present, —to all of which he testified. He testified, therefore, to at least some material things, —particularly that the attesting witnesses signed the will, and that they both signed it in the presence of the testatrix and of each other. We state that he remembered and



testified to these things merely because it brings the case more nearly within the facts of some of the cases cited below, where an attesting witness had recollected some of the occurrences attendant upon the making of a will, but had forgotten others. Such facts strengthen the finding of a court that the will was duly executed.

It is our view, both upon reason and authority, that the finding of the trial court that the will was duly executed is beyond disturbance here. While the Code provides that certain things are necessary to the making of a valid will, it does not prescribe how those things shall be proved. It leaves that to the general rules of evidence. There is provision, it is true, that if the attesting witnesses are alive, and present in the county, they must, in the event of a contest, be called. This is a very natural and just provision, for in such case the failure of the proponent of a will to call his attesting witnesses would be a very suspicious circumstance. But there is no statutory declaration, and no principle of law, to the effect that a will executed in due form shall go for naught unless an attesting witness, after the lapse of many years, shall continue to recollect everything material that occurred at the time he subscribed his name to it. Such a rule would make the validity of the will dependent, not upon the disposing mind of the testator, nor his freedom from duress, undue influence, or fraud, nor upon his clear expression of his intention in the body of the instrument, nor upon its execution in conformity to the form and ceremony prescribed by the statute, but upon the fullness, accuracy, and persistency of the recollection of one of the persons who signed it as a witness. Such a rule cannot be maintained either upon principle or precedent. What constitutes a sufficient execution of a will is prescribed by the statute. What constitutes sufficient proof of such execution is not so prescribed, and is a different question,—a question to be solved by the general principles of evidence. In the case at bar there was no person other than Berger present at the making of the will who was capable of testifying at the time of the trial to its execution. The husband of the testatrix, and the other witness, Heard, were dead, and the little girl was too young at the time of the making of the will to know anything about it. The fact that the instrument was signed by the testatrix and the attesting witnesses was proved. There was no evidence tending to disprove the proper execution of the will, or to impeach it in any way. These are the facts of the case, and it is not necessary for the purposes of this decision to go beyond them. We are satisfied that upon these facts the court was warranted in holding the will duly executed. Where an attesting witness has no recollection as to certain matters connected with the making of the will, the case is,

upon principle, in the same condition as where he is dead, insane, or absent; and in such case "proof of the handwriting of the testator and of the subscribing witnesses, or any of them, may be admitted as evidence of the execution." Code Civ. Proc. § 1315. And such evidence is sufficient, in the absence of any counter showing, to prove the execution.

Authorities supporting the above conclusion are numerous. We will refer to some of them: In 1 Greenl. Ev. par. 38a, we find the following: "Execution of Instruments—Regularity of Acts. Of a similar character is the presumption in favor of the due execution of solemn instruments. Thus, if the subscribing witnesses to a will are dead, or if, being present, they are forgetful of all the facts, or of any fact material to its due execution, the law will in such cases supply the defect of proof by presuming that the requisites of the statute were duly observed." Authorities are cited sustaining the text. In Beach on the Law of Wills the author, in paragraph 39, says: "On the death of the witnesses, or on the failure of their memory, the proof of the fact of execution begets the presumption that all the details of the statutory requirements were complied with, whether so stated in the attestation clause or not, unless the contrary be proven." In 1 Jones, Ev. § 44, it is said as follows: "If a will purports to have been duly signed, attested, and witnessed, on proof of execution the court will presume, in the case of the death of the witnesses, or in case they do not remember the facts connected with its execution, that the law was complied with; and the details of the statutory requirements will be presumed, whether it is so stated in the attestation clause or not, unless the contrary is proven." Other text-books state the same rule. There are innumerable judicial decisions to the same point. It is sufficient to cite the following: *Burgoyne v. Showler*, 1 Rob. Ecc. 10; *In re Leach*, 12 Jur. 381; *Fatheree v. Lawrence*, 33 Miss. 622, and cases there cited; *Deupree v. Deupree*, 45 Ga. 415; *Ela v. Edwards*, 13 Gray, 91; *Eliot v. Eliot*, 10 Allen, 357; *Clarke v. Dunnivant*, 10 Leigh, 13; *Kirk v. Carr*, 54 Pa. St. 285; *McKee v. White*, 50 Pa. St. 354. See, also, cases cited in the notes to the sections of the text-books above quoted.

As the question here involved is one of considerable importance, we will notice a few of the expressions by which the principle is declared in the cases above cited. In *Burgoyne v. Showler* it is said: "I think I should be establishing a very dangerous precedent if I were to pronounce against this will. I think the principle on which Sir H. J. Fust has acted in these cases is this: That, in the absence of the recollection of the witnesses, he will presume the will to be duly executed." In *Re Leach* each of the witnesses "remembered that he signed his name as a witness

to the will in the testator's presence, but neither of them could recollect whether the testator signed his name in their presence, nor whether his signature was already set to the will when they signed, or whether the other witness was present"; and upon this testimony it was held that "the presumption is in favor of the due execution, according to the principle laid down by the learned judge who sat for me in the case of *Burgoyne v. Showler*, and I therefore decree probate to pass as prayed." In *Kirk v. Carr* the court says: "Want of memory will no more destroy the attestation than insanity, absence, or death." In *Clarke v. Dunnivant*, *Tucker, J.*, in his concurring opinion, says, having alluded to a case where the attesting witness to a will had sworn affirmatively that the statute had not been complied with in making it: "How is it where, as in this case, they do not negative a compliance with the statute, but merely have forgotten the circumstances? It seems to me that, upon fair analogy, the question should be decided as it would be if the witness were dead, and his handwriting proved. And so, accordingly, I think, are the authorities to be understood." After referring to the case of *Jackson v. Le Grange*, 19 Johns. 386, approvingly, he says: "Where the memory of the witness fails, the proof of his signature will justify an inference that all the requisites of the law have been complied with." Further on he says: "From the whole of these cases, then, I deduce that on a question of probate the defect of memory of the witnesses will not be permitted to defeat the will, but that the court may, from circumstances, presume that the requisitions of the statute have been observed, and that they ought so to presume from the fact of attestation, unless the inferences from the fact are rebutted by satisfactory evidence." Having alluded to suggestions of mischief which might follow the decision, he says: "Far greater mischiefs would arise from a contrary decision, which should make the rights of every devisee and legatee depend, not only upon the honesty, but also upon the slippery memory of witnesses. Under such a decision no man could be sure of dying testate, since the forgetfulness of a witness would frustrate all his precaution; and a question of title by will, which, in the spirit of the statute of frauds, the legislature designed to rest upon written evidence alone, would, after all, depend upon the integrity and the memory of those who were called on to attest the instrument. The consequence would be that I may have a good will by me to-day, but, if I live five years, it may become a void instrument, because one of the witnesses to it cannot recall some ceremony of its execution. Such a consequence I would not aid in bringing about. It would tend, I have no doubt, to multiply the attempts, already too common, to set aside wills, since the chances of success must be very much increased if the frailty of human

memory is to be called in to the aid of the discontented heir." In the leading opinion by *Parker, J.*, the same views are expressed, and he says: "Few persons witnessing a paper would, after eight or nine years, be able to recall every fact that might be necessary to give it legal validity; and if their defect of memory is, without other impeachment, to prejudice the rights of parties claiming under it, the mischief would be greater than any that can result from this decision." In *Ela v. Edwards* the court says: "The obvious policy of the law, as heretofore declared in this commonwealth, has been that no man's will should be defeated through the want of memory on the part of the attesting witnesses to the facts essential to a good attestation." In *Deupree v. Deupree* the court below had charged the jury that, in case of the defective memory of an attesting witness, proof of his signature would be sufficient, provided there was an attestation clause which recited the things which the witness had forgotten, but that there would be no presumption of due execution in the absence of an attestation clause; and the appellate court held this to be error. The court says: "There is no question as to the general rule that on the death of the witnesses, or on the failure of their memory, the proof of the fact of execution begets a presumption that all the details of the fact were such as the law requires." After citing a number of cases the court says: "These cases establish, also, that this presumption does not depend on the recitals in the attestation clause." Further on the court says: "As a matter of course, the presumption is stronger or weaker, according to any material facts connected with the case; and, if it was recited, this would strengthen it. But it is a wise rule of law that such a presumption should exist. How many wills do not come up for probate until many years after the execution of them! Sometimes the witnesses can only recognize their own handwriting. Sometimes they only remember the fact that the testator signed, and perhaps only that they signed. Who was present, and all the other details, have passed from memory. To say that under such circumstances the will is not to be probated would be a death blow to wills." The statutes of Georgia on the subject are substantially like ours; and there is nothing in our Code which prescribes any form for the attestation of a subscribing witness, or that there shall be any recitals in such attestation.

The authorities cited by appellants are not in point, unless it be that of *Luper v. Werts*, 19 Or. 132, 23 Pac. 850. In *Walker's Estate*, 110 Cal. 397, 42 Pac. 815, the court was not dealing with the general question of the sufficiency of proof of the execution of a will. The facts there were undisputed, and the only question was whether or not one of the alleged attesting witnesses had subscribed his name to the document. The other cases cited do not deal with the question of the suffi-



ciency of the proof of execution. In *Luper v. Werts* there are some expressions in the opinion of a majority of the court tending to support appellants' contention. The case was decided by a divided court, and the decision could have well been placed upon the fact that the testimony of Peyser, one of the subscribing witnesses, showed affirmatively that the will had not been properly executed. The case illustrates the danger of upsetting a will, even upon the adverse testimony of a subscribing witness, unless the attendant circumstances strengthen his testimony; for it seems to have been admitted there that, as said by Lord, J., in his dissenting opinion, "Peyser is an unwilling witness, of an unreliable character, whose testimony, as disclosed by the record, indicates a purpose to defeat the will." The testimony of a witness who had solemnly subscribed to a will as an attesting witness, and afterwards endeavored to overthrow it, should be closely scrutinized; and, no doubt, the court below in that case sustained the will because there were circumstances which caused it to disbelieve the testimony of Peyser. What was said in the opinion of the court as to the question here involved was mostly dictum; and, if anything can be there found not in accordance with the views herein expressed, we think, notwithstanding our high opinion of that court, it was contrary to the great volume and weight of authority. The judgment and orders appealed from are affirmed.

We concur: BEATTY, C. J.; VAN FLEET, J.; GAROUTTE, J.; TEMPLE, J.; HARRISON, J.

121 Cal. 426

HART v. KETCHUM. (Sac. 448.)

(Supreme Court of California. July 14, 1898.)

GIFT CAUSA MORTIS—VALIDITY.

On March 19, 1897, a decedent, during his last illness, placed in defendant's hands two savings bank books, saying he wanted him to draw the money, and pay his creditors and funeral expenses, and then select some charitable institution, and give it \$100. He said nothing about any balance, did not specify any institution, but told defendant to select it. The orders for the money were prepared, and signed by decedent, and defendant then said that, if decedent got well, he would keep the money safely for him. The orders were sent to the banks, and the money received by the defendant. Decedent died on March 22d. Prior and subsequent to decedent's giving the bank books to defendant, he stated to others that he wished defendant to have the balance. *Held* insufficient to show a gift causa mortis, either to defendant or any charitable institution.

Department 1. Appeal from superior court, Sierra county; Stanley A. Smith, Judge.

Action by Amos Hart, administrator, etc., against Platt Ketchum. Judgment for plaintiff, and defendant appeals. Affirmed.

J. M. Walling, for appellant. Frank R. Wehe, for respondent.

HARRISON, J. The plaintiff seeks by this action to recover from the defendant certain moneys claimed to belong to the estate of James Preston, of which he is the administrator. The defendant claims a right to the money by virtue of a gift causa mortis from the intestate. Judgment was rendered in favor of the plaintiff, and the defendant has appealed.

On the 19th day of March, 1897, James Preston, being ill, and expecting to die from his illness, placed in the hands of the defendant two savings bank books, saying: "I want you to draw this money, and pay it out as I wish to have it done, to different parties. I want you to draw the money, and pay Damas Sirard \$1,000; pay John Sherman, in North San Juan, for one week's board,—about six dollars, I suppose; and pay to A. J. Grimes ten dollars." Then he said, "You select some charitable institution, and give or send to them one hundred dollars from this money." That was the talk right then. He said nothing to me about any balance, if any should remain. He did not specify any charitable institution, but told me to select one, and I asked him what one, and he said he did not know; that I should select one, and suit myself." He also said that he wanted the defendant to pay his funeral expenses. "He wanted me to pay all—to pay these parties certain amounts, and pay all his little bills that he might be owing, and all expenses and everything of that kind." Orders upon the banks for the money were then prepared by the defendant, and signed by Preston, and the defendant said to Preston: "Now, Jim, if you get well, I will keep this money safely for you, and you shall have every nickel of it back. You need not be afraid of losing any of it through me." The orders were sent to the banks at San Francisco and Sacramento, and subsequently the money represented by them was received by the defendant. Preston died on the 22d of March. The court found that in the making of said orders and delivery of said bank books the deceased did not intend to make a gift of his property to any one, or to transfer the title to said property to any one, but intended to retain his right and dominion over it during his lifetime; "that in the delivery of said bank books and making of said orders it was intended by said Preston to constitute said Ketchum his agent for the purposes above set forth, and it was intended by said Preston that such disposal of his said property should only take effect at the time of his death"; and thereupon rendered judgment in favor of the plaintiff.

Money deposited in a savings bank may be the subject of a gift causa mortis if it appears from the transaction that the donor intended thereby to confer upon the donee a present right to the money, and at the same time clothed him with the means of obtaining it. The delivery, however, must be as a gift in presenti, and not for the purpose of making

a future disposal of it under the directions of the donor. If the donee is merely empowered to draw the money, and is thereafter to dispose of it in accordance with instructions from the donor, he is only an agent of the donor, and his agency terminates with the death of the donor. It is essential to a gift *causa mortis* that the donor shall confer upon the donee, at the time of the gift, a present title and property in the thing given; and, if the thing given is capable of corporeal delivery, there must be an actual or symbolical delivery of it, or if it is not so capable, the means of obtaining control and possession of the thing must be then given. Civ. Code, § 1147. Unless the property in the thing given vests in the donee, it remains in the donor, and there is only a purpose or intention on his part to make a gift. Such purpose or intention is incapable of enforcement. The delivery must accompany the gift, and must be made at the same time. It is the delivery by the donor, and not the possession by the donee, that makes the gift effective. *Cutting v. Gilman*, 41 N. H. 147; *Miller v. Jeffress*, 4 Grat. 472. The law requires a gift *causa mortis* to be absolute at the time it is given, but adds to it the condition that it may be revoked at the will of the donor, and that it is revoked by his recovery; but if, by the terms of the gift, it is not to take effect until after the death of the donor, the disposal is testamentary, and not a gift. Such limitation is a condition precedent by which the gift is prevented from becoming absolute in the lifetime of the donor, and the thing given is, therefore, a portion of his estate at the time of his death. *Daniel v. Smith*, 64 Cal. 346, 30 Pac. 575; *Id.*, 75 Cal. 548, 17 Pac. 683; *Walter v. Ford*, 74 Mo. 196; *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415. At the time that Preston handed the bank books to the defendant he said nothing that in terms indicated his intention to make a present gift of the money. His remark, "I want you to draw this money, and pay it out as I wish to have it done, to different parties," and the subsequent designation of the persons to whom the money was to be paid, merely indicated the disposition which he wished made of his money after his death, and his selection of the defendant as his agent for that purpose. Certain directions for the payment of a portion of the money were then given, but at the time of giving them Preston said nothing indicating an intention to give any money to the defendant, or of the disposal to be made of what might remain after making the payments which he then directed. The language used by him indicated that the defendant was to pay out whatever money he might draw as Preston should direct. The statement by Preston to Hourcade, prior to his giving the bank books to the defendant, of what he intended to do, and his subsequent statement to Wayman, in the absence of the defendant, that he wished the defendant to have the balance, might be corroborative of

any statement of the defendant as to what transpired between him and Preston, but it is not available to make the terms of the gift different from what the defendant stated them to be, or to establish a gift to the defendant at the time he received the books. The defendant said that he had no other conversation with Preston, and that he said nothing to him about any balance, if it should remain. That it was not the intention of Preston to direct the defendant to make an immediate payment to the persons designated, and that the defendant was not authorized to make such payment is shown by the defendant's statement that at the time he received the bank books he told Preston that he would keep the money safely for him, and that he should have it all back if he recovered. It is also to be noted that, with the exception of the \$100 which was to be given to some charitable institution to be afterwards selected by the defendant, Preston was under some obligation to each of the persons to whom he directed the defendant to pay the money; and, while the use of the word "pay" might be consistent with an intention to make a gift, it is inconsistent with such intention when used with reference to the discharge of an obligation. It cannot be held that there was a gift by Preston to any charitable institution, since the defendant was to select the institution to which the money was to be given. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(6 Cal. Unrep. 72)

FOX v. GRAYSON. (S. F. 1,447.)

(Supreme Court of California. July 14, 1898.)

APPEAL—REVERSAL—INJUNCTION—DISSOLUTION—DISMISSAL.

When it is not clear that a reversal of an order dissolving a temporary injunction would have no legal effect, a motion to dismiss an appeal therefrom on that ground will not be sustained.

Appeal from superior court, city and county of San Francisco.

Action of one Fox against one Grayson. From an order dissolving a temporary injunction, plaintiff appealed, and defendant moves to dismiss the appeal. Motion denied.

W. T. Baggett, for appellant. Deal, Tanszky & Wells, for respondent.

PER CURIAM. Motion to dismiss the plaintiff's appeal from an order dissolving a temporary injunction, upon the ground that a reversal of the order would have no legal effect, and consequently that the questions raised by the appeal have become mere abstractions. It is not clear that a reversal of the order would have no legal effect. Motion denied.



(121 Cal. 536)

SPENCE v. SMITH. (Sac. No. 290.)

(Supreme Court of California. July 13, 1898.)

For original opinion, see 53 Pac. 653.

PER CURIAM. The judgment heretofore rendered herein is modified by striking out the directions to the court below to enter judgment upon the findings in favor of the plaintiff, and is amended so as to read, "The judgment is reversed, and a new trial ordered."

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(121 Cal. 419)

MARCH v. BARNET et al. (S. F. 704.)

(Supreme Court of California. July 13, 1898.)

SUBROGATION—SURETIES—BILLS AND NOTES.

In a suit on a note against the indorser, the maker's property was attached, and he caused it to be released by giving the statutory bond. Judgment was entered on the note against maker and indorser, and the attachment surety paid it, and took an assignment of it to himself. His obligation on the bond was only as surety for the maker. *Held*, that the surety or his assignees having notice could not enforce the judgment against the indorser.

In bank. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

Action by William F. March against S. Barnet and others to recover for the wrongful taking of personal property. Judgment for plaintiff against defendant Jacob Steen and for defendants Barnet, Isaac Blum, Joseph Blum, and J. H. Jacobs. Plaintiff appeals. Reversed.

For decision in department, see 46 Pac. 152.

W. D. Story, for appellant. Z. N. Goldsby, for respondents.

VAN FLEET, J. When this cause was in department, an opinion was rendered affirming the judgment (51 Pac. 20), but subsequently the judgment of this court was set aside, and the cause ordered to a hearing in bank. The action is to recover \$1,400 and interest, for the alleged wrongful taking of certain personal property of the plaintiff. The material facts, as stated in the complaint and found by the court, were these: In October, 1890, O. M. Button brought an action against Jacob Steen and John Ross and W. F. March, the plaintiff herein, on a promissory note made by said Steen, payable to John Ross, or order, and by him indorsed to plaintiff, March, who in turn, before maturity, indorsed the same to Button. A writ of attachment issued in said cause, which was levied upon the property of defendant Jacob Steen. Thereupon S. Barnet and one G. Bowman entered into an undertaking for the release of said attached property as prescribed by section 540 of the Code of Civil Procedure, whereby they undertook and agreed to pay any judgment plaintiff in that action might obtain against the defendant Steen, whereupon the attachment was released. Button

obtained judgment in that action against Steen as maker of said note and March as indorser thereof for \$625.97 and costs,—the suit having been dismissed as to defendant Ross; the findings upon which the judgment was based expressly disclosing the fact that Steen was the maker and March an indorser of the note. On April 18, 1892, Barnet paid that judgment to Button, and took an assignment of it. On May 17, 1892, defendant Barnet assigned the judgment to defendant Isaac Blum, who, on May 31, 1892, assigned it to Joseph Blum, having first taken out an execution, and placed it in the hands of the sheriff of San Francisco, instructing him to seize and sell the interest of March in the schooner Ingalls, which, under the further direction of Joseph Blum, the sheriff proceeded to do, selling said property to said Joseph Blum on May 28, 1892, for \$770, which interest was then and there of the value of \$1,000. Before making the sale, the sheriff demanded an indemnifying bond, which was given by defendants Isaac Blum, Joseph Blum, and J. H. Jacobs. Joseph Blum transferred his purchase to J. H. Jacobs on the day of the sale, and Jacobs at once took possession of the same, and held it at the commencement of the action. At all these times, from the payment of the Button judgment by Barnet until the sale and transfer of March's interest in the schooner, each of the defendants S. Barnet, Isaac Blum, Joseph Blum, and J. H. Jacobs had full notice of the relation sustained by said S. Barnet to that judgment, as surety for Steen; and said transfers from Barnet to Isaac Blum, from Isaac Blum to Joseph Blum, and from Joseph Blum to Jacobs, were made with the intention on the part of each of them "to have said property of plaintiff seized under said execution and sold, so as to protect said Steen against said judgment, and to reimburse said S. Barnet for the amount paid by him to said O. M. Button when he took said assignment." Upon these findings the court below gave plaintiff a judgment as against defendant Steen for \$943.41 and costs, but denied him any relief as against defendants S. Barnet, Isaac Blum, Joseph Blum, and J. H. Jacobs; the action having been theretofore dismissed as to defendant Laumeister. Plaintiff appeals from so much of the judgment as is in favor of the defendants Barnet, the Blums, and Jacobs, the appeal being upon the judgment roll, without a bill of exceptions.

In the department opinion it was assumed that by his undertaking to release the attachment in Button against Steen et al. Barnet obligated himself on behalf of both Steen and March to meet any liability which should be cast upon them, or either of them, by the judgment in that case; and this assumption of fact dominated the conclusion there reached. Were such the case, the reasoning of that opinion—that upon paying the judgment in that case Barnet became subrogated to the rights of Button,

the judgment creditor, as against both Steen and March, and entitled to enforce it indifferently against either—would be logical, and the conclusion reached obvious. But it is quite apparent that the assumed existence of the fact upon which that theory of the case rests is based upon a misapprehension of the findings. The findings do not show that Barnet became obligated upon behalf of both Steen and March; to the contrary, they show very clearly that the undertaking given by Barnet was given solely at the request and for the benefit of Steen, and to release his property, and that the obligation Barnet assumed thereby was only that in case the plaintiff in the action, Button, "recovered judgment therein against said Jacob Steen," he would on demand pay, etc. There was nothing in the terms of the undertaking or the relation of the parties which, either as a matter of fact or matter of law, made Barnet responsible for any obligation of March, or which in any way made March a party to Barnet's undertaking. The undertaking made Barnet the surety of Steen, but it created no obligation or privity between Barnet and March. And while, in becoming Steen's surety, Barnet thereby made himself a party to the judgment, and became bound to pay it upon Steen's default (Brandt, Sur. § 408; Freem. Judgm. § 180; Black, Judgm. 587; Riddle v. Baker, 13 Cal. 296, 306), as between himself and March he remained a stranger to the judgment. When, therefore, Barnet paid the judgment, he was performing solely the obligation of his principal, Steen, and his right to subrogation was confined to the rights of the judgment creditor as against Steen, and he was entitled to look for reimbursement only to the latter; in other words, as put in the books, he "stood in the shoes" of his principal, and he had precisely the same rights which the latter would have had, and none other. Civ. Code, § 2847; Freem. Judgm. §§ 470, 471; Brandt, Sur. §§ 242, 260, 270; Fitch v. Hammer (Colo. Sup.) 31 Pac. 336. It is obvious that, had Steen himself paid the judgment, he could not have looked to March for reimbursement. While as to Button they were equally liable, as between themselves, Steen, as maker of the note, was ultimately responsible to March. March v. Barnet, 114 Cal. 375, 46 Pac. 152. Since, therefore, Steen would have had no right to enforce the judgment against the plaintiff, March, neither had Barnet such right. Brandt, Sur. § 227; and authorities above cited. Consequently, when the property of plaintiff was seized and sold in pretended satisfaction of such judgment for the reimbursement of Barnet, the taking was clearly unlawful, and constituted a naked trespass in those participating therein, for which they were jointly and severally liable to plaintiff in the full value of the property taken. Lewis v. Johns, 34 Cal. 629; Weber v. Ferris, 37

How. Prac. 102; Lovejoy v. Murray, 3 Wall. 1; Davis v. Newkirk, 5 Denio, 92. As the findings show that all of the respondents participated in said taking, the plaintiff was clearly entitled, under the facts found, to a judgment against them for the value of the property, with interest from the date of the taking. In fact, had he asked it, plaintiff would have been entitled to a judgment for punitive damages, since respondents are found to have had full knowledge of the relation of Barnet to the judgment which they procured to be enforced, and were also charged with notice of plaintiff's rights in the premises. The taking was, therefore, to be regarded as malicious.

Respondents make the point that on a former appeal in this case (March v. Barnet, 114 Cal. 375, 46 Pac. 152) this court construed the action as being merely one for contribution by March, a surety, against Steen, the principal, in which it was held that March was entitled to recover against Steen only to the extent that the proceeds of his property had been applied towards the satisfaction of the judgment against Steen; and, say the respondents, the construction given to the complaint on that appeal is the law of the case, and, the action having been held to be one of the character indicated, no recovery can be had herein against these respondents. But there was nothing decided on that appeal which in any way conflicts with or militates against the conclusion that we reach on this, and the doctrine of the law of the case may not be invoked. That was an appeal by Steen from the judgment which was rendered against him as above stated, and all that this court was then dealing with was the rights as between the plaintiff here and Steen. What was there held as to the liability of Steen was clearly proper, since the findings do not show that he participated in the unlawful taking of plaintiff's property, and he was, therefore, not answerable in tort. The question as to the sufficiency of the pleadings or findings to authorize a judgment against these respondents was not before the court on that appeal, and was in no way considered; nor did the court pretend to fix the character of the action as against these respondents.

There was no objection taken by the demurrer of a misjoinder of causes of action, and the respondents have not pressed their demurrer on the ground of misjoinder of parties defendant. Their entire argument in support of their demurrer is that "the demurrer should have been sustained as to these respondents." We construe this as an attack only upon the general ground of a want of facts; and, manifestly, the demurrer was properly overruled upon that ground.

The other points made by respondents are sufficiently answered by what is said above in the discussion of the merits. The judgment in favor of respondents is reversed,



and the cause remanded, with directions to the court below to enter judgment for plaintiff upon the findings against said respondents for \$1,000, found to be the value of the property, together with legal interest from the date of the taking, and for costs of the action and of this appeal.

We concur: BEATTY, C. J.; HARRISON, J.; GAROUTTE, J.; McFARLAND, J.; TEMPLE, J.

(121 Cal. 414)

**BANTA v. SILLER et al. (Sac. 297).<sup>1</sup>**

(Supreme Court of California. July 13, 1898.)

JUDGMENTS—VACATION—REVIEW ON APPEAL—  
NEGLIGENCE—PLEADING—INCONSISTENT  
DEFENSES.

1. Under Code Civ. Proc. § 473, authorizing a court to relieve a party from a judgment, order, or other proceeding taken against him through mistake, inadvertence, surprise, or excusable neglect, such release is largely within discretion of the court; and, in the absence of gross abuse thereof, the court's ruling granting relief against an order refusing to settle a statement of a case which was not presented within the prescribed time, and reopening the case for settlement, will not be disturbed.

2. Under Code Civ. Proc. § 441, providing that defendant may set forth as many defenses as he may have, which must be separately stated, he may allege in one count of a verified answer that a horse and wagon causing an injury were not under his control or driven by his servants, but had been furnished to a third person, and in another that the horse and wagon were being driven by defendant, and that plaintiff's injury was caused by his own negligence.

Department 2. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by James F. Banta against J. L. Siller and L. G. Siller. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Albert M. Johnson, for appellants. A. L. Hart, for respondent.

**PER CURIAM.** The verdict and judgment were for plaintiff. Defendants appeal from the judgment and from an order denying their motion for a new trial.

The motion for a new trial was made upon a statement of the case; and respondent objects to the consideration of the statement, on the ground that the proposed statement and amendments thereto were not presented to the judge for settlement, or left with the clerk for the judge, within the time prescribed by the Code of Civil Procedure. The statement was prepared in proper time, and amendments duly proposed, and appellants gave notice to respondent that they would present the statement, with the amendments, to the judge for settlement on the 27th day of February, 1896, which was within the 10 days prescribed by the Code (section 472). It appears that they were not presented to the judge on that day, but were left with the clerk for the judge two days afterwards.

Afterwards, on March 16th, the proposed statement and amendments came up for settlement, and upon objection of respondent the court refused to settle the same. On the same day, appellants served notice of a motion to be relieved from the order refusing to settle the statement, on the ground of their inadvertence, excusable neglect, etc. The court granted the motion, and thereafter, against plaintiff's objections, settled the statement as it is here presented. There is no doubt that the court had power to do this. As was held in *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. 332, the settlement of a statement is a "proceeding," within section 473 of the Code of Civil Procedure; and, under that section, the release of a party from a proceeding taken against him through mistake, inadvertence, etc., is a matter largely within the discretion of the trial court. An order granting such release will not be disturbed here, unless it clearly appears that the court or judge was guilty of gross abuse of discretion in making it. Indeed, it has been frequently said here that in cases of doubt the court ought to resolve the doubt in favor of the application, so that the full merits of the litigation might be presented. *Buell v. Emerich*, 85 Cal. 116, 24 Pac. 644; *Wolff v. Railway Co.*, 89 Cal. 332, 26 Pac. 825; *Grady v. Donahoo*, 108 Cal. 211, 41 Pac. 41; *Harbaugh v. Water Co.*, 109 Cal. 70, 41 Pac. 792. In the case at bar the evidence upon the point clearly warranted the court in setting aside its order and settling the statement; and in doing so the court certainly did not abuse its discretion.

The respondent, while riding a bicycle, came into contact with a horse and wagon belonging to the appellants, and was injured thereby; and this suit is brought to recover damages for the alleged injury. In their answer, the appellants, in addition to denials, set up two separate and distinct defenses, to wit: (1) That at the time of the collision the horse and wagon were not under the control of the appellants, or either of them, and were not being driven by any of defendants' servants, but were in the possession and control of one Axel Telstrom, to whom they had furnished the same for the purpose of carrying out a certain independent contract made by said Telstrom; and (2) that the horse and wagon were at the time owned by appellants, and were being driven by them along the highway, and that the accident occurred through the negligence, etc., of the respondent, and not through any fault of defendants, or any of their servants or employés. The complaint and answer were both verified. The court tried the case upon the theory that, where an answer is verified, there cannot be set up in it two inconsistent and contradictory averments. This point arose upon the refusal of the court to stop counsel for respondent, in his argument to the jury, from contending that appellants had committed perjury in their answer; upon an instruc-

<sup>1</sup> Rehearing denied.

dion to the jury that Telstrom must be held to have been the servant of the appellants; and upon an instruction that "a defendant may plead as many separate defenses as he has, but a sworn answer must not deny a fact in one part which is averred to be true in another part." In these rulings the court erred; and, for the errors thus committed, the judgment must be reversed, and a new trial ordered.

There is some language in the opinion of the court in the case of *Bell v. Brown*, 22 Cal. 678, which, if considered by itself, and disconnected from the rest of the opinion and from the facts in the case, gives some support to the views of the court below on this point. Section 441 of the Code of Civil Procedure provides that "the defendant may set forth, by answer, as many defenses and counter-claims as he may have," and that "they must be separately stated"; and in *Bell v. Brown* the court, referring to section 441, says: "It does not attempt to make any distinction between the two [verified and unverified pleadings], or to make any rule which does not apply equally to both. The right to set up numerous defenses in a suit is equally as important to the defendant in the one case as in the other. It is an absolute right given him by law, and the principle is as old as the common law itself.

\* \* \* In many cases it would be an absolute denial of justice if a defendant should be shut out from setting up several defenses." The language in *Bell v. Brown*, relied on by respondent, is correct when applied to the averments of any single separate defense, but is not applicable to the whole of an answer which contains different distinct and separate defenses. This distinction was pointed out in subsequent cases. In *Buhne v. Corbett*, 43 Cal. 264, the court say: "A party defendant in pleading may plead as many defenses as he may have. If a plea or defense separately pleaded in an answer contain several matters, these should not be repugnant or inconsistent in themselves. But the plea regarded as an entirety, if it be otherwise sufficient in form and substance, is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded. And there is no distinction in this respect between pleadings verified and unverified." See, also, *Billings v. Drew*, 52 Cal. 565; *Botto v. Vandament*, 67 Cal. 332, 7 Pac. 753; *McDonald v. Railway Co.*, 101 Cal. 206, 35 Pac. 643, 646.

The court properly held that an offer to prove a certain compromise was not admissible, after it had already admitted some evidence on the subject; but whether or not the appellants were prejudiced by the admission of such evidence, notwithstanding the fact that it was afterwards stricken out, will not arise on another trial, and need not be now considered. We see no other point in the case necessary to be discussed. The judgment and order appealed from are re-

versed, and the cause remanded for a new trial.

TEMPLE, J. I concur, but desire to state that I concur in the conclusion on the point discussed solely because it was so held in *Stonesifer v. Kilburn*. I think, however, that case was wrongly decided. Section 473 authorizes the court to relieve a party from a judgment, order, or other proceeding taken against him. In that case no default or other order had been taken against the moving party when the affidavits were made and the notice given by the moving parties of their application to be relieved. No objection had been made to their right to have the bill of exceptions settled, other than that the service of the notice to settle was accepted subject to objections. There was then nothing to be relieved from, and section 473 could not apply. The decision of this court was a direction to the trial court to settle the statement notwithstanding the lapse of the statutory time, because a reasonable excuse for the delay was shown, and was in conflict with numerous decisions of this court. *Wunderlin v. Cadogan*, 75 Cal. 617, 17 Pac. 713; *Carpenter v. Superior Court*, 75 Cal. 596, 19 Pac. 174; *Hodgdon v. Railway Co.*, 75 Cal. 650, 21 Pac. 372; *Bunnell v. Stockton*, 83 Cal. 320, 23 Pac. 301; *Jue Fook Sam v. Lord*, 83 Cal. 162, 23 Pac. 225. In fact, the application in the *Stonesifer Case* was simply to prevent the party opposing the motion from successfully urging the objection that he had lost his right by failing to move in time. Previously, this court had held that, if the time was allowed to lapse, the court could not then grant further time, and could not settle the statement. The *Stonesifer Case* simply reverses these rulings, and holds that under such circumstances the court can, and, if the delay is excused, will, settle the statement.

(121 Cal. 468)

CURTIS v. DEVOE. (Sac. 387.)

(Supreme Court of California. July 20, 1898.)

GUARDIANS—LIABILITIES—RIGHTS OF WARD—PRESUMPTIONS—ACCOUNTING—APPEAL—REVIEW.

1. Code Civ. Proc. § 1754, providing that a guardian shall give a bond conditioned that he will render an account at such times as the court directs, and section 1774, providing that he must present his account to the court at the end of one year from his appointment, and as often thereafter as may be required, do not require annual reports of guardians.

2. The failure of a guardian to render accounts regularly and promptly does not impose punitive responsibility on him, but the question of his liability for loss depends on the circumstances under which the loss occurred.

3. In the absence of evidence, and of probative facts necessarily inconsistent therewith, it will be presumed that a finding of good faith and prudence on the part of a guardian in making a loan was justified.

4. The fact of a guardian's proceeding with a foreclosure and compromising a deficiency judgment after his ward arrives at majority does



not raise the presumption that he continued to act with the consent and approval of the ward.

5. Under Code Civ. Proc. § 1753, providing that every guardian shall have the care and management of his ward's estate until he attains his majority or the guardian is legally discharged, and section 1754, subd. 3, requiring the guardian, at the expiration of his trust, to settle his accounts with the court or his ward, the guardian has no control over his ward's estate after he arrives at majority, except for the purpose of accounting as to transactions during the minority; and where he proceeds with the foreclosure of securities of the ward, and bids in the property at the sale for more than it is worth, he is liable on his bond for the difference in value, or the ward may repudiate the sale, and look to him for the full amount of the secured debt.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Final accounting of Chris. W. Devoe, guardian of Robert B. Curtis, a minor. There was a decree of accounting, and the ward appeals. Modified.

Bradley & Farnsworth, for appellant. W. B. Wallace, for respondent.

CHIPMAN, C. Settlement of final account of guardian. The appeal is by the ward upon the judgment roll alone. The court found that the guardian was appointed October 20, 1887, and was the acting guardian until March 4, 1894, when the ward came of age; that on May 29, 1896, the guardian filed his final account and report of his transactions as such guardian to March 4, 1894, the date of the ward's majority. The account as filed showed that the estate received by the guardian was money. Upon the hearing some items were disallowed and some were added, which, together with certain compensation allowed the guardian, left a balance due the estate of \$2.21, omitting a certain transaction relating to the loan of \$1,500, now made the subject of this appeal. The court found that on November 16, 1888, the guardian loaned to one Edward E. Bush and one J. J. Harlow, jointly, \$1,500, taking their note, payable one year after date, to the guardian, bearing interest at 1 per cent. per month, secured by mortgage on certain 160 acres of land in Tulare county, to which Bush and Harlow had at the time a perfect title free from all liens, and then of the market value of \$2,600, "when times were more prosperous and prices were generally higher than now, and which lasted until about the beginning of 1893"; that in making said loan the guardian acted without order of court, but he was not negligent in any way, but acted with ordinary care and prudence, and the land was ample security for said loan at said time; that interest was fully paid on said loan up to November 18, 1891, but no further payments were made thereon; that on October 31, 1893, the guardian commenced suit to foreclose said mortgage, and obtained judgment October 21, 1894, for \$2,-

098, and \$244 costs; that "on October 29, 1894, the said land was offered for sale at public auction, and, there being no other bidders, said guardian bid in said land in the name of his said ward for \$1,500, and upon the return of sale a deficiency judgment was entered in said action against said Bush and Harlow in the sum of \$888.50, and a certificate of sale of said land was issued in the name of said Robert B. Curtis (the ward), and thereafter a deed to said land was executed by the commissioner making said sale to said Curtis, which was forwarded to the attorney of said Curtis at New York City; that said guardian could not, after due diligence, collect said deficiency judgment, and said Harlow having died insolvent, and said Bush being in imminent danger of insolvency, said guardian accepted in satisfaction of said deficiency judgment lots 26 and 27, block 184, and lots 4, 5, and 6, block 185, in the city of Hanford, Kings county, taking a conveyance of the same directly to himself, and he now holds a perfect legal title to said lots, free from any liens, \* \* \* in trust for said Curtis." The court found that the ward never authorized or ratified said satisfaction of said deficiency judgment, but expressly refused to do so; and, although aware of the foreclosure sale and the purchase of the mortgaged premises in his name, the ward refused to confirm or ratify the sale, and refused to accept the certificate of sale or the deed, or to accept the land in settlement of his account. He did not, up to the time of the trial, offer to convey the land to the guardian, though requested so to do, and "refused to do anything to enable said guardian to sell it, claiming that to accept said deed or to reconvey said property might be considered as a ratification of the act of said guardian," but at the trial "the said ward offered to execute a deed of said land to said Devoe, so as to divest said ward of whatever title stood in his name." It was further found that said mortgaged land had greatly depreciated in value, "and is not now of a value exceeding \$320, as the evidence shows that there is not now any market value for such lands, and said land was worth a little more in October, 1894, than it is now, but there was no evidence of what its value was at that time." Finding 9 is "that in all said transactions said guardian acted in perfect good faith with his said ward, and with ordinary care and prudence; that the only account or report rendered or filed by said guardian since February 25, 1888, is his final account and report." The court found as conclusion of law: "That the account of said ward should be settled by said guardian taking the said land purchased on said foreclosure sale, and paying the said ward in lieu thereof \$320, the value thereof; also that he pay said ward said balance of \$2.21,—making in all \$322.21, which the court finds to be due said ward, with

legal interest from the 19th day of September, 1896, all of which shall be paid within twenty days from the date hereof; and that said ward take the said town lots in Hanford; \* \* \* that said guardian, within twenty days from the date hereto, execute and deliver to said ward a proper deed conveying to him the legal title of said lots, free from incumbrance; \* \* \* and that said ward, within twenty days from the date hereof, execute and deliver to said Devoe a proper deed conveying to him the legal title to said land foreclosed, free from any incumbrance imposed by said ward;" and judgment was accordingly entered.

Appellant contends that the court should have settled the guardian's account by directing the guardian to pay his ward \$2.21, and the further sum of \$1,500, with legal interest from November 16, 1891, computed with annual rests, and that the guardian should be compelled to take the 160 acres of land purchased at the foreclosure sale, and also the lots in Hanford.

1. It is claimed by appellant that the guardian did not conduct his trust as required by law, nor manage the estate with ordinary care and prudence, because (1) he did not render accounts and reports to the court as required by law, citing sections 1754, 1774, Code Civ. Proc., and *In re Allgier*, 65 Cal. 229, 3 Pac. 849; (2) he did not manage his ward's estate with ordinary care and prudence, citing section 249, Civ. Code, and sections 1754-1792, Code Civ. Proc.

There is no disagreement between respective counsel as to the duties, generally, of the guardian. As to these it may be said that the guardian should follow the directions of the statute, and make the accounts and reports therein required of him. His own safety, the requirements of business prudence, and the welfare of the ward and his estate demand this. The statute does not require annual accounts of guardians, but it would be better for all concerned if so made. At the same time, we cannot say that a failure to strictly comply with the statute, or neglect to render accounts with some regularity and promptness, necessarily imposes punitive responsibility upon the guardian. If there be loss to the estate, the question of the guardian's liability therefor depends much upon the circumstances under which the loss occurred. *Wheeler v. Bolton*, 92 Cal. 159, 28 Pac. 558; *In re Estate of Cousins*, 111 Cal. 441, 44 Pac. 182.

In the present case the failure to render annual accounts, or to take the order of the court for the loan to Bush and Harlow at the time it was made, do not appear to have caused loss or to show want of prudence. The land was found to be ample security, and so remained up to "about the beginning of the year 1893." Interest was promptly paid to November, 1891. No explanation is given in the findings why the guardian delayed foreclosure after November, 1891, until October,

1893, when action was commenced; but the court found, after setting forth the various acts of the guardian from the commencement of his trust to and including his acts relating to the foreclosure and sale, "that in all said transactions said guardian acted in perfect good faith with his said ward, and with ordinary care and prudence"; and as to making the loan to Bush and Harlow, and accepting the mortgage, the court found that "said guardian \* \* \* was not negligent in any way, but acted with ordinary care and prudence, and said land was ample security for said loan at said time." We must assume, in the absence of the evidence, and in the absence of any findings of probative facts which are necessarily inconsistent with this finding of good faith and prudence, that it was justified. We think it must be held that up to March 4, 1894, when the ward came of age, and to which time the account was brought, the findings justify the conclusion that the guardian had acted in good faith and with ordinary prudence; and had he promptly filed his account, asking its settlement and his discharge from his trust, we think the finding would have justified a settlement by turning over the estate to the ward in its then condition,—with the foreclosure suit then pending,—and adjusting the several items of the account, as was done by the court. Placing out of view the Bush and Harlow loan, the account as settled showed receipts \$2,856.99, and disbursements \$2,854.78, leaving a balance due the ward of \$2.21. There is no explanation given in the finding of the delay in rendering the account after March 4, 1894, until May 29, 1896. No objection was made to the account because of its being delayed so long, and no injury is found to have accrued to the ward by this delay. The court made findings as to all the contested items of the account, and as to all others it found the account to be correct. There may have been evidence at the hearing explanatory of this delay. The finding that in all the guardian's transactions he acted in good faith, and with ordinary prudence and care, seems to cover the rendering of his final account, and we cannot say that the mere fact of the delay in making it is sufficient to warrant us in holding that the finding is not sustained in this particular.

2. It is claimed by appellant, and it was found by the court, that the proceedings on foreclosure, after the ward came of age, were without his authority or ratification, both in the matter of bidding in the property at the sale in the name of the ward, and in settling the matter of deficiency judgment by compromise with Harlow, and taking the deed to the Hanford lots. There is nothing in the findings to show by what authority the guardian assumed to act after March 3, 1894. We do not think any presumption arises, as claimed by respondent, that Devoe continued to act as guardian by consent and with the approval of the ward. The findings seem to



show the contrary, for the ward refused to consent to or ratify the acts of Devoe.

Section 1753, Code Civ. Proc., provides as follows: "Every guardian appointed shall have the custody and care of the education of the minor, and the care and management of his estate until such minor arrives at the age of majority or marries, or until the guardian is legally discharged." The guardian's power, when appointed by the court, is suspended by the majority of the ward. Civ. Code, § 254. By section 1754, subd. 3, Code Civ. Proc., he is required, "at the expiration of his trust, to settle his accounts with the court, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto."

It was said in *Re Allgier*, supra: "When a ward attains the age of majority the office of guardian comes to an end, and it is then the duty of the guardian, and one of the obligations of his bond, to exhibit a final account of his guardianship to the probate court, make a settlement with the probate judge or with the ward, and deliver all the property in his hands to the ward. Code Civ. Proc. § 1754. Failure to do this constitutes a breach of his bond, for which he and his sureties are liable after settlement of the guardianship." Action must be brought on the bond within three years from the discharge of the guardian. *Id.* § 1805. Jurisdiction remains in the probate court, after the minor's majority, over the estate in the hands of the guardian for the purposes of an accounting as to transactions during the minority of the ward, but not as to any occurring after the ward has attained majority. It was so held in the case just cited, and it was said, as to the effect of the ward's having attained majority: "When that event happens, the ward is *sui juris*, and the legal liability which attaches to him for any services rendered to him by his guardian arises, not out of the relation of former guardian and ward, but out of the contractual relation established by the transactions between them as contracting parties. Such a liability is not enforceable within the jurisdiction of a probate court; the remedy upon it lies, not in a probate proceeding, but in an action at law." And this seems to be in accord with the general rule. *Woerner, Guardianship*, §§ 94, 101.

Respondent cites, as holding otherwise, *Seaman v. Duryea*, 11 N. Y. 324, and *Pyatt v. Pyatt*, 46 N. J. Eq. 285, 18 Atl. 1048, and claims that the remarks of the court in *Re Allgier* were dicta. In the New Jersey case it was said: "It would be a narrow, not a liberal, construction of the statutory terms which authorize this court to compel guardians 'to account for the estate in their hands,' to say that it can compel such an account only up to the time when the ward becomes of age, and that guardians must 'account for

the estates in their hands,' so far as their subsequent dealings with such estates are concerned, in some other tribunal." Of this doctrine Mr. Woerner remarks (note 1, § 340) that it rests upon cases holding that the probate court was, under the statute, vested with full chancery powers. Under our statute (Code Civ. Proc. § 1753), the guardian has the custody and care of the minor's person and property "until such minor arrives at the age of majority or marries." We do not think that the clause, "or until the guardian is legally discharged," was intended to prolong his control of the person and estate of the minor; for, if it did, he would have control for one year after the majority of the ward (Civ. Code, § 257), and this would be in conflict with the provisions of the Code of Civil Procedure, supra. Upon the minor's attaining majority, the guardian must then make a settlement either with the court or the ward, and pay over and deliver to the ward all the estate in his hands, "or due from him on such settlement." In point of fact, the account here does not include any items after March 4, 1894, and it is to that date that the court settled it. The court found that the guardian was indebted to the ward in the sum of \$2.21, disregarding the loan to Bush and Harlow. It found that that loan was properly made, and that there was no lack of care and prudence in what the guardian did concerning this loan and its enforcement up to March 4, 1894. We are unable to see upon what principle or theory the court, as conclusion of law, decided that the guardian should convey the Hanford lots to the ward, and pay the ward \$320 and this small balance of \$2.21, and that the ward should convey the Bush and Harlow lands to the guardian. This adjustment related to transactions occurring after the ward's majority, which were wholly unauthorized by the ward.

The guardian took credit in his account for the Bush and Harlow loan of \$1,500, and this the court found to be proper, but he had in his control when the ward came of age the note and mortgage given by Bush and Harlow, the subject of the foreclosure suit. The cause had not been tried, and was not tried and judgment entered until October 2, 1894. He also had in his possession at that time other property of the ward, to wit, a horse and cart. He should have turned over to the ward the note and mortgage and the chose in action and the horse and cart. The latter he still holds, and can and should deliver to the ward, but the note and mortgage he cannot deliver; neither can he deliver the then pending action thereon, for it was carried to decree, and a sale of the mortgaged property was subsequently made, and the ascertained deficiency was compromised; and all this was without any authority whatever, either as guardian, or as agent or trustee, of the ward.

While it is true that the settlement of a guardian's account, as we have seen, cannot

ordinarily include transactions occurring after the ward has attained his majority, it appears that the guardian, while still in possession of the estate, assumed, without any authority, to conduct the foreclosure proceeding to final judgment, and he bid in the mortgaged premises at \$1,500. In doing this he must be held to have determined the value to be that sum. The sale was at auction, and there may have been other bidders. We must assume that the guardian bid the fair cash value at that time, and he cannot be heard to say that it was in fact less than he bid, nor should he be allowed to avail himself of any subsequent depreciation in its value. He chose to convert the note and mortgage and judgment thereon into property of the value of \$1,500. Indeed, it was, in legal effect, a conversion to his own use of the ward's property of that value while yet in his possession; and we can see no violation of the general rule as laid down in *Re Allgier*, supra, in authorizing the court to charge the guardian with that amount in his account.

As to the compromise relating to the deficiency judgment, it was equally without authority; but, as the ward does not appear to have suffered loss thereby, his rights may be fully protected by giving him the option of taking the deed to the Hanford lots or taking the deficiency judgment, in which latter case the title should be restored to Bush, who conveyed the lots to the guardian.

The decree should be modified so as to settle the account as rendered, requiring the guardian to pay over the ascertained money balance of \$2.21, and also the further sum of \$1,500, with interest from October 29, 1894, at 7 per cent. per annum, and to deliver the horse and cart. The decree should require the guardian to execute a deed of the Hanford lots to the ward, if he should elect to take them; otherwise to convey the same to Bush, and the ward to look alone to the deficiency judgment. The decree should also require the ward to convey to the guardian whatever interest or title there may be in him to the property purchased by the guardian at the foreclosure sale. Thus modified, the decree settling the final account should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the decree settling the final account be modified in accordance with said opinion, and when so modified it shall stand affirmed.

(121 Cal. 433)

STANSBURY v. WHITE et al. (L. A. 416, 417.)

(Supreme Court of California. July 16, 1898.)

MUNICIPAL IMPROVEMENTS—SPECIFICATIONS—AUTHORITY OF STREET SUPERINTENDENT.

A city council has no power in its specifications for bids for the improvement of a street

to delegate to a street superintendent the authority to determine the amount of work to be done by the successful bidder, what materials shall be used in certain events, and whether the right quality and quantity of material have been used, and an assessment for improvements based on such specifications is invalid.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Two actions, by C. V. Stansbury and H. I. Moore, partners, against J. O. White and others, were tried together. There were judgments for plaintiffs. On the death of Moore, after the judgments were rendered, and before appeals were taken, Stansbury was substituted as sole plaintiff. Defendants appeal. Reversed.

C. W. Chase, for appellants. Chas. McFarland, for respondent.

BELCHER, C. Two actions were commenced by C. V. Stansbury and H. I. Moore, co-partners, doing business under the firm name of Stansbury & Moore, against the defendants, J. O. White, E. B. White, his wife, and Delia W. Chase, to foreclose the liens of a street assessment for improvements made on Gallardo street, in the city of Los Angeles. The assessment involved in one of the cases was on the north 17 feet of lot 21 in the Villa Tract in said city, for \$40.49; and that involved in the other case was on the south 16 feet of lot 22 in the same tract, for \$38.12. The defendants filed a general demurrer to each complaint, which was overruled, and then answered. The cases were tried together, and judgments were entered awarding the plaintiffs the relief demanded, with costs and attorneys' fees. From these judgments the defendants have appealed, the appeals being respectively designated as Nos. 416 and 417. The cases, as shown by the records and briefs filed, are in all respects identically the same, except as to the lots assessed and the amounts of the assessments, and they may therefore be considered together. After the judgments were rendered, and before the appeals were taken, Moore died; and, by an order of court, Stansbury, the surviving member of the firm, was substituted as sole plaintiff.

It is alleged in the complaints that on August 28, 1895, the city council of the city of Los Angeles passed a resolution of intention to have Gallardo street, between certain designated terminals, graded, graveled, and guttered in accordance with specifications No. 5 on file in the offices of the city engineer and city clerk of said city, and to have constructed along each side of the street, between the said terminals, a cement curb and a cement sidewalk, five feet wide, in accordance with the amended specifications No. 12 on file in the offices of said city engineer and clerk. At the trial it was stipulated that the work was done under said specifications, which were fully set out. Specifications No. 5 contained, among others, the following pro-



visions: "The contractor shall not use any material in filling the subgrade that is of a spongy nature, and should the street, or any portion thereof, be found to contain material unsuited for foundation purposes, the contractor shall remove such material at his own expense, and replace it with good earth or gravel. \* \* \* An allowance for settling, to be determined by the street superintendent, shall be made when finishing fill. \* \* \* Unless otherwise directed by the street superintendent, the crown of the street shall be made to conform with the cross section on file with the city clerk. \* \* \* The crown and sidewalks shall be made to conform to the above-mentioned cross section. Should the street superintendent deem it necessary to change the above-described form of cross section of street at any place thereof, the contractor shall comply to such change without receiving extra pay therefor. \* \* \* The contractor shall provide for drainage under all banks that it may be necessary for him to make across ravines or drainage channels, and put in such culverts as the street superintendent may direct, and at his own cost. \* \* \* In all fills the earth shall be made to assume its natural slope, or shall be made of such slope as may be indicated by stakes set by the city engineer. \* \* \* Doubts as to the true meaning and intent of these specifications will be solved by the street superintendent." And specifications No. 12 contain, among others, the following provisions: "Sidewalks shall be three and one-half inches thick, built on a foundation constructed as follows: All soft or spongy material is to be removed and replaced with sand gravel of a quality and quantity acceptable to the street superintendent, and then tamped, etc. \* \* \* The material to be supplied in case of fill must be satisfactory to the street superintendent. \* \* \* The finishing coat shall be mixed with lamp black or any durable coloring matter that shall give a dark slate color, the same to be of a shade that will be satisfactory to the street superintendent."

The street improvement act of 1885 (St. 1885, p. 147) provides, in section 6: "The work provided for in section two of this act must, in all cases, be done under the direction and to the satisfaction of the superintendent of streets, and the materials used shall comply with the specifications and be to the satisfaction of said superintendent of streets. \* \* \* The city council may, by ordinance, prescribe general rules directing the superintendent of streets and the contractor as to the materials to be used, and the mode of executing the work, under all contracts thereafter made." And the same act, as amended in 1891 (St. 1891, p. 196), provides, in section 3: "Before ordering any work done or improvement made, which is authorized by section two of this act, the city council shall pass a resolution of intention so to do, and describing the work.

\* \* \* Before passing any resolution for the construction of said improvements plans and specifications and careful estimates of the costs and expenses thereof shall be furnished to said city council, if required by it, by the city engineer of said city." And in section 5 it is provided that, before the awarding of any contract, a notice, "with specifications," shall be given, inviting sealed proposals or bids for doing the work ordered.

It will be observed that, while it is alleged that the work was to be done in accordance with specifications No. 5 and No. 12, it in no way appears from the complaints what those specifications contained, as they are not set out in *hæc verba*, or even in substance. It is impossible, therefore, to ascertain from the complaints what work was intended or was ordered to be done, or what the contract for the work was, except that it was for grading, graveling, and guttering the street, and constructing cement curbs and cement sidewalks along the sides thereof. But if we assume that the reference to the specifications as on file in the offices of the city clerk and engineer was sufficient to make them a part of the complaint, and in that respect to constitute a good pleading, still, under the law as declared in *Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 881, they seem to be subject to objections similar to those held fatal to the assessment involved in that case. The specifications clearly delegate to the superintendent authority to determine whether more or less work shall be done by the contractor, what materials shall be used in certain events, and whether or not the right quality and quantity of material has been used, and, if he decides against the contractor, the latter must do the work all over again. For example, the superintendent may decide, in case he wishes to favor a contractor, that the subgrade contains no "material unsuited for foundation purposes" which need be removed; that a small "allowance for settling" is enough; that the crown of the street as constructed conforms "with the cross section on file," and no change is necessary; that no "culverts" are needed; that the shade of the sidewalk as laid is satisfactory, and may solve all doubts in favor of the contractor. On the other hand, he may decide, in case he is not friendly to the contractor, that the subgrade contains material unsuited for foundation purposes, and require the same to be removed to such depth as he may name; and he may be very particular as to the character of the material used for the "filling," and as to the "allowance for settling," and may require a large amount of "good earth or gravel" to be used. He may change the "crown of the street," so that the expense will be very much increased. He may decide that many "culverts" are necessary, and that those put in shall be of stone or brick or iron instead of wood, and thus add largely to the expense. He may solve all "doubts" against

the contractors, and so make him do over again work already once done. After the sidewalk is laid, he may decide that the "shade" of the same is not satisfactory to him, and that the contractor must relay the walk, and put in different "coloring matter." Under such specifications, it is evident that no one could intelligently bid for the contract, as he could not tell in advance what would be the exact character or extent of the work to be done, or the necessary expense of doing it. Any bidder would therefore hesitate to take such a contract to do the work, unless his bid was placed at a high figure, or he felt sure he would be favored by the superintendent. In the case above cited, it is said: "The legislative department of the city has no power to delegate to any other officer or body the authority to determine upon the necessity of making such improvement, or the character or extent of any improvement which it may itself direct to be made. In the language of Mr. Dillon (Mun. Corp. § 96): 'It is not competent for the council to pass an ordinance delegating or leaving to any officer or committee of the corporation the power to determine the mode, manner, or plan of the improvement.'" The court then cites several cases in which it has been held that no valid assessment upon property can be made under an order directing the improvement, and, among others, one where the work was to be done "in such manner as the city superintendent shall direct." The court further said: "A contract in terms like the present gives to the superintendent of streets the opportunity to make the cost of the improvement greater or less, according to his desire to favor or injure the contractor, vests him with an illegal discretion, tends to prepare the way for an unfair assessment, and opens wide the door to fraud or favoritism." See, also, *Warren v. Chandos*, 115 Cal. 382, 47 Pac. 132, and *Perine Contracting & Paving Co. v. City of Pasadena*, 116 Cal. 6, 47 Pac. 777. In the first of these cases it is said, on page 386, 115 Cal., and page 133, 47 Pac.: "In *Bolton v. Gilleran*, supra, it was held that a contract which gave to the superintendent of streets the power to increase or diminish the cost of the improvement, after the contract had been entered into, by requiring a greater or less amount of material for its completion as he should determine, rendered the assessment invalid."

Several other points are made by appellants, but, in view of what has been said, they need not be considered. Under the authorities above cited, we conclude that the demurrers should have been sustained, and advise that the judgments appealed from be reversed, and the causes remanded.

I concur: SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgments appealed from are reversed, and the causes remanded.

121 Cal. 400

STUDER v. SOUTHERN PAC. CO. (Sac. 289.)

(Supreme Court of California. July 9, 1898.)

INJURY TO BOY CLIMBING BETWEEN CARS—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE.

Plaintiff's evidence showed that defendant's freight train had stood across a public street at a way station for seven or eight minutes when plaintiff's 12 year old son, of ordinary intelligence, passed along the street, and, after waiting two or three minutes for the train to move on, attempted to cross between the cars, and while climbing over the couplings the train started backwards without giving notice by bell or whistle, and he was crushed between the cars. *Held*, that the evidence clearly showed that the proximate cause of the injury was due to the boy's negligence, and that a nonsuit was justifiable.

In bank. Appeal from superior court, Solano county; A. J. Buckles, Judge.

Action by one Studer against the Southern Pacific Company. The plaintiff was nonsuited, and he appeals. Affirmed.

Joseph Craig and R. J. Hudson, for appellant. Geo. A. Lamont, for respondent.

HARRISON, J. Plaintiff brought this action to recover damages for the death of his son, alleged to have been caused by the negligence of the defendant. At the close of the plaintiff's testimony the court granted a nonsuit, and from the judgment thereon the plaintiff has appealed.

The facts shown at the trial are as follows: On the 22d of July, 1895, the defendant was moving a freight train of about 15 cars loaded with basalt blocks, and on arriving at Cordelia station the train stopped. The track of the defendant at this station runs parallel with Main street, and directly south of it. Near the station there is another street which intersects Main street at right angles, and when the train was stopped it stood directly across this intersecting street,—the locomotive and two or three cars being to the east of it,—and the travel into it from Main street was thereby obstructed. After the train had stood in this position eight or ten minutes, the deceased, a child between 12 and 13 years old, came along Main street from the west, as far as the intersection of the other street, and, after waiting there two or three minutes, attempted to cross the train between two of the cars, and while in the act of climbing over the couplings the train started backwards without giving any notice by bell or whistle, and he was injured by being crushed between the cars, and subsequently died from the injuries so received. Whether the court properly granted the nonsuit depends upon whether it appeared from the testimony on the part of the plaintiff that the deceased was guilty of negligence. The place where the injury was received was a public highway, and the deceased is not to be regarded as a trespasser by reason of his attempt to cross the street while it was obstructed by



the defendant's cars. Nor was a temporary obstruction of the street, by stopping the train, in violation of any right of the deceased, since the defendant was also entitled to use the crossing as a part of its right of way. Each was required to exercise his right with a proper reference to the rights of the other, but an interference by one with the other in the exercise of his right did not confer upon the other the right to disregard the proper mode of using the street. The right to do an act does not authorize a person to do it carelessly. If the defendant improperly blocked the street, or allowed its train to remain upon the crossing for an unreasonable length of time, the deceased was not for that reason authorized to incur unnecessary risk, or to act negligently in seeking to cross the street, but was still required to exercise such prudence as would ordinarily be required of one seeking to pass between the cars of a standing train, which was liable to move at any moment. An attempt to pass between the cars of a train that is liable to move at any instant, without taking any precaution to avoid danger, is itself an act of negligence, when decided by the standard of common prudence, and has been so held by courts whenever the occasion has been presented; and the act is equally negligent whether it is done at a street crossing or elsewhere. "The fact that a train of cars is unlawfully blocking a crossing is no reason why a person should throw himself under the wheels, or recklessly expose himself to danger. He is bound, notwithstanding such acts of negligence, to exercise proper care and prudence; and, if he fails to do so, he cannot hold another responsible for an injury which may be fairly traced to his own negligence." *Lewis v. Railroad Co.*, 38 Md. 588. In *Railroad Co. v. Copeland*, 61 Ala. 376, under a state of facts greatly resembling those in the present case, the court said: "The attempt thus to pass between the cars of a train, which he must have known was liable to be moved, cannot be classed as less than negligence. It borders on recklessness." In *Hudson v. Railway Co.*, 123 Mo. 445, 27 S. W. 717, the plaintiff attempted to climb over and between two flat cars which had obstructed the crossing of a public street for a longer time than was permitted by the municipal ordinance on the subject, and was injured by the sudden moving of the train without any warning or signal. The court said: "In climbing over the cars, he put his feet in such a position that they were bound to be caught if the cars moved. He knew at the time that the cars had been standing there longer than was permitted by the ordinance. They were likely to move at any time, and should have moved before that time. In getting over the cars in the way plaintiff attempted to do, he must be held to have taken the obvious risks involved in that act." In *Railroad Co. v. Finchin*, 112

Ind. 592, 13 N. E. 677, the plaintiff was injured while passing between two cars forming a part of a freight train standing across a public street. The court said: "A person who has knowledge that a train of cars is stopping temporarily at a way station on its way to its destination has no right to assume the risk of passing between the cars. It is a danger so immediate and so great that he must not incur it. \* \* \* In this case the risk of passing between a train of cars, likely to get under way at any moment, was such as no one could assume without being guilty of negligence. This is one of the cases where it must be declared, as matter of law, that the risk is so great that no one who has a knowledge of the danger has a right to assume it." The same principle is sustained in *Andrews v. Railroad Co.*, 86 Ga. 192, 12 S. E. 213; *Pannell v. Railroad Co.*, 97 Ala. 298, 12 South. 236; *Magoon v. Railroad Co.*, 67 Vt. 177, 31 Atl. 156; *Corcoran v. Railway Co.*, 105 Mo. 399, 16 S. W. 411; *Wallace v. Railroad Co.*, 165 Mass. 236, 42 N. E. 1125; *O'Mara v. Canal Co.*, 18 Hun, 192; *Howard v. Railroad Co.*, 41 Kan. 403, 21 Pac. 267.

The fact that the deceased was only about 12 years of age did not require the court to submit to the jury whether his attempt to cross the street between the cars constituted negligence. Negligence is the want of such care as a person of ordinary prudence would exercise under the circumstances of the case. When the facts are clear and undisputed, and when no other inference than that of negligence can be drawn from them, the court is not required to submit the question to the jury, but may itself make the inference. *Nagle v. Railroad Co.*, 88 Cal. 86, 25 Pac. 1106. The court may also determine whether an act is such as would be performed by a person of ordinary prudence, or whether, in the common judgment of mankind, it would be deemed dangerous or attended with peril. The same act which would be negligence in an adult may not be such if done by a child, but a child is required to exercise the same degree of care that would be expected from children of his age, or which children of his age ordinarily exercise (*State v. Baltimore & O. R. Co.*, 24 Md. 84; *Collins v. Railroad Co.*, 142 Mass. 301, 7 N. E. 856); and the court is as fully authorized as a jury to determine what this degree of care is. Children, as well as adults, should use the prudence and discretion which persons of their years ordinarily have, and they cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless. "The law imposes upon minors the duty of giving such attention to their surroundings, and care to avoid danger, as may fairly and reasonably be expected from persons of their age and capacity." *Merryman v. Railroad Co.*, 85 Iowa, 635, 52 N. W. 545. In the present case the capacity and intelligence of the child

are not controverted, and he must be presumed to have had all the qualities ordinarily belonging to a person of his age.

The failure of the defendant to give notice that the train was about to start is not available to the plaintiff. This was not the proximate cause of the injury, as might have been the case had the deceased sought to cross the street directly in front of the locomotive, or at the rear of the train. As was said in *O'Mara v. Canal Co.*, supra: "The injury could not have occurred except for plaintiff's act in undertaking to climb over the train between the cars. It was for the court to determine whether that was negligence which contributed to the injury; and, as other courts have said, no one could doubt it was. Nor is it of importance that defendant was guilty of wrong or negligence in blocking up the way, or in starting its train suddenly and without notice. The defendant is not liable for the injury sustained by plaintiff unless it occurred solely by its fault and negligence, and not in any degree through the fault or negligence of the plaintiff." See, also, *Railroad Co. v. Houston*, 95 U. S. 697; *Railroad Co. v. Copeland*, 61 Ala. 376. The judgment is affirmed.

We concur: VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

121 Cal. 446

MOODY v. NEWMARK et al. (L. A. 328.)  
(Supreme Court of California. July 16, 1898.)

PLEDGES—RIGHTS AND LIABILITIES OF PLEDGEE—  
CONTRACTS—VALIDITY—PARTNERSHIP—DRAFTS  
—PLEADING—FINDINGS—INCONSISTENCY.

1. The buyer of property having pledged it, an agreement of the pledgee with the seller that he would not redeliver the property until the balance of the price should be paid was void, as an agreement not to perform the obligation due the pledgor, of delivering up the property on payment of the charge against it.

2. A complaint on a draft payable out of a special fund, which failed to show the existence of such fund, was insufficient.

3. A complaint on a draft payable out of a certain fund averred that the fund was \$8,521; that, after payment of a prior claim of \$8,000, one-third of the surplus was applicable to plaintiff's demand; and that such surplus amounted to \$1,900. The court found the amounts as alleged, and that plaintiff had been paid \$183. *Held*, that the findings were inconsistent, and would not support a judgment for plaintiff.

4. A sale of partnership property was made by one of three partners nominally in his own right. The buyer pledged it. The selling partner drew an order on the pledgee, directing him to pay a second partner one-third of the amount collectible on the price, less the amount of the loan. This order was accepted. The pledgor became insolvent, and the property deteriorated in value so that it was worth no more than the charge against it, and the pledgee redelivered it to the buyer on repayment of the loan. *Held*, that he was not liable on the draft.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by A. S. Moody against Newmark & Edwards and another. There was a judgment for plaintiff against defendants Newmark & Edwards, from which, and from an order denying a new trial, they appeal. Reversed. For commissioners' decision, see 50 Pac. 758.

J. T. Hout, for appellants. E. Edgar Galbreth, for respondent.

TEMPLE, J. This action was brought to recover from Newmark & Edwards, as partners, money alleged to be due upon a certain order drawn upon the firm by one J. S. Robinson. It is alleged that on the 24th day of September, 1894, J. S. Robinson was indebted to plaintiff in the sum of \$543.09, and on that day drew and delivered to plaintiff his written order or draft, reading as follows: "Los Angeles, Cal., Sept. 24, 1894. To Newmark & Edwards, Los Angeles—Gents: Please pay to A. S. Moody, or order, the sum of five hundred and forty-three & <sup>09</sup>/<sub>100</sub> dollars—to be paid as equity is collected from wheat now in Puente warehouse sold last May 19th to J. V. Suman, Colton, viz., after the amount borrowed on wheat has been paid, the amount collected over & above such loan, you to pay Mr. A. S. Moody (<sup>1</sup>/<sub>3</sub>) one-third of all such amounts until said amount of five hundred and forty-three & <sup>09</sup>/<sub>100</sub> dollars is fully paid. Amount of wheat on hand this day 6,348 sax, 831,325 lbs. J. S. Robinson." The order was on the same day accepted by Newmark & Edwards. Before suit was brought there had been paid on the order \$183.25. At that time there was stored in a certain warehouse a quantity of wheat which had been sold by Robinson to one Suman for \$8,521.08; and Newmark & Edwards were authorized and empowered by said Robinson, and undertook, to collect from Suman the price of said wheat. It is charged that, subsequent to the acceptance of the order, Newmark & Edwards permitted Suman to remove all of the wheat, and "received, or should have received, payment in full of the said purchase price for the same at or before said removal of said wheat, which said purchase price amounted to more than \$2,000, as equity, as mentioned in said order or draft, after the amount borrowed on said wheat had been fully paid." "And it was understood between plaintiff and defendants that the defendants were not to authorize, suffer, nor permit said Suman to remove said wheat, or any part or portion thereof, unless the purchase price was paid by said Suman at or before the time of such removal." The "equity" which was to be collected is not explained, except in the recital above quoted, as "equity" after the amount borrowed had been repaid. There is no allegation that any amount had been borrowed, or that the wheat had been pledged as security for any sum whatever. Of course, it is absurd to speak of collecting an equity, and in legal phraseology no meaning appropri-



ate to anything involved in this case can be given to the term. No equity is averred, and there probably was none to aver. But doubtless the parties had reference to some surplus which might remain after some charge upon the wheat had been satisfied. But there is not shown that there was any such charge. Much less is it shown that there was or would be a possible surplus after the charge hinted at had been paid. Nor does it appear what Robinson or plaintiff had to do with the wheat after it had been sold and delivered to Suman. It is not shown that anything remained due Robinson on account of the wheat, and certainly not that Robinson retained a lien upon it, or any right to demand payment to him of any money as a condition of its being delivered to Suman by the pledgee. Suman was plainly entitled to have all the wheat delivered to him as soon as he paid the charge upon it, and an agreement on the part of Newmark & Edwards with either Robinson or plaintiff not to do so was void as against public policy. It was an agreement not to perform their obligation to Suman. Newmark & Edwards undertook to pay the order out of a special fund. It is not otherwise shown, than by a conclusion of law which is based upon no facts stated, that such a fund ever existed. If the allegation can be regarded as of a fact, it must be held to mean that Newmark & Edwards delivered the wheat to Suman without collecting the price. That there was a price to be collected, as I have already stated, is not averred, but may be implied from this allegation now under consideration. Such a mode of pleading cannot stand before a special demurrer, and such a demurrer was interposed in this case. But, had all these allegations been found in the complaint, still it does not appear that Newmark & Edwards are answerable for the fact that no such fund was created. Under the allegations, they were bound to deliver the wheat when the charge upon it was paid, and it does not appear that Robinson or plaintiff had any claim upon it. They cannot be held responsible for not doing what they were under no legal obligations to do. The demurrer should have been sustained. In the complaint it is averred that the price of the wheat amounted to \$8,521.08. That is, in effect, also the statement in the order sued upon. Such is also the finding; and it is also found that the wheat was pledged to Newmark & Edwards to secure the sum of \$8,000 loaned by them to Suman, together with interest, charges, and costs. The interest, charges, and costs cannot be made out from the record; but, if there were none, there could have been only \$521.08 collected as "equity," had the whole price been collected. By the terms of the order, Newmark & Edwards were required to pay one-third of this to plaintiff. It affirmatively appears, therefore, from the complaint, that the entire fund which could have existed, applicable to his debt, has been paid to him; and it is also found that defend-

ants have paid to plaintiff one-third of the money received in excess of their loan to Suman. In another finding it is found that said defendants delivered the wheat to Suman, and should have received the full price, "and which purchase price amounted to \$1,900 more than \$2,000 as equity mentioned in said order or draft." Supposing this to mean that the price, if received, would have amounted to \$1,900 more than the debt to defendants, it is still utterly irreconcilable with the allegations of the complaint and with the other findings. No one can discover from the record how such a finding can be true. The amount of the wheat and its price are twice stated in the complaint. These correspond with each other, and with the other findings upon the subject. There is no controversy whatever as to the amount of the debt. But, where two findings upon an essential fact are so opposed to each other, the findings cannot support the judgment.

But suppose we overlook the manifold defects in the complaint, and assume that the finding is that there would have been a surplus of \$1,900 if the full price had been collected, and, further (as is neither alleged nor found), that the wheat was held also to secure a balance of the price due Robinson; still plaintiff cannot recover. A brief summary of the facts found may be thus stated: The wheat in question was raised by defendant Robinson and another as partners. May 19, 1894, Robinson, with the knowledge and consent of the other joint owners, sold and delivered the wheat to Suman at the price of \$1.025 per cental. Suman then borrowed upon the wheat, which was in a warehouse, \$8,000, payable, with interest, costs, and charges within 90 days. The terms of the chattel mortgage provided that, if the wheat deteriorated in quality or depreciated in price, Suman would correspondingly reduce the debt or increase the security, and in case Suman failed to do so the note should become immediately due; and Newmark & Edwards were authorized to sell or buy or dispose of the wheat without previous notice to Suman. It is found that the wheat did depreciate in value and in quality, and then, with the knowledge and consent of Robinson, from whom Suman had purchased, an arrangement was made by which defendant took a portion of the wheat in payment. It is distinctly found that at the time the wheat was not worth more than sufficient to pay the loan made by defendants, and has not been of any greater value since. Since the wheat had ceased to furnish security, defendants had a right to sell it for their debt, and with the consent of Robinson, which they had, could surrender the wheat to Suman upon receiving payment or other security. It further appears from the findings that the turning over of the wheat to defendants, and the loan made on it, was a partnership affair, and the order sued upon was given merely to show that plaintiff should receive

one-third of any amount would be coming to the partnership. Naturally the partnership should lose, and not these defendants, if Suman became insolvent, and the wheat deteriorated to such an extent that it would not pay. It was through an arrangement with the partnership, and not primarily with appellants, that Suman was permitted to hold the wheat until required in his mill. They received the \$8,000 loaned, and it is found that it was worth no more. Neither the law nor equity required that the defendants should make up to them their losses. The judgment and order are reversed.

We concur: McFARLAND, J; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

(121 Cal. 438)

SEYMOUR v. McAVOY et al. (S. F. 546.)<sup>1</sup>  
(Supreme Court of California. July 16, 1898.)

CREDITORS' SUITS—PARTIES—TRUSTS—RIGHTS OF  
CREDITORS OF BENEFICIARY—DECREE OF  
DISTRIBUTION—CONCLUSIVENESS.

1. Where a judgment creditor sues to subject equitable assets to his judgment, defendants cannot require other judgment creditors to be brought in as parties, inasmuch as a creditor commencing such action acquires an equitable lien on such assets, and a priority over other judgment creditors who have not previously commenced any such suit.

2. The author of a trust to pay to another the income of property may at common law provide that the interest of the beneficiary shall not be subject to the claims of his creditors, and such provision need not be express, but may be implied from the terms of the trust in the light of all the circumstances.

3. Testator devised his entire property in trust—First, to provide out of one-half of the income for the support and maintenance of the widow, and out of the other half the support and education of two daughters; second, to accumulate the surplus income; third, to transfer to each of his daughters on her marriage one-fourth of the estate, with one-fourth of the accumulations of the income; and, fourth, on the death of the widow, to transfer to each of the daughters, or her children in case of her decease, one-fourth of the trust property, with one-fourth the accumulations of the income. *Held*, that no creditor of the widow or of an unmarried daughter could subject her interest in the property, the income, or the surplus thereof to his judgment.

4. Under Code Civ. Proc. § 1666, providing that a decree of distribution is conclusive as to the rights of heirs, legatees, or devisees; and section 1908, providing that a judgment in the probate of a will or the administration of a decedent's estate is conclusive on the will or the administration,—the invalidity of a trust provision in a will cannot be urged by a creditor of the beneficiary after decree of distribution.

Temple, J., dissenting.

In bank. Appeal from superior court, San Francisco county; J. M. Seawell, Judge.

Action by Helena Seymour against Margaret McAvoy and others to subject the interest of certain defendants in certain trust property to the satisfaction of a judgment held by her against them. From a judgment for plaintiff, and an order denying a new trial, defendants appealed. Reversed.

Sullivan & Sullivan, for appellants. Wickliffe Matthews and D. E. Alexander, for respondent.

VAN FLEET, J. On the 1st day of January, 1869, William McAvoy died, leaving, surviving him, his widow, the defendant Margaret, and two minor children, the defendants Emma and Della. He left a will, which was admitted to probate on the 22d day of January, 1869, by the probate court of the city and county of San Francisco, of which the material portions are as follows: "Item. I give, devise, and bequeath all my property, of every name, nature, and kind, to my executors aforesaid, in trust to manage and control the same, and to keep the same invested for the following purposes: (1) To provide out of the income thereof for the comfortable support and maintenance of my beloved wife (it being my desire and wish that she shall convey and release to said executors all her interest in my estate and in the community property, and, upon her doing so, she is to be provided with such support and maintenance) as one-half of such income will provide. (2) To provide out of said income for the support and education of my two daughters. \* \* \* (4) To accumulate such income until the death of my beloved wife, or until one or both of my said daughters shall marry. Upon the marriage of either daughter, to make over to her, as her separate estate, one-fourth of the estate then in the hands of said trustees; and, upon the marriage of the other daughter, to make over a like proportion; and, upon the death of my beloved wife, to transfer and make over a like residue of the estate to my said daughters, share and share alike, or the children of the one which may die before her said mother's death." On January 11, 1869, the defendant Margaret, in pursuance of the request expressed in the will, conveyed to the executors all her interest in the property in trust to carry out the provisions of said will. The court found, however, that William McAvoy died seised in fee of the property in question; and it follows that the defendant Margaret had no interest in the property except such, if any, as she may have derived under the will. On July 21, 1876, a decree of final distribution was entered, by which the property was distributed to the trustees named in the will (of whom the defendant Byrne is now the sole survivor), to have, hold, and dispose of in accordance with the terms and provisions of said will. On April 27, 1887, the defendant Della married; and the trustee thereupon conveyed to her one undivided fourth of said property, in accordance with the terms of the will. Both of said daughters were of full age at the time of the recovery of plaintiff's judgment, hereinafter mentioned, and their education had been completed. On September 27, 1893, the plaintiff recovered a judgment against the defendants Margaret and

<sup>1</sup> Rehearing denied.



Emma for upward of \$3,000, on which an execution was issued, and returned wholly unsatisfied. Thereupon the plaintiff brought this action against the trustee and the beneficiaries under the will, to subject the interest of the defendants Margaret and Emma in the trust property to the satisfaction of her judgment. The court found that the sum of \$100 per month was sufficient for the support and maintenance of each of the defendants Margaret and Emma, and gave judgment directing the trustee to pay to each of said defendants, out of three-fourths of the net income of the property, the sum of \$100 per month, and to pay the whole of the residue of said three-fourths to the plaintiff in satisfaction of her judgment. On the trial it was shown that certain third persons were creditors of said defendants Margaret and Emma, and that some of them had reduced their debts to judgment; and the defendant Byrne moved to have said persons brought in as parties to this action, which motion was denied by the court.

1. A judgment creditor, by filing a bill in equity to subject equitable assets to the payment of his judgment, acquires an equitable lien on such assets and a priority over any other creditor who has not already filed such a bill. Other judgment creditors who have not filed such a bill are therefore not necessary parties to the action, and their presence is not necessary for the protection of the defendants. The court therefore did not err in refusing to bring in as parties other judgment creditors who had not themselves commenced any such suit.

2. The only question of importance in the case is whether the defendants Margaret and Emma have any interest in the property or income in question, which can be subjected to the claims of their creditors. We think it clear that they have no such interest. It must be noticed at the outset that the provisions of the Civil Code cannot affect this case. The estate of the trustee and the rights of the beneficiaries vested on the death of the testator in 1869, and the Code is not and could not constitutionally be retroactive, so as to divest any of their rights. As there was not at the testator's death any statute in force in this state on the subject, this case must be decided in accordance with the rules of the common law; and, in ascertaining those rules, we may look as well to the decisions in other states of this Union possessing the common law, as to those of the English courts. *Lux v. Haggin*, 69 Cal. 384, 385, 10 Pac. 674.

By the great weight of authority in America, it is settled that the author of a trust to pay to or apply for the benefit of another the income of property, or a portion of such income, may lawfully provide that the interest of the beneficiary shall not be assignable, or shall not be subject to the claims of his creditors. Out of the many decisions to this effect, we may refer to *Nichols v. Eaton*, 91

U. S. 716, 725; *Stelb v. Whitehead*, 111 Ill. 247; *Bank v. Adams*, 133 Mass. 170; *Roberts v. Stevens*, 84 Me. 325, 331, 24 Atl. 873; *Lampert v. Laydel*, 96 Mo. 439, 446, 9 S. W. 780; *Jourolmon v. Massengill*, 86 Tenn. 81, 100, 5 S. W. 719; *Garland v. Garland*, 87 Va. 758, 13 S. E. 478; *Ooerman's Appeal*, 88 Pa. St. 276, 284; *Grange Agency v. Lee*, 72 Md. 161, 19 Atl. 648; *Wallace v. Campbell*, 53 Tex. 229; *Wales' Adm'r v. Bowdish's Ex'r*, 61 Vt. 27, 17 Atl. 1000. It is also well settled in the jurisdictions where this doctrine prevails that such provision need not be express, but may be implied from the general intention of the donor, to be gathered from the terms of the trust, in the light of all the circumstances. *Baker v. Brown*, 146 Mass. 369, 15 N. E. 783; *Pope's Ex'rs v. Elliott*, 8 B. Mon. 56; and *Roberts v. Stevens*, and *Wales' Adm'r v. Bowdish's Ex'r*, *supra*. The decisions in England and in some of the American states limit this doctrine to cases where there is an express provision for a cesser or limitation of the estate upon any alienation, or upon bankruptcy, levy of execution, or the like. But we think that the rule established by the decisions we have cited is more consonant with the rules of law and with the principles of reason. Alienability is not an essential attribute of an equitable life estate in property; and there is nothing in the policy of the law prohibiting a donor from providing that his bounty shall be enjoyed only by those to whom he intends to extend it, and that property devoted by him to a trust otherwise valid shall not be diverted from its appointed destination.

The will in question does not, in terms, provide that the interest of the beneficiaries shall not be subject to the claims of their creditors, but its provisions lead to that result by an implication equally strong. By the legal effect of this instrument the entire property is devised to the executors in trust—First, to provide out of one-half of the income thereof for the comfortable support and maintenance of the testator's widow, and to provide out of said income for the support and education of his two daughters; second, to accumulate the surplus of one-half of said income after providing for the support and maintenance of the widow until her death, and to accumulate the remaining half thereof after providing for the support and education of the daughters (one-half of said half until one of the daughters should marry, and the other half of said half until the other daughter should marry); third, to transfer to each of the daughters, upon her marriage, one-fourth of the trust property, with one-half of the accumulations of one-half of the income; and, fourth, upon the death of the widow to transfer to each of the daughters, or to the children of either of them deceased at that time, one-fourth of the trust property, with one-half of the accumulations of the other half of the income. Under these provisions the only right of the widow is

to have the trustee support her during her life out of one-half of the income; and the only right of the defendant Emma, until her marriage, is to have a like support out of one-fourth of the income. No sums whatever are directed to be paid to either of them during those periods, but the trustee is himself to expend the money for their support. Of course, therefore, no creditor could take any part of the income so appropriated for their support without entirely defeating the provision for that purpose. It is plain, therefore, that under no circumstances can any creditor of the defendant Margaret take any portion of this property; for she has no interest in it, present or prospective, except the right to be supported during her life, which right could not be reached by a creditor without defeating the trust. *Johnston v. Zane's Trustees*, 11 Grat. 552, 569. Nor does the creditor of defendant Emma stand in any better position. Besides her right to a support, which, for the reasons shown, cannot be impaired, the only interests she has are a right to one-fourth of the property contingent upon her marriage, and a right to another fourth thereof contingent upon her surviving her mother. Until those events occur the trustee must continue to accumulate the surplus income, for neither of them may ever occur; and, if they do not occur, the accumulation, as well as the corresponding share of the corpus of the property, will belong to some other person. No part of this surplus can therefore be taken by a creditor without defeating the trust for accumulation. An express provision in the will restraining alienation, voluntary or involuntary, would therefore have been no stronger than the necessary implication derived from the purposes to which the property is directed to be applied.

We have not been referred to any rule of law as it stood before the enactment of the Code which is contravened by any provision in this will, and we cannot see any infirmity in any of those provisions. They would be valid even under the English rule (*Chambers v. Smith*, 3 App. Cas. 795); and, even if they had been for any reason invalid, such invalidity could not now defeat the will, for the decree of distribution is conclusive of the validity of all of its provisions. Code Civ. Proc. §§ 1666, 1908; *William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323; *Greenwood v. Murray*, 26 Minn. 259, 2 N. W. 945. It follows that the plaintiff is not entitled to subject the property in question to her judgment.

This conclusion renders it unnecessary to consider the other questions argued, and, as the facts appear on the face of the findings, no new trial will be required. The judgment and order appealed from are reversed, and the cause remanded, with directions to the court below to set aside its conclusions of law, and to enter judgment upon the findings in favor of the defendants.

We concur: HARRISON, J.; GAROUTTE, J.; McFARLAND, J.

TEMPLE, J. I dissent. If it be held that the case is not governed by the code provision, then the rule of the common law must prevail. At common law these so-called "spendthrift trusts" were held invalid; the rule being, as was expressed in *Brandon v. Robinson*, 18 Ves. 429: "Certainly no man shall have an estate to live on, but not an estate to pay his debts with. Certainly property available for the purposes of pleasure or profit shall be also amenable to the demands of justice." It is said that the American rule of decision is in favor of the validity of such trusts. I doubt this. Certainly in many states the English rule has been approved. In some the matter is controlled by statute. See, 23 Am. & Eng. Enc. Law, 10. In *Nichol v. Levy*, 5 Wall. 441, it is said: "It is a settled rule of law that the beneficial interest of the cestui que trust, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure it the inconsistent characteristics of right and enjoyment to the beneficiary, and immunity from his creditors," etc. Such estates are contrary to the policy of our laws, which provide means of subjecting the property of all to the satisfaction of their obligations. Such trusts enable one by his own act to make property exempt from execution, and violate our ideas of equality and fair play. If there is a conflict in the authorities, and we are free to choose, I think the English rule by far most conformable to justice and good policy. I think, also, that the opinion is at variance with the very recent decision in *Re Cavarlay's Estate* (Cal.) 51 Pac. 629.



121 Cal. 490

**TRUMAN v. YOUNG. (L. A. 511.)**

(Supreme Court of California. July 21, 1898.)

**CLAIM AND DELIVERY—COMPLAINT.**

A complaint in an action in claim and delivery, alleging plaintiff's ownership and right to possession of goods on November 14, 1895, and that on June 2, 1896, plaintiff demanded possession of defendant, is insufficient; plaintiff's ownership or right to possession subsequent to said November 14th not being alleged, though it is alleged that "defendant still unlawfully withholds and detains" them.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Waldo M. York, Judge.

Action by Augusta Truman against John W. Young. Judgment for plaintiff. Defendant appeals. Reversed.

Frank P. Flint, Wm. P. Jones, and Flint & Barber, for appellant. A. B. Hotchkiss, for respondent.

**HAYNES, C.** Action in claim and delivery, for the recovery of a certain diamond. Findings and judgment were for the plaintiff, and the defendant appeals from the judgment and an order denying a new trial.

The defendant demurred to the complaint upon the ground that it did not state sufficient facts. The court overruled the demurrer. It should have been sustained. The complaint alleges "that on the 14th day of November, 1895, said plaintiff was the owner and entitled to the immediate possession of the following goods and chattels" (describing them); that their value is \$350; "that the defendant, without the consent of the plaintiff, now detains said goods and chattels from the possession of said plaintiff"; that on June 2, 1896, plaintiff demanded possession, and that defendant refused to deliver them; "that said defendant still unlawfully withholds and detains said goods and chattels from the possession of the plaintiff, to her damage," etc. The complaint was filed June 5, 1896. There is no allegation that the plaintiff was the owner at any time after November 14, 1895, or of any fact showing that she was entitled to the possession after that date. The defendant might detain the property without her consent, though she had no right whatever to its possession; and so the fact that a demand was made does not show either a general or special ownership, or any right to the possession. Respondent contends, however, that there was an allegation of ownership on November 14, 1895, and that the allegation that "defendant

still unlawfully withholds and detains said goods and chattels" implies a continued ownership, and cites *Williams v. Ashe*, 111 Cal. 188, 43 Pac. 595. In that case the allegation was that "on and after" a certain day he was the owner and in possession, etc., and this, it was said, implied a continued ownership or right of action. The complaint in this case is not distinguishable from the complaint in *Fredericks v. Tracy*, 98 Cal. 659, 33 Pac. 750, in which, also, there was the allegation here made, that "defendant still unlawfully withholds possession," etc. See, also, *Affierbach v. McGovern*, 79 Cal. 268, 21 Pac. 837; and *Holly v. Heiskell*, 112 Cal. 174, 44 Pac. 466. The judgment must therefore be reversed. This conclusion makes it unnecessary to examine the question made by the motion for nonsuit, or as to the sufficiency of the evidence to justify the findings. The judgment and order should be reversed, with leave to the plaintiff to amend her complaint.

We concur: SEARLS, C.; BELCHER, C.

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment and order are reversed, with leave to the plaintiff to amend her complaint.

6 Cal. Unrep. 72

**PRICE v. SPENCER. (S. F. 1,068.)****LAYSON v. SAME.**

(Supreme Court of California. July 21, 1898.)

**DECEIT—EVIDENCE—VALUE OF STOCK.**

Evidence of the intrinsic value of stock is not admissible in an action for false representations as to value thereof; it having a well-known and fixed market value, and the inquiry having been as to this.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; Stanton L. Carter, Judge.

Two actions against L. A. Spencer,—one by Fannie Price, and the other by M. A. Layson. From adverse judgments, plaintiffs appeal. Affirmed.

W. H. Layson, for appellants. F. H. Short, for respondent.

**SEARLS, C.** An appeal was taken in both of the above-entitled causes upon the same record, and it is stipulated, in substance, that they embody the same pleadings, facts, and questions of law, and that "the judgment or order of the supreme court in said case of *Price v. Spencer* shall be the judgment and order made in the case of *Layson v. Spencer*," etc. Under this stipulation, we shall omit all further mention herein of the case of *Layson v. Spencer*, and confine ourselves to the case of *Fannie Price v. L. A. Spencer*, subject only to a final disposition of the two cases. The complaint charges in substance:

(1) That in April and May, 1893, defendant undertook, as the agent of plaintiff, to purchase for her some shares of the capital stock

of the Fresno Loan & Savings Bank, a corporation. (2) Defendant was an officer, to wit, teller, in said bank, and well knew the value of the stock thereof, but the value thereof was unknown to plaintiff. (3) To induce plaintiff to purchase said stock, defendant falsely represented to plaintiff that the stock was worth from \$129 to \$130 per share, and was paying, and would pay, semiannual dividends of \$6 per share. That defendant professed to know an old man in San Francisco who would sell a few shares of the stock at \$112 per share, which he said was very cheap. That plaintiff, relying upon these representations, requested defendant to purchase for her five shares at \$112, and forwarded to him \$560 therefor. That defendant retained the money, and fraudulently transferred to her, on the books of the corporation, five shares of the capital stock belonging to himself, all of which he concealed from plaintiff. (4) Since January, 1893, the bank has paid no dividends. When the stock was transferred to plaintiff, it was, as defendant well knew, worth no more than \$65 per share. (5) Plaintiff did not know until November, 1894, that the stock was the property of defendant; and she immediately gave notice of the rescission of the contract, offered to return the stock, and demanded a return of her money, all of which was refused by defendant. (6) All of defendant's representations were false, and made to deceive, and did deceive, plaintiff.

There is another cause of action, stated in like words, showing that plaintiff, under like circumstances, purchased three other shares of the same capital stock at the same price.

Plaintiff prays for a decree adjudging the sale to be rescinded; that defendant holds in trust for plaintiff \$896; that he pay the same over, with interest; and for costs.

The answer denies that the defendant undertook, as agent or otherwise, to purchase for plaintiff any shares of the capital stock of the Fresno Loan & Savings Bank; avers that he did, at the request of W. H. Layson, the attorney of plaintiff, procure from one Harvey Phinney five shares of said stock, and caused them to be transferred to plaintiff, for which she paid \$112 per share. He denies that he was ever the owner of the stock, or had any interest therein, except that he purchased the same for \$110 per share only when he found a purchaser therefor at \$112 per share, and that the stock was thereupon transferred from Harvey Phinney directly to plaintiff, and that the interest of the defendant therein was but the \$2 per share which he retained. Without further particularity, it may be said the answer denies all the allegations of fraud, and the facts upon which the same are predicated. The answer to the second cause of action proceeds upon the same lines as that to the first. The findings of the court negatived all the charges of false or fraudulent representations by defendant, alleged to have induced the purchase of the stock by the plaintiff; found that the defendant was not the

owner of the stock purchased by plaintiff, but that he purchased the same, as the agent of plaintiff, at \$110 per share, and charged her \$112 per share, retaining to his own use the difference of \$2 per share, amounting in the case of plaintiff to \$16, which sum defendant held in trust for the plaintiff; and the latter had judgment for said sum of \$16, and for her costs of suit.

The testimony in the case was sharply contradictory upon most of the issues, and, by all the precedents, the findings of the court below in such a case are conclusive here. Counsel for the appellant argues his case mainly from the standpoint of plaintiff's testimony, rather than from a review of the whole case as made. Assuming his alleged facts as established, little difficulty would be experienced in reaching his conclusions. This we may not do, in the face of the record. Defendant admits in his answer, substantially, that he did, at the request of plaintiff, receive from one Harvey Phinney the stock in question, for which the plaintiff paid, and that he retained to himself \$2 per share. This constituted him, pro tanto, the agent of the plaintiff. According to the findings of the court, this retention of \$2 per share constituted the whole of defendant's offending. Appellant, however, contends that the evidence shows that defendant was the owner of the stock, and sold the same to plaintiff, concealing the fact of such ownership, etc. It is true that there was some evidence tending to show, if taken by itself, that defendant owned the stock. But, in the interpretation which appellant places upon it, it proves too much for her case. The agent of plaintiff was W. H. Layson, her brother. In the spring of 1893 he visited Fresno, in quest of an opportunity to invest some money for his two sisters, the plaintiffs in the two cases; called upon defendant, the teller of the bank aforementioned, with whom he had a conversation in reference to the bank and its stock; learned from defendant that a man had some of the stock for sale. Layson, on the 7th of May, wrote defendant, asking: "Is the stock you spoke to me about still for sale, or part thereof? What a price? I have forgotten." On the 8th day of May, defendant answered in part, as follows: "I have still twenty-seven shares on hand. \* \* \* Can sell at same price as offered you (\$112 per share) if sold at once." Later in May, Layson wrote the Fresno Savings Bank as follows: "Inclosed find draft for \$896. Buy L. A. Spencer eight shares of Fresno Savings & Loan Bank stock,—five shares for Fannie Price, three shares for M. A. Layson,—not exceeding \$112 per share. What does stock sell for in the market? [Signed] Layson." The draft was payable to the bank. On receipt by the bank of this letter and draft, defendant went to Harvey Phinney, who had previously offered to sell stock at \$110, took him to the bank, where eight shares were transferred from Phinney to Fannie Price and M. A. Layson, as directed by their agent, W. H. Layson, and the certifi-



cates forwarded to their agent, W. H. Layson, in the name of the bank; the actions, however, being formulated in the name of the bank by its teller, the defendant. On the 17th of June the bank received a like order from Layson for three shares, which were procured by the defendant from Phinney, through his agent, one Frank Laning, and transferred directly to plaintiff herein, as in the former case. In 1894 plaintiff ascertained that defendant had purchased the stock at \$110 per share, and demanded of him the \$2 per share which he had overcharged them. In response, defendant replied that: "I sold the stock to you fairly. Now, after I tell you that, practically, and, I believe, legally and morally, I owned the stock that I sold to you," etc. We have said that, if this evidence proves that defendant was the owner of the stock, it also proves too much. On their theory, they were informed by him before the purchase that he had the stock for sale, and if they knew this, and ordered it purchased from him, it is not perceived that there was any agency on his part, or that, in the absence of fraud, they had any cause for complaint. On this theory, there is no estoppel that can be urged against defendant. The case of *Bank v. Hiatt*, 58 Cal. 234, simply holds that a purchaser has a right to rely upon representations of the seller as to facts not within the purchaser's knowledge, and the fact that the purchaser might by inquiry have obtained knowledge of the facts will not relieve the seller from responsibility. In the present case, if the seller was the owner of the stock, his first act in the premises was to inform the plaintiff of that fact. But we need not pursue this inquiry further. The court found that defendant purchased the stock as the agent of plaintiff, and that he was never the owner thereof. This finding is amply supported by the evidence. As before stated, the seller took or caused his stock to be taken to the bank, where it was indorsed and transferred by the bank to the plaintiff; and, as the bank held plaintiff's checks for the purchase price, we may reasonably infer that it paid the sellers. The defendant was the medium through which the transaction was consummated, and the fact that the seller did not know the purchaser is, upon the showing made, a circumstance of little importance. The whole pith of the transaction may be embodied in few words: The bank in question was, as a going concern, a prosperous institution, paying large dividends. Its stock had a well-defined market value at from \$110 to \$115 per share, and had been much higher. Soon after plaintiff's purchase, there was a bank panic, under the pressure of which it closed its doors for a few days; then opened again, and struggled along until 1895, when, its securities and assets having shrunk greatly, it went into liquidation, and its stock fell to, say, one-half its former price.

Certain testimony was received at the trial in reference to the value of the property be-

longing to the bank in question, which was afterwards stricken out. This ruling is assigned as error. The only object of such testimony was to show the intrinsic value of the stock. Under some circumstances, such testimony would doubtless be proper. Here, however, the stock was shown to have had a well-known and fixed, though variable, market value. It was as to this market value that plaintiff inquired from defendant and others before making her purchase. It afforded a fixed and certain standard of value, and was the proper criterion of such value. It was not, therefore, error to confine the evidence to such standard.

Numerous other errors in rulings made upon the trial are specified by appellant, most of which we think not well taken, and, as to all others, that a different ruling would not have affected any finding of fact, or justified a different result. I advise that the judgment and order appealed from in each of the above-entitled cases be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from in each of the above-entitled cases are affirmed.

121 Cal. 482

COOLEY v. CALAVERAS COUNTY. (Sac. 458.)

(Supreme Court of California. July 21, 1898.)  
FEES OF OFFICER—SETTLEMENT—SPLITTING CLAIM  
—UNCONSTITUTIONAL LAW.

A justice of the peace having presented his claim against the county for fees as per the statute, and had them so allowed and paid, cannot, on the statute being subsequently declared unconstitutional, recover balance of what he would have been entitled to but for the law.

Commissioners' decision. Department 2. Appeal from superior court, Calaveras county; C. V. Gottschalk, Judge.

Action by John Cooley against the county of Calaveras. Judgment for defendant. Plaintiff appeals. Affirmed.

Kettle & Hawley, for appellant. John J. Snyder, for respondent.

SEARLS, C. Action brought to recover from the county of Calaveras the sum of \$561.80, a balance claimed to be due the plaintiff as fees and compensation for services as justice of the peace in and for Angels township, in said county. The defendant had judgment for costs. Plaintiff appeals from the judgment, and the cause comes up on the judgment roll. The cause was submitted to the court upon an agreed statement of facts. This agreed statement is not set out in the record; hence the facts as found by the court are conclusive. The facts so found are, so far as necessary to the questions involved, as follows: (1) Plaintiff was a justice of the

peace in and for the township of Angels, county of Calaveras. (2) As such justice of the peace plaintiff, between April 2, 1895, and December 28, 1896, in pursuance of his judicial duties, heard and determined 155 criminal actions or proceedings on examination or trial properly before him. (3) That as such justice of the peace plaintiff was entitled to receive of and from the defendant county, in each of the said actions or proceedings, the sum of \$3, aggregating in all the amount of \$465. (4) That prior to the 25th day of February, 1897, and prior to the commencement of this action, plaintiff presented to the board of supervisors of the defendant county his claims in due form, and properly verified by his oath as to their correctness, for each and every of said 155 criminal actions or proceedings tried or examined by him as aforesaid, aggregating in all the sum of \$465. (5) The board of supervisors duly passed upon and allowed each and every of said claims for the full amount of fees demanded by plaintiff, to wit, the sum of \$3 in each of said actions or proceedings tried, etc., as aforesaid. (6) Each and every of said claims so presented and allowed as aforesaid were by the county treasurer of the defendant county duly paid to plaintiff, and "that a complete settlement between plaintiff and defendant county was had thereon." (7) On the 25th day of February, 1897, the plaintiff, as such justice, filed additional claims in all of said 155 cases, etc., for which he had presented his claims as aforesaid, and which had been allowed and paid as aforesaid, in which he claimed in the same cases as follows: For complaint, \$2; issuing warrant, \$2; trial of each case, \$3; aggregating in each case, \$7. In each case plaintiff credited the county with the \$3 previously paid him thereon as aforesaid. (8) The board of supervisors rejected said claims. (9) The defendant county is not indebted to defendant in any sum.

Upon the foregoing facts the case may be succinctly stated thus: Under the act of March 28, 1895, entitled "An act to establish the fees of county, township and other officers," etc. (St. 1895, p. 267), it is provided by section 1 that justices of the peace may, for their own use, collect the following fees and no others: "For all services in a criminal action or proceeding, whether on examination or trial, three (3) dollars."

The plaintiff, having performed services in criminal cases subsequent to the passage of this act, presented his claim therefor as therein provided, which was allowed and paid in full as presented. Thereafter, and in January, 1897, this court in *Dwyer v. Parker*, 115 Cal. 544, 47 Pac. 372, the clause above quoted from the act of 1895 was held unconstitutional for the reasons assigned therein. Subsequent to that decision plaintiff prepared and presented his claim for fees in the same cases as per the fee bill. Subdivision 13, § 200, County Government Act 1893 (St. 1893, p. 491). In this last claim he credited the coun-

ty defendant with the several amounts previously received in the same cases. The question is, can the plaintiff recover such balance?

The contention of appellant is that the fact that plaintiff claimed and received three dollars in each case from defendant, believing that he was not entitled to receive more, does not preclude him from recovering the balance due him under the county government act of 1893, which authorizes him to demand and receive seven dollars in each case heard and determined by him; that, being entitled to payment from the defendant in full, he is not precluded from enforcing such payment by his mistake in supposing he was only entitled under the act of 1895 to receive three dollars in each case, since the act of 1895 has been declared invalid by this court.

For the purposes of this case we shall assume that plaintiff was originally entitled to the fees as provided by the county government act. Assuming this, however, we still think the question of plaintiff's right to recover on the facts of the present case must be answered in the negative.

1. It is a familiar principle of law that a party having an entire demand cannot split it up into separate causes of action, and this rule applies to claims against counties equally with those against individuals. *Zirker v. Hughes*, 77 Cal. 235, 19 Pac. 423.

2. There was no mistake as to the fees plaintiff should receive when his services were rendered. The statute of 1895 fixed their amount, and plaintiff settled upon that basis, and no subsequent decision of a court can create a mistake and annul a previous contract which was legal and valid when made. The case of *Bank v. Daniels*, 12 Pet. 32, illustrates the principle. There a bill in equity was filed to recover money paid as damages for the nonpayment of a bill of exchange, as provided for in a statute of the state of Kentucky. This statute had not, at the date of payment, received a judicial construction. It was subsequently held in other cases that, the bill being payable without the state of Kentucky, the statute did not apply. In discussing the case the supreme court says: "The question is not what the courts have since decided, but whether the parties mistook the law when they believed this bill bore damages. It would be as mischievous as an *ex post facto* law to permit a subsequent decision to overturn the fair compromises and contracts of individuals made under a different and correct view of the law. But we do not consider this a case of ordinary mistake of a point of law. The agreement was in exact accordance with the general understanding of the law at the time it was made. Two years afterwards the court of appeals, in another case, gave a different construction. The community would be in a miserable condition if at every change of opinion upon questions of law all their previous contracts and settlements were to be overturned. Men could never know the end of their controversies were



such a rule to prevail." The court also quoted with approval from the opinion of Chancellor Kent, in *Lyon v. Richmond*, 2 Johns. Ch. 51, the following: "A subsequent decision of a higher court, in a different case, giving a different exposition to a point of law from the one declared and known when a settlement between parties takes place, cannot have a retrospective effect and overturn such settlement. The courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. And to permit a subsequent judicial decision in any one case on a point of law to open and annul everything that has been done in other cases of a like kind for years before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of mankind, no such pernicious precedent is to be found. The case is therefore to be decided according to the existing state of things when the settlement in question took place." The understanding of the law prevailing at the time of the settlement of a contract, although erroneous, will govern, and the subsequent settlement of a question of law by judicial decision does not create such a mistake of law as courts will rectify. We recommend that the judgment appealed from be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

(6 Cal. Unrep. 78)

MORE v. MILLER et al. (S. F. 897.)<sup>1</sup>

SAME v. MORE et al. (S. F. 1,104.)

(Supreme Court of California. July 21, 1898.)

TIME FOR APPEAL — INTERVENTION — JUDGMENT AGAINST ADMINISTRATOR AFTER REMOVAL.

1. Time for appeal by interveners commences to run from time complaint in intervention is stricken out for want of interest, not from time of judgment between original parties.

2. Judgment against one as administrator is invalid, he having been removed after submission of the cause, but before judgment, notwithstanding pendency of his appeal from order of removal. It may, however, be entered against him *nunc pro tunc*, as of the date of submission.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by H. Clifford More, administrator of Lawrence W. More, deceased, against John F. More, administrator of Alexander P. More, deceased. Eliza M. Miller, afterwards made special administratrix of Alexander P. More, deceased, and C. A. Baldwin, intervened.

From order dismissing complaint in intervention, and from judgment for plaintiff against original defendant, interveners appeal. From order vacating said judgment, plaintiff appeals. Interveners' appeal dismissed. Order affirmed on plaintiff's appeal.

Whitcomb & Boyle, for plaintiff. Thos. McNulta, A. G. Eells, and J. B. Mhoon, for interveners.

BELCHER, C. H. Clifford More, as administrator of the estate of Lawrence W. More, deceased, duly presented to John F. More, as administrator of the estate of Alexander P. More, deceased, a claim for allowance, amounting to the sum of \$13,670.14. The claim was at first allowed in part by the administrator and the probate judge, but thereafter the allowance was revoked and recalled by both the administrator and the judge, and the claim entirely rejected. Thereupon this action was brought to establish the claim, as provided in section 1498 of the Code of Civil Procedure. The defendant administrator answered the complaint, and within proper time Eliza M. Miller and C. A. Baldwin, by leave of the court, filed a complaint in intervention, alleging that Alexander P. More died intestate on October 21, 1893, leaving an estate, consisting principally of land, of the value of more than \$500,000; that the interveners were sisters of the decedent and his heirs at law, and upon his death became, and ever since had been, seised in fee and possessed of the said landed estate; and denying that any sum of money whatever was due or owing from the said estate to the plaintiff. Subsequently, on motion of the attorney for the plaintiff, the court made an order "that the order made herein allowing said Baldwin and Miller to file their complaint in intervention be, and hereby is, vacated and set aside, and that said complaint be, and hereby is, stricken out and dismissed." This order was based upon the ground that it did not appear that the interveners had any interest in the matter in litigation in said action, or in the success of either of the parties thereto, or an interest against both. It was dated October 31, 1895, and a copy thereof was served on the attorney for the interveners on November 5, 1895. The case was afterwards tried, and on May 29, 1896, submitted for decision. On December 16, 1896, findings were filed, and on January 15, 1897, judgment thereon was entered that the plaintiff "do have and recover from said John F. More, as the administrator of the estate of Alexander P. More, deceased, or his successor as administrator of said estate," the sum set forth in his rejected claim and demanded in his complaint, with interest and costs of suit. From this judgment and the order dismissing their complaint in intervention the interveners served and filed notice of appeal on February 15, 1897, being the appeal designated No. 897. Thereafter, on April 2, 1897, the attorneys for John F. More, as administrator, and for Eliza M. Miller, as special

<sup>1</sup> Rehearing granted.

administratrix, of the estate of A. P. More, deceased, after due notice, moved the court to vacate and set aside the said decision and judgment upon the ground that both said decision and judgment were inadvertently and improvidently made by the court, in that they were made and entered against said John F. More, as administrator of the estate of Alexander P. More, deceased, payable in due course of administration, whereas at the time and times when each and both were so made and entered as aforesaid the said John F. More had ceased to be such administrator, his letters of administration having been revoked and annulled by an order of said court duly given and made in the matter of the estate of Alexander P. More on the 21st day of September, 1896. At the hearing of the motion, by agreement by and between the attorneys for the moving parties and the plaintiff, entered upon the minutes of the court, it was admitted "that upon proceedings duly had and taken in the said superior court \* \* \* in the matter of the estate of Alexander P. More, deceased, \* \* \* then and now pending in said superior court, and by orders duly given and made by said court in said matter, the powers of the said administrator of said estate, John F. More, defendant herein, were on the 1st day of June, 1896, suspended until the further order of the said court; that said Eliza M. Miller was on the 4th day of June, 1896, appointed special administratrix of the said estate; and that by an order of the said superior court in said matter, made and dated on the 21st day of September, 1896, it was ordered that the letters of administration issued to the said John F. More by said court, and dated February 12, 1894, be revoked and annulled, and that the said John F. More be restrained from further exercising any of the rights or duties as such administrator; and that said John F. More, as such administrator and individually, thereafter, on the 20th day of November, 1896, duly and regularly took and perfected appeals to the supreme court of the state of California from said order, and from the whole thereof, and that said appeals are now pending and undecided in said supreme court." After the hearing the court, on April 13, 1897, granted the motion, and ordered the said decision and judgment vacated, annulled, and set aside. From this order the plaintiff appealed, the appeal being designated No. 1,104.

1. The only question involved in the first appeal (No. 897), which it is necessary to consider is, was the appeal taken in proper time? As the law stood at that time, an appeal from an appealable order or judgment was required to be taken within one year after the order is made or the judgment entered. Code Civ. Proc. § 939. "Upon an appeal from a judgment the court may review the verdict or decision, and any intermediate order or decision excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might

have been taken." *Id.* § 956. Here the appeal was taken more than a year and three months after the order was made striking out and dismissing the complaint in intervention. That order disposed of the interveners' rights as parties to the suit, and had the force and effect of a judgment against them, and was, in our opinion, appealable. In *Stich v. Dickinson*, 38 Cal. 608, the appellant filed a complaint in intervention, to which the defendants demurred on the ground that it did not state facts which entitled the intervenor to intervene, inasmuch as it did not show that the intervenor had any interest in the matter in litigation, in the success of either of the parties, or against both or all of them. The demurrer was sustained, and a judgment was thereupon entered against the intervenor, from which he appealed. It was claimed by the respondents that the appeal was prematurely taken, there having been no final judgment in the action as between the original parties to it. But it was held that the judgment against the intervenor was final, and that the appeal was properly taken. The judgment was accordingly reversed, with directions to the court below to overrule the demurrer to the intervention. And in *People v. Pfeiffer*, 59 Cal. 89, which was a proceeding for the condemnation of land, the appellant made application for leave to intervene in the proceeding. "The court made an ex parte order permitting him to present and file a complaint in intervention, but subsequently, after filing the complaint, set aside the order, refused to allow him to intervene, and dismissed his complaint. From the judgment of dismissal the appellant took no appeal, as he might have done,"—citing *Stich v. Dickinson*, *supra*. After a judgment of condemnation was entered, the appellant appealed from that judgment, but it was held that he was not a party to the action, because his suit to be made a party was rejected, and his appeal was dismissed. The cases cited by appellants, as declaring a different rule, are not in point. They are cases where a pleading, or part of a pleading, of one of the parties to the action had been stricken out on motion; and it was held that the order of the court, not being itself appealable, might be reviewed on appeal from the final judgment. The cases above cited seem to be decisive of the question in hand, and it must, therefore, be held that the appeal from the order striking out the complaint in intervention was not taken within the time allowed for that purpose, and hence cannot be considered on its merits.

2. The question involved in the second appeal (No. 1,104) is, was the judgment rendered against "John F. More, as the administrator of the estate of Alexander P. More, deceased," invalid, he having been removed from his trust, and having ceased to be administrator of the estate some months before the judgment was entered? If it was, there was clearly no error in setting the judgment aside on motion. It has been held in this state that



a judgment rendered in favor of or against a party to the action after his death is a nullity, and, although it is not void on its face, it may be set aside on motion. *Ewald v. Corbett*, 32 Cal. 493; *McCreery v. Everding*, 44 Cal. 284; *Elliott v. Paterson*, 65 Cal. 109, 3 Pac. 493. It has also been held in other jurisdictions that where an executor or administrator is removed from his trust he ceases to have any connection with the estate, and no judgment relating to its affairs can be rendered against him. In *Wiggin v. Plumer*, 31 N. H. 251, it is said, on page 266: "He ceases to be a party to the action on removal from his trust as absolutely as if he were dead, and the action must either be prosecuted against the new representative of the estate or it will be discontinued. \* \* \* When the administrator is displaced, he ceases to have either interest in or power over that estate, and a judgment to reach the estate must be rendered against the party entitled to represent it. The judgment also must be for a sum to be levied of the goods and estate of the deceased in the hands of the defendant administrator, to be administered. Such a judgment cannot be rendered against one who appears by the record not to be administrator." In *Bank v. Stanton*, 116 Mass. 435, it is said: "Upon her removal from the office of executrix, her liability to and right to defend against this action ceased. It follows that no judgment therein can be rendered against her." In *Re Dunham's Estate*, 8 Ohio Cir. Ct. R. 162, it is said: "We are of the opinion that the judgment, having been rendered after the cessation of the powers of Mrs. Dunham as executrix, was wholly void as evidencing the existence of a claim against the estate." And in *Taylor v. Savage*, 1 How. 282, it is said by the supreme court of the United States, Taney, C. J., delivering the opinion: "By his removal from the office of executor he was as completely separated from the business of the estate as if he had been dead, and had no right to appear in or be a party in this or any other court to a suit which the law confined to the representative of the deceased."

It is objected, however, for the appellant that the effect of the order removing More from his trust as administrator was suspended by his appeal therefrom until the final determination of the appeal, and that meantime he continued to be the administrator of the estate; citing *In re Moore's Estate*, 86 Cal. 72, 24 Pac. 846. That case simply holds that pending an appeal from an order removing an administrator of an estate he is suspended from office, and it is within the power of the court to appoint a special administrator to act during the period of suspension, but not to appoint a general administrator until such order or removal becomes final. It is true that pending the appeal from the order removing More he was only suspended from the office of administrator. But after the removal he ceased to be practically and in effect the administrator of the estate. He could exercise

no powers and perform no duties as such. "He was as completely separated from the business of the estate as if he had been dead." The appeal did not revive or in any way restore his powers. "The effect of an appeal from an order setting aside a judgment is not to revive the judgment. The judgment no longer exists, so far as the assertion of any rights under it is concerned, until it shall be brought into force again by a reversal of the order setting it aside. \* \* \* The Code does not provide that an order appealed from shall cease to exist,—be annulled,—but that it cannot be further enforced by a proceeding upon it. Here the revocation of probate and the surcease of appellant's functions as executor became complete eo instanti the order of revocation was entered." In *re Crozier's Estate*, 65 Cal. 332, 4 Pac. 109. We conclude, therefore, in view of the well-settled rules of law, that after More was removed from his office as administrator no judgment could properly be entered against him as such administrator, and that there was no error in setting the judgment in question aside.

Undoubtedly the judgment might have been, and we think should have been, entered against the defendant nunc pro tunc, as of the date of the submission of the cause for decision; and it may be so entered now, on the going down of the remittitur on this appeal. *Fox v. Mining Co.*, 108 Cal. 478, 41 Pac. 328. We advise that appeal No. 897 be dismissed, and that the order involved in appeal No. 1,104 be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal No. 897 is dismissed, and the order involved in appeal No. 1,104 is affirmed.

121 Cal. 478

PACKWOOD v. BROWNELL. (Sac. 359.)  
(Supreme Court of California. July 20, 1898.)

#### ELECTIONS—RECEIPT OF VOTES.

1. Receipt of votes during the absence of some of the members of the board of judges does not vitiate the election, the law not requiring all the members to be present during all the time voting is in progress.

2. A statement of contest of election should show how the poll may be purged of illegal votes, the mere fact of receipt thereof being no ground for rejection of the whole vote.

3. The mere fact that the polls are not opened at sunrise, as required by Pol. Code, § 1160, does not invalidate the election, but a delay preventing a full and fair vote must be shown.

Harris and Temple, JJ., dissenting.

In bank. Appeal from superior court, Lassen county; W. T. Masten, Judge.

Shinn & Shinn, for appellant. N. J. Barry, for respondent.

PER CURIAM. When this case was in department the opinion hereto attached was pre-

pared by Mr. Commissioner BRITT, and after further consideration we are satisfied with the conclusion therein reached. For the reasons given in that opinion the judgment is reversed, with directions to the court below to dismiss the proceeding.

"The parties here were opposing candidates for the office of supervisor of supervisor district No. 4, in Lassen county, at the election held November 3, 1896. In the total poll Brownell had 2 votes more than his opponent, and received a certificate of election accordingly. In Pitt River precinct of said district 32 votes were cast for said office, those for Brownell exceeding those for Packwood by 6; so that if the return from this precinct were thrown out Packwood would be elected. The latter instituted the present proceeding to contest the election, alleging in his written statement, filed as required by section 1115, Code Civ. Proc., malconduct on the part of the board of judges of election at Pitt River precinct. The contestee moved the court below, under section 1122 of the Code, to dismiss the proceeding on the ground of insufficiency of the causes of contest set out in said statement, and that it showed no ground for rejecting the returns from said precinct. The motion was denied, and a trial was had, with the result that the court rejected the vote of said precinct, and adjudged that Packwood had been duly elected.

"The question we find most exigent on appeal is whether the court erred in denying the said motion of the contestee to dismiss. The following are the specifications of malconduct contained in the statement: '(1) That the said board of judges of election of Pitt River precinct did not open the polls at sunrise of said day of election, nor keep the polls open for the length of time required by law. (2) That said board \* \* \* allowed certain persons to vote at said polls, on said day of election, whose names did not appear on the precinct register of said Pitt River precinct. (3) That all of the members of the board \* \* \* were not present during all of the time that the polls were held open, and that votes were received during the absence of certain members of said board of election.' We shall consider these in their inverse order.

"As to the third specification, it is enough to say that the law does not require that all the members of the board shall be present during all the time that voting is in progress. As to the second, it is wholly insufficient, in that it fails to state that the alleged illegal votes were received through some fraud, conspiracy, mistake, or negligence of the board, infecting their proceedings or discrediting their presumptive integrity, and in failing to show that there are no practicable means of ascertaining the true vote,—of 'purging the poll.' The mere fact that illegal votes are received is no ground for rejecting the whole vote of a precinct. *Russell v. McDowell*, 83 Cal. 77, 79, 23 Pac. 183; *Whipley v. McKune*, 12 Cal. 352; *McCrary, Elec.* §§ 523, 524.

"The first ground of contest is the main subject of dispute by counsel. Its gist is that the board did not open the polls at sunrise. The averment following—that the polls were not kept open for the length of time required by law—is a conclusion only, and adds no force to the charge. Section 1160 of the Political Code requires the polls to be opened at sunrise of the morning of the day of election. We may admit that the provision is mandatory, but even mandatory provisions of the election law are to be liberally construed. *Jennings v. Brown*, 114 Cal. 307, 46 Pac. 77. How is the time of sunrise, within the meaning of the statute, to be determined? If by observation of the appearance of the sun's disk above the horizon of the polling place, then the occurrence of clouds or fog must make the legal time to open the poll a matter of guess. If the polling place is in a valley among mountains, it may be sunrise on the neighboring summits while it is yet shadow in the valley. If the time is to be fixed by reference to an almanac, then since in the month of November the sun rises later or earlier, accordingly as we reckon north or south of any point, accuracy can be attained only by consulting tables calculated for the exact latitude of the precinct. These considerations illustrate the difficulty, perhaps the impossibility, which may be encountered in the attempt to determine the lawful time for opening the polls at a given precinct. Therefore, it must be from the nature and necessity of the case that the legislature intended that some margin, even though narrow, should be allowed for honest effort to comply with the statute, and did not intend that the vote of any precinct should be invalidated because the polls were not open at the very instant of sunrise. Therefore, further, if any person seeks to take advantage of omission in this regard, he must allege some delay sufficient to show a transgression of the statute inconsistent with an honest and intelligent endeavor to obey its command, or that the violation of its letter on which he relies has operated to obstruct the full and fair expression of the suffrage of the precinct. This conclusion results from the elementary principle that in pleading a party must allege the ultimate facts which he must prove. Here the statement shows that thirty-two votes were polled at the election held in Pitt river precinct, and the bald fact relied on to invalidate it is that the polls were not opened at sunrise. We are unwilling to allow that proof of this, and no more, would justify the disfranchisement of the precinct. The authorities most pertinent to the subject support our view. *Cleland v. Porter*, 74 Ill. 76; *Soper v. Sibley Co.*, 46 Minn. 276, 48 N. W. 1112; *Holland v. Davies*, 36 Ark. 450; *People v. Cook*, 8 N. Y. 91-93; *McCrary, Elec.* § 165. A contrary doctrine would, we are strongly disposed to think, 'lead to more fraud than it would prevent.' *Atkinson v. Lorbeer*, 111 Cal. 421, 44 Pac. 162. The judgment should



be reversed, with directions to the court below to dismiss the proceeding."

HENSHAW, J., took no part in the decision of this case.

We dissent: HARRISON, J.; TEMPLE, J.

BEATTY, C. J. I concur in the judgment of reversal. The requirements as to time and place of holding elections are certainly mandatory. But time, in this connection, means the proper day for holding the election, and does not mean that the polls must necessarily be opened at the hour of sunrise on that day. A slight delay in opening the polls, explained and excused by the absence of one of the officers and by the necessity of setting up the booth, railings, etc., ought not to disfranchise the voters of a precinct, in the absence of any showing of actual injury. Delay in opening the polls in a precinct where ample time is still left for receiving all the votes is a much less serious irregularity than a premature closing of the polls, and yet I suppose it would scarcely be contended that an entire precinct should be thrown out because the polls were closed at 4 o'clock, or even earlier, if at the same time it appeared that every registered voter had deposited his ballot before the closing. In this case it was found by the court, although it had not been alleged, that at least one voter was prevented from casting his ballot by the delay in opening the polls; but it did not appear how he would have voted, and, even allowing that he would have voted for the contestant, the result of the election would not have been changed. It also appears that one man not registered in the precinct was allowed to vote. Counting his vote and the vote that was lost by the delay in opening the polls for the contestant, the result would have been a tie. But as to the illegal vote I think the court erred in rejecting the offer of the contestant to prove that it was cast for the contestant. The voter was "assisted" in marking his ballot by an officer of the election who was called as a witness to prove that the vote was cast for contestant. The offered evidence was excluded upon the ground that the election law (Pol. Code, § 1208) prohibits any disclosure by the assisting officer of the contents of the ballot. But this law applies in terms only to the ballots of electors. Where a ballot is unlawfully deposited by one who is not an elector, the law ought not, and in my opinion does not, enjoin secrecy as to his ballot where the interest of third parties and of the public is concerned.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county. J. W. Hughes, Judge.

Action by Emily J. Higgins against H. M. Higgins and others to enforce a lien. Judgment for plaintiff. Defendant San Diego Savings Bank appeals. Affirmed.

N. H. Conklin, for appellant. A. H. Sweet, for respondent.

BRITT, C. Defendant H. M. Higgins and the plaintiff, Emily J. Higgins, husband and wife, entered into a contract in writing of date April 9, 1891, whereby they agreed, among other things stipulated, to live apart, and the husband agreed to pay the wife the sum of \$600 per year during her life. Such contract contained the following clause: "The payment of said annuity to be a binding and continuing obligation upon the said H. M. Higgins, and upon his executors, administrators, and assigns, and to constitute a lien upon his estate during his lifetime, and after his death, during the lifetime of the said Emily J. Higgins." The instrument was duly acknowledged, and was recorded on November 12, 1894, in the office of the county recorder of San Diego county, in which county certain lands owned by said H. M. Higgins were situated. Subsequently, H. M. Higgins made to the defendant San Diego Savings Bank a mortgage of the lands aforesaid to secure his promissory note to the bank for the sum of \$5,000. Plaintiff sued in this action to recover arrears of the said annuity, and to subject the said lands—particularly described in her complaint—to sale for the payment thereof. The court below held that plaintiff had a first lien on the land, in virtue of said contract with her husband and notice thereof to the subsequent mortgagee, and rendered judgment accordingly. The bank appealed.

Appellant insists that the language of said contract is so uncertain, for want of definite description of property to be affected, that no lien was or could be created thereby, nor any notice of a lien imparted to subsequent incumbrancers. It must be allowed that considerable force of argument and some decided cases support this contention. See *Herman v. Deming*, 44 Conn. 124; *De Wolf v. Manufacturing Co.*, 49 Conn. 282; *Green v. Witherspoon*, 37 La. Ann. 751. But the prevailing judicial view, well enough justified, perhaps, in legal principle, is that deeds and mortgages describing the property to be conveyed or incumbered, in terms essentially similar (for purposes of the question here) to those employed in the contract of Higgins and wife, are not void for want of greater particularity, but suffice to pass title or impose a charge according to the apparent intent, extrinsic evidence being admitted, under proper pleading, to identify the property. *Trust Co. v. Pauly*, 111 Cal. 122, 43

121 Cal. 487

HIGGINS v. HIGGINS et al. (L. A. 427.)  
(Supreme Court of California. July 21, 1898.)

MORTGAGE—DESCRIPTION OF PROPERTY.

Contract of husband declaring payment of annuity to wife a lien on his "estate" is a sufficient description to give notice to a subsequent mortgagee of any of his lands.

Pac. 586; *Pettigrew v. Dobbelaar*, 63 Cal. 396; *Wilson v. Boyce*, 92 U. S. 320; *Land Co. v. Randell*, 82 Iowa 89, 47 N. W. 905; *Leslie v. Merrick*, 99 Ind. 180; *Roehl v. Haumesser*, 114 Ind. 311, 15 N. E. 345; *Witt v. Harlan*, 66 Tex. 660, 2 S. W. 41; *Drew v. Carroll*, 154 Mass. 181, 28 N. E. 148; *Railroad Co. v. Talman*, 15 Ala. 472.

The objection that the description of property must be specific in order to satisfy the definition of a mortgage in our statute (Civ. Code, § 2920) is met by the principle which pervades the cases cited that that is certain which is capable of being made certain. True, the term "estate," used in this contract to denote the subject of lien, has in law a diversity of meaning; but it should be understood here in the sense which will accomplish, and not defeat, the obvious purpose to create a lien, viz. to comprehend property susceptible of being impressed with a lien. As it was used without any qualification, it included all the lands of the husband. *Archer v. Deneale*, 1 Pet. 585; *Pulliam v. Pulliam*, 10 Fed. 40. Failure to indicate the locality of the property is not fatal. *McCullough v. Olds*, 108 Cal. 529, 41 Pac. 420. It may be, as the court below ruled, that no lien was created against personalty. The contract was not executed in the manner of a mortgage of chattels under the statute; but, in our opinion, it was effectual to charge a lien on lands, and the judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(121 Cal. 554)

PEOPLE v. CREEGAN et al. (Cr. 217.)<sup>1</sup>  
(Supreme Court of California. July 28, 1898.)  
CRIMINAL LAW—TESTIMONY OF ACCOMPLICE—CORROBORATION EVIDENCE—FORGERY.

1. Under Pen. Code, § 1111, providing that a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, without the aid of the testimony of the accomplice, tends to connect defendant with the offense, such corroborating testimony is not competent if given by a witness who is also an accomplice.

2. Where the only corroborating evidence given under Pen. Code, § 1111, requiring the testimony of an accomplice to be corroborated, was by a witness claimed to be also an accomplice, the question whether he was such was for the jury, and its verdict, from which it must be assumed (defendant being found guilty) that he was found not to be an accomplice, is conclusive of that fact, if the evidence thereon was properly received.

3. Testimony, in a trial for forgery, of a witness claimed to be an accomplice, that he was acquitted of the same offense, is not competent, as showing that he was not an accomplice.

4. Testimony of an accomplice that he did not consider another witness guilty of the crime for which accused was being tried is not competent, as showing that such witness was not also an accomplice.

5. Under Code Civ. Proc. § 1944, requiring the judge to be satisfied that a writing, shown a witness for the purpose of establishing proof of handwriting, was genuine, before he could admit it for that purpose, it was improper to show the circumstances under which it was written.

6. On the trial of one charged with forgery, the testimony of an accomplice, to whom was submitted a writing of defendant for the purpose of proving his handwriting, that the writing was a memorandum of extracts from the *Bankers' Almanac*, containing a list of towns, and that witness and accused were picking out the towns, was incompetent, in so far as it authorized an inference that accused was thus engaged in an attempt to commit a similar offense to the one charged.

7. The only direct evidence connecting the accused with a forgery was that about the time of the crime he was at hotels near the scene thereof under an assumed name, and that the day after the crime he left the locality with another accused, both passing under assumed names. Four months later the two were arrested, and gold coins similar to those obtained by means of the forgery were found on their persons, and in the room of accused was found a package called a "forger's outfit." Held not to be sufficient to sustain a verdict of guilty.

8. Where the finding by the jury that a co-defendant was an accomplice must be vacated by reason of the admission of incompetent evidence, the admissions of the alleged accomplice, made, as to accused, out of the latter's hearing, cease to be competent against him.

In bank. Appeal from superior court, city and county of San Francisco.

James Cregan and Charles Becker were convicted of forgery, and they appeal. Reversed.

Dunne & McPike, for appellants. Atty. Gen. Fitzgerald, for respondent.

HARRISON, J. The defendants were convicted upon an indictment for forgery, and have appealed from the judgment. The forgery of which they were convicted was committed as follows, viz.: On the 9th day of December, 1895, Frank L. Seaver, representing himself to be A. J. Scott, purchased from the Bank of Woodland a draft for \$12 upon the Crocker-Woolworth Bank of San Francisco, in favor of A. H. Dean. Prior to this date (December 4th) he had deposited the sum of \$2,500 with the Nevada Bank, and opened an account there under the name of A. H. Dean. On the 17th of December he deposited with this bank the above draft, which in the meantime had been raised from \$12 to \$22,000, and had the same placed to his credit. On the morning of the 18th he drew from the bank \$20,000 in gold coin, and on the succeeding day left the state. The defendants were indicted by the grand jury of San Francisco for this forgery, upon the ground that they were parties thereto.

The principal witness on the part of the prosecution was Seaver, by whose testimony the defendants' connection with the crime was shown as follows: An agreement had been made in the city of New York, between the witness and the defendant Cregan, to come to California for the purpose of perpetrating some act of this kind, and in pursu-

<sup>1</sup> Rehearing denied.



ance thereof they reached San Francisco in the latter part of November, 1895, and Seaver procured the draft in Woodland as above stated. On the 11th day of December he returned to San Francisco, and while on the Oakland boat gave the draft to Creegan, who told him that Becker was stopping at an hotel in Oakland, and that he would go back on the boat and give him the draft for the purpose of having it raised. On the 16th of December, Creegan returned the draft to Seaver in its altered condition, telling him that it had been raised by Becker, and advising him to deposit it in the bank the next day. Seaver made the deposit, and at the same time drew out all the money which was previously standing to his credit. In the evening of that day he and Creegan and one McCosta arranged to meet the next morning for the purpose of drawing the money, and on the morning of the 18th they met at the corner of Third and Mission streets, where it was agreed by them that Seaver should go to the bank, draw the money, and take it away, and that McCosta and Creegan should follow him for the purpose of seeing that no harm came to him. In pursuance of this arrangement, Seaver hired a buggy, and with his office boy as a driver went to the bank, —Creegan and McCosta standing outside,—drew \$20,000 upon his check, which was given to him in four sacks, of \$5,000 each, and placed them in a satchel, which he put in the buggy. He then drove to a distant part of the town, where he met McCosta, and they carried the coin to his room, where he took two of the sacks out of the satchel and gave them to McCosta to deliver to Creegan. McCosta testified that upon receiving the two sacks he went out of the house and met Creegan in the street, and together they took a car for the ferry, and went over to Oakland, where Creegan took the money from him, ostensibly for the purpose of placing it in a room, and shortly returned and gave him one hundred dollars which he said Becker had sent him, and also gave him a package which he requested him to take to New York.

The connection of Creegan with the forgery depends upon the testimony of Seaver and McCosta. Seaver was, by his own admission, an accomplice, and, in order to permit his testimony to be considered by the jury, it was necessary to have other evidence which, in itself, without the testimony of Seaver, tended to connect Creegan with the commission of the crime. Section 1111 of the Penal Code is as follows: "A conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence which, in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof." The testimony of McCosta is the link in the chain of evidence

by which the prosecution sought to show that Creegan was implicated in the forgery, and to make the testimony of Seaver available against him. But, if McCosta was also an accomplice, the jury would be required to disregard his testimony, equally with that of Seaver. Whether he was an accomplice was therefore a vital fact to be determined by the jury. The relation which it was shown he bore to the transaction was such as to authorize the defendants to claim that he was particeps criminis, and the prosecution vigorously sought to resist this claim, and the jury were instructed by the court in accordance with the above provisions of section 1111 of the Penal Code. It must be assumed from the verdict that, upon the evidence before them, the jury found that he was not an accomplice, and if this evidence was properly received their verdict must be accepted as conclusive of the fact.

The defendants contend that the court improperly allowed certain evidence to be introduced which influenced the jury in their verdict, and that for this reason the verdict should be vacated. While McCosta was on the witness stand he testified that after leaving the state in December he and Seaver had been arrested in Minneapolis, and brought back here for trial; whereupon the following questions were asked him by the counsel for the prosecution: "Q. You were subsequently tried in this court room? A. Yes, sir. Q. For a complicity in this affair, or for forging this check? A. Yes, sir. Q. And were acquitted? Mr. Dunne: Objected to as incompetent, unadjudicated as against these defendants, and *res inter alios acta*. The Court: Well, I will overrule the objection." The defendants excepted to the ruling, and the witness thereupon answered, "Yes, sir."

The court manifestly erred in permitting this testimony to be given. One of the main questions to be determined by the jury was whether McCosta was an accomplice. This was a question of fact to be determined by the jury before whom the defendants were being tried (*People v. Bolanger*, 71 Cal. 17, 11 Pac. 799; *People v. Kraker*, 72 Cal. 459, 14 Pac. 196); and they were entitled to have it determined upon only such evidence as was competent therefor. The conclusion that another jury had reached in another case, in which these defendants were not parties, was not competent evidence for the determination of this question. The statement of McCosta that he had been acquitted upon that trial had no legal tendency to show that he was not an accomplice in the crime. It was, in effect, merely saying to the jury that upon that occasion he had been told by 12 men, or had heard them say, that he was not guilty. That verdict of acquittal was, at most, but the declaration of the jury in that case that, upon the evidence presented to them, they did not believe him to be guilty. What that evidence was, or what influences may have affected them in reaching that conclusion, was

not shown. His acquittal may have resulted from the failure of the prosecution to introduce all the evidence that was introduced at the present trial, or it may have depended upon rulings of the court in regard to the weight to be given to the evidence before them. See *Burke v. Wells, Fargo & Co.*, 34 Cal. 60; *People v. Mitchell*, 100 Cal. 328, 34 Pac. 698; *Marceau v. Insurance Co.*, 101 Cal. 338, 35 Pac. 856, and 36 Pac. 813. His acquittal in that case freed him from being again placed in jeopardy for the crime, and constituted a perpetual protection against any punishment therefor; but as against these defendants it did not create a legal status for him, or establish the fact that he was not an accomplice.

That the error was prejudicial to the defendants cannot be gainsaid. Upon a controverted issue, to be determined by a jury, the fact that another jury had determined the same issue against the contention of the defendants would have great, if not controlling, influence; and the fact that the court permitted this evidence to be introduced, notwithstanding the objection of the defendants, would naturally incline the jury to the opinion that it was entitled to be considered by them as an element in determining the fact. For similar reasons, the court erred in refusing to strike out the testimony of the witness Seaver that he did not consider that McCosta was guilty of this forgery.

While Seaver was on the witness stand a writing was shown to him, and he stated that it was in the handwriting of Creegan, and was written in the room of the witness in the hotel at St. Paul, Minn. The paper was then offered in evidence as a specimen of Creegan's writing, for the purpose of comparison with certain signatures alleged to have been made by Creegan. The witness was then asked upon what occasion this paper was written, and stated "it was a memoranda of extracts from the Bankers' Almanac, containing a list of suitable towns throughout Minnesota and Dakota which drew drafts on St. Paul and Minneapolis, which Creegan wrote in my company, and while we were both examining the book we picked out the towns for the—". The defense objected to this question, and at the above point in the answer of the witness moved to strike out that part of the answer referring to the purpose for which they were examining the book. Their objection to the question and the motion to strike out the answer should have been granted. The object of introducing the writing was for a comparison with other alleged writings of the defendant, and the judge was required to be satisfied that the writing was genuine before he was authorized to admit it for this purpose. Code Civ. Proc. § 1944. The circumstances under which it was written involved an issue which was irrelevant to the issue before the jury, and the testimony thereof was improperly received. To the ex-

tent that the testimony authorized an inference that Creegan and the witness had, several months subsequent to December, been engaged in an attempt to perpetrate a similar offense, it was irrelevant and incompetent to establish the present charge.

It is, moreover, contended on behalf of Becker that there was no evidence before the jury connecting him with the offense, or from which they were authorized to find him guilty, and we are of the opinion that this contention must be sustained. The only evidence by which Becker is connected with the transaction is the testimony of Seaver and McCosta, and the only testimony given by them which indicates his complicity in the crime are statements alleged to have been made to them by Creegan in the absence of Becker, and without his hearing. Neither of these witnesses had any personal acquaintance with Becker, or met or spoke to him at any time, nor was he seen by either of them, except that McCosta says that on one occasion he saw him on the opposite side of a street in Oakland. Nor is there any evidence in the case, except the testimony by these witnesses of Creegan's statements to them, that Becker ever knew of the draft or of its alteration, or of any of the circumstances connected therewith. The only direct evidence that was given respecting Becker is that at some time in the month of December he was at the Golden Eagle Hotel in Sacramento under an assumed name, and was afterwards at the Galindo Hotel, in Oakland, under the same name, and that he and Creegan left Oakland together on the 18th day of December, under assumed names. This, moreover, is the only time in which Becker was shown to have been seen by Creegan while in the state. While these facts might corroborate any testimony having a legal tendency to establish his guilt, they have no connection with the alleged crime, and are not available by themselves as substantive evidence of such guilt.

About four months after the forgery was committed Becker and Creegan were arrested in Philadelphia while planning a trip to Guatemala, and some gold coin which was minted in San Francisco in 1895 was found upon their persons, and in the room of Becker there was found a package called by the magistrate before whom they were examined a "forger's outfit," which it was claimed resembled the package that McCosta stated Creegan had requested him to carry to New York. McCosta did not testify that Creegan told him that the package came from Becker, nor was it shown that Becker ever saw the package that McCosta took to New York. Whether there ever was such a package depends upon the testimony of McCosta, but, if it be assumed that it was the same which Creegan gave to him, there is no evidence that Becker ever saw it prior to the time when he was in Philadelphia, and McCosta's



description of the package which was given to him differs materially from that which was found in Becker's room. But, admitting the existence of these facts, they would not in themselves, without the aid of the testimony of Seaver and McCosta, have authorized the jury to find a verdict against Becker. As the finding by the jury that Creegan was an accomplice must be vacated by reason of the admission of incompetent evidence, it cannot be used as a basis for holding that Becker is bound by his declaration, since we cannot assume that in the absence of this evidence the jury would have so found.

The judgment and order denying a new trial are reversed, and a new trial ordered.

We concur: GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.; VAN FLEET, J.

(121 Cal. 522)

PEOPLE v. RECLAMATION DIST. NO.  
136 et al. (Sac. 238.)

(Supreme Court of California. July 23, 1898.)

QUO WARRANTO — USURPATION OF CORPORATE  
FUNCTIONS—RECLAMATION DISTRICT—  
HEARING—PUBLICATION.

1. In quo warranto by the state against a pretended corporation, it is sufficient to allege the ultimate fact that it is usurping corporate functions without legal right, without stating the facts constituting such usurpation.

2. Under St. 1867-68, p. 507, § 30, requiring publication of a petition for the formation of a reclamation district "for four weeks next preceding the hearing thereof, in some newspaper published in the county," a publication in a daily paper "once a week for four weeks, commencing on the 5th day of December, \* \* \* to and including the 2d day of January," is a sufficient publication for a hearing on January 3d.

3. The continued usurpation of a corporate franchise gives rise to a continuing cause of action by the state, which is not estopped by mere inaction in the prosecution of its rights.

4. Where a petition for the formation of a reclamation district has been granted by the board of supervisors, and the names of some of the subscribers appear to have been signed by third persons, it is conclusively presumed that such board found that they were authorized and genuine signatures.

Temple, J., dissenting.

In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Quo warranto by the people of the state of California against reclamation district No. 136 and others. There was a judgment for the plaintiff, and defendants appealed. Reversed.

A. M. & H. W. Johnson, for appellants.  
Atty. Gen. Fitzgerald and W. A. Gett, Jr., for respondent.

GAROUTTE, J. This is a proceeding by quo warranto to exclude the defendants from all corporate rights. The demurrer to the complaint was overruled, and the defendants answered. When the case was called for trial, defendants moved for judgment on the pleadings, on the ground that the complaint

did not state facts sufficient to constitute a cause of action, for the reason that the pleading only averred that the defendants were usurping the functions of a corporation, there being no allegation of the particular circumstances constituting such usurpation. The motion for a nonsuit was denied. Judgment passed for plaintiff, and defendants now appeal from that judgment, and also from the order denying their motion for a new trial.

It is insisted that the complaint is fatally defective in not alleging specifically the acts constituting the usurpation. Many cases are cited to support this contention, but a sufficient answer to them is found in the fact that they are not cases of quo warranto. In a proceeding prosecuted by the state, of the character here inaugurated, it is sufficient to allege the ultimate fact, namely, that the defendants are exercising the franchise without authority of law. *People v. Cooper*, 139 Ill. 461, 29 N. E. 872; *People v. Clayton*, 4 Utah, 421, 11 Pac. 206, and cases there cited.

The trial court found that the board of supervisors had no jurisdiction to form the district, and that the district was not legally organized. The most serious objection to the validity of the organization of the district rests upon the publication of the petition of the landowners for its formation. By section 30 of the act of the legislature (St. 1867-68, p. 507) the petition is required to be published "for four weeks next preceding the hearing thereof in some newspaper published in the county." As to the character of the publication made in this case, the affidavit of the printer is as follows: "That a true copy of the annexed petition [which is made part of this affidavit] has been published in said paper [the Sacramento Daily Record] once a week for four weeks, commencing the 5th day of December, 1871, to and including the 2d day of January, 1872." Do the facts set out in this affidavit fill the measure required by the statute? In other words, was the petition published four weeks next preceding the hearing thereof? The hearing of the petition was fixed for January 3, 1872. Giving to the affidavit of the printer a fairly liberal interpretation, it appeared therefrom that the petition was published the 5th, 12th, 19th, and 26th days of December, and January 2d. If such a publication had been had in a weekly newspaper published in the county, it would have come strictly within the requirements of the statute. But does the fact that the publication is had in a daily newspaper once a week for the required time satisfy the law? It must be borne in mind that the number of publications is not specified by the statute. There is no direct adjudication in this state upon the question; but, upon examination of the authorities of other states, we find many cases holding publications of notice in daily papers once a week for the time prescribed by the notice a sufficient compliance with the law. It is unnecessary to quote from these cases. It is sufficient to say

that they squarely meet the point and support the validity of such a publication. We simply cite them: *Wing v. Dodge*, 80 Ill. 564; *Wood v. Knapp*, 100 N. Y. 109, 2 N. E. 632; *Thurston v. Miller*, 10 R. I. 358; *In re Harris*, 14 R. I. 637; *Bowen v. Argall*, 24 Wend. 501; *Alexander v. Alexander* (Neb.) 41 N. W. 1065; *Dayton v. Mintzer*, 22 Minn. 393; *Brewer v. City of Springfield*, 97 Mass. 153; *Frothingham v. March*, 1 Mass. 247. To support plaintiff's position, the case of *Hellman v. Merz*, 112 Cal. 661, 44 Pac. 1079, is relied upon; but that case fails to reach the mark. The reasons for the conclusion there declared are not as full and complete as they could well have been stated. The conclusion, nevertheless, in that case, is correct and absolutely sound. The notice there required was the probate notice provided for by section 1549 of the Code of Civil Procedure. The subsequent section (1705) declares, in effect, that the notices provided for by section 1549 must be published as often as the paper is published during the time over which the notice is extended, unless otherwise directed by the court or judge. This mandatory requirement equally applies to both weekly and daily papers. In the *Hellman Case* the court or judge did not otherwise direct the publication of the notice, and, it being published in a daily paper, should have been published every day that the paper was issued prior to the day of sale. But such publication was not had, and therein consisted its invalidity. In this case the notice of publication was sufficient.

It is contended that the state is estopped from questioning the validity of this corporation. It is insisted that an estoppel has been created by reason of inaction in the matter upon the state's part for so many years, during which time defendants have expended large sums of money in reclaiming the land embraced within the lands of the alleged district, and have enjoyed the fruits of their labors during all that time. These and kindred circumstances in no way create an estoppel against the state. The continued exercise of a franchise or right is a continued usurpation, upon which a new cause of action in favor of the state is ever arising.

It is claimed that the petition is void upon its face, in this: that it appears therefrom that the names of some of the owners of land were attached to it by other parties. If these names were signed under express authority of the owners of the land, then the signatures were those of the owners. In passing upon the merits of the petition, the genuineness of these signatures was a matter essentially within the power of the board of supervisors to decide. And the approval of the petition by the board was an adjudication of the fact,—an adjudication that was absolutely conclusive. *Humboldt Co. v. Dinsmore*, 75 Cal. 604, 17 Pac. 710; *Farmers' & Merchants' Bank of Los Angeles v. Board of Equalization of Los Angeles*, 97 Cal. 318, 32

Pac. 312. For the foregoing reasons, the judgment and order are reversed.

We concur: VAN FLEET, J.; McFARLAND, J.; HARRISON, J.

TEMPLE, J. I dissent, concurring in the opinion heretofore rendered in department (50 Pac. 106S).

6 Cal. Unrep. 84

# WRIGHT v. PACIFIC COAST OIL CO. (S. F. 82S.)

(Supreme Court of California. July 27, 1898.)

## INJURY TO SERVANT—KNOWLEDGE OF DANGER.

Plaintiff had been for seven years in charge of stills for distilling petroleum, and inspected the bottoms, and notified defendant, the owner, when they were to be replaced. The life of a bottom was about five and a half months, and at the end of four months he would begin inspections, making them after every run. He knew the danger of the bottoms giving way, and whether they had been regularly inspected. A crack being discovered in a bottom, plaintiff and the superintendent knelt down and looked at it, neither thinking of any danger. At the superintendent's suggestion, plaintiff then proceeded to remove a burner to prevent the oil in it being caked, and while standing in front of the still the bottom gave way, and a quantity of asphaltum ran out, burning plaintiff. *Held*, that the injury was caused by an unforeseen accident, resulting from the inevitable impairment of the still, of which plaintiff had equal means of knowing with defendant, and he could not recover.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by W. H. Wright against the Pacific Coast Oil Company. There was a judgment for plaintiff, and from the judgment, and an order denying a new trial, defendant appeals. Reversed.

Van Ness & Redman, for appellant. Tappan & Simpson, for respondent.

HAYNES, C. This appeal is by the defendant from the judgment and an order denying its motion for a new trial. The defendant is a corporation engaged in the business of refining lubricating and illuminating oils, and in November, 1895, the defendant was in its employ as a "stillman," and while so employed received personal injuries, and prosecutes this action to recover damages therefor. Upon the premises of defendant there were eight small vats or stills which were operated by the plaintiff. These stills are circular, are seven feet in diameter, and about five feet high. They rest on a brick foundation three or four feet high, and are inclosed with brick, forming a jacket. The bottom of the still is formed of a sheet of steel riveted to the base of an angle iron, and the sides are riveted to the perpendicular part, thus forming a vat shaped like a tub, the top, or cover, having a manhole, through which access may be had to the inside. About 18 inches below the bot-



tom is a grate upon which coke is placed, and where the fire, fed by an oil spray, burns. These stills are filled with petroleum to within about a foot of the top. The oil is heated to a high temperature, and the vapors are conveyed by pipes to the receiving house, and condensed. When the process is completed the oil is evaporated away until only the asphaltum is left, and that is coked on the bottom of the still. When sufficiently cooled, the asphaltum is dug out, and the still is charged for another run. The process ordinarily requires 18 or 20 hours to bring the contents down to a coke, and the cooling, cleaning out, and recharging occupy the remainder of two days. The bottom of the still, being exposed to great heat, lasts about five or five and a half months, and when a new bottom is required the still is taken down, and the rivets connecting the bottom with the angle iron are cut, and a new bottom put in. The greatest heat being at the center, that part is first to wear out. The bottom soon begins to sag at that point, and the sag increases the longer it is used, and as the bottom becomes thin minute cracks are made, through which a seepage or sweating occurs, creating a moisture on the bottom when a new charge is put in or before it is fired up. After a bottom had been used about four months inspections of the bottom began to be made by the stillman by pumping a quantity of oil into the still, and then going under it with a torch and examining the bottom. If it was found to be moist, it was deemed insufficient for another run, and would be reported by the stillman to the superintendent, who would either direct a new bottom to be put in, or have the boiler-maker test it with a hammer to ascertain its strength.

The circumstances more immediately connected with the accident are that the plaintiff was in the receiving house, and was informed by another employé that one of his stills was on fire. The plaintiff testified that he ran to the still, and found a dense smoke pouring out, and immediately opened the damper, thus allowing the smoke to pass up the flue. He then opened the furnace doors, and, kneeling down, looked at the bottom of the still, and observed a small crack near the center of the bottom, through which he says he saw oil dropping down into the fire box. That he looked at it for a very brief space of time, and got up off his knees, and found the rest of the employés there, and Mr. Miller, the superintendent. That he and Miller both got down and saw the crack and what was going on. Then both stood up quietly for a second or so, and the superintendent said: "Well, I guess it won't get any worse; I guess it will take up;" and directed the other employés to go about their work, and then said to the plaintiff: "Wright, you disconnect that burner." That he went and got a pair of tongs to disconnect the burner (which fed the oil to the fire under

the still), and gave it one or two turns to loosen it, and then took his hands to it. That he was standing in front of the furnace doors, which were then closed, when he heard a great roaring sound, and was immediately enveloped in flames. His hands were badly burned, and his face to some extent. The oil had been shut off from the burner by some one at the first alarm. The immediate cause of the flame bursting out was that a hole was broken in the center of the bottom of the still, letting a quantity of the asphaltum or refuse fall on the coke fire underneath.

The principal controversy as to the facts relates to the removal of the burner, in which the plaintiff was engaged at the time he was burned. The plaintiff testified that he was ordered to remove it, and Mr. Miller testified that he said to him: "If you take off the burner, it will save from carbonizing." The burner consists of a small pipe which conveys the oil into the furnace, that pipe being inside of a larger one, which conveys steam. The steam pipe is drawn to a nozzle, and is grooved or rifled spirally on the inside, thus spraying the oil. These pipes, or burner, are 12 to 15 inches long, projecting a few inches inside the furnace wall. The reason for removing it was that when the oil and steam were shut off some oil would be left in the burner, and the heat of the furnace would evaporate the pure oil, and leave a residuum which would carbonize, or coke, and thus clog the burner to some extent, and cause trouble in cleaning it out. The burners are sometimes taken off during the run for the purpose of cleaning or adjustment. The plaintiff testified that removing the burner would prevent coking, and that "the taking off the burner had nothing to do with the flame shooting out,—nothing whatever. I did not make any protest against taking off the burner when Mr. Miller directed me to do it. I had no objection to that. I did not regard it as an improper thing to do, under those circumstances." Upon being asked how long it would require to stand there to take the burner off, he replied, "Half a minute."

The plaintiff had been in defendant's employment about ten years, and for seven years next before the accident had been in charge of these stills. He testified that he had never been instructed to examine the bottoms of the stills with a torch, but had always done so out of a desire to make himself useful and to retain his place. The superintendent testified that the stillmen were always instructed to do so; that it was part of their duty; that the boiler-maker who put in the bottoms never examined the stills unless the stillman reported that they required attention; and this is not denied by the plaintiff, nor does he deny that it was always understood to be his duty.

Upon his examination in chief the plaintiff, after describing the mode of examination with a torch, was asked: "Did you make such an

inspection as you describe on this particular still prior to the accident? A. Yes, sir. Q. How long prior? A. Couple of weeks. Q. With what result? A. Found nothing that would indicate the necessity of reporting that it was played out, or gone in." Plaintiff further testified: "The bottom becomes very thin in course of time from being used over the fire. They get down almost as thin as a piece of paper. After they have been in use about four months I begin to inspect them to see whether or not there is any sweating or seepage underneath. If they are wet underneath, then I don't use them. I notify Mr. Miller that that bottom needs to be taken off and a new one put on, and Mr. Miller has Mr. Bird do it. \* \* \* I cannot recall that Mr. Miller ever gave me any specific instruction to do that. I knew it was expected of me. I can't recall how I came to get into the habit of inspecting. I had been doing that, adopting that method, for fully four or five years. \* \* \* It gradually came to be understood to be a portion of my duties to examine the bottoms before using them; everybody so understood it."

An explanation made by Mr. Miller throws light upon this method of inspecting the stills. These bottoms are made of steel, and when new are five-sixteenths of an inch in thickness. So long as the contents of the still remain in a liquid state the fire does not injure the bottoms; but when it is no longer a liquid, in the coking stage, the bottom is brought to a white heat and is slowly burned away. The first cracks occur in the cooling process, and, if any exist, upon putting in the cold petroleum, and before the fire is started, the sweating or moisture on the outside of the bottom shows them, even when they cannot be seen or otherwise detected; and, if no moisture appears, it is known to be good for another run, since the cracks will not occur until the next cooling takes place. Hence the necessity for regular inspection, when from the age of the bottom, or its sagging in the center, weakness is indicated. In this case the bottom was found to be scarcely thicker than tissue paper.

It is therefore apparent—First, that it was plaintiff's duty, under his employment as stillman, to inspect these bottoms when they had been in use about four months, and regularly thereafter, and, when cracks were indicated by the moisture, to report to the superintendent; and, second, having decided, as he must have done by making an inspection at about the regular time, that his duty required him to commence the inspection of this particular still, it was his duty to continue these inspections; and, if it was his duty to commence the inspection two weeks before the accident, it was negligence on his part to omit it during the whole of that time, the still being freshly charged every second day, thus furnishing six or seven opportunities for inspection after the one made and before the accident. Upon this point he testified:

"When the convexity began to get considerable, and I knew that the still had been in a period of four months or thereabouts, I would make it my business, after every charge had been cleaned out, to put in one or two barrels of oil, shut off the supply, and go down and make this examination with a torch, and not until I discovered seepage would I report. I might be making these examinations a couple of weeks or longer before the seepage would manifest itself. The seepage was the customary and usual test." Much more of the testimony of the plaintiff, as well as of other witnesses, might be quoted, tending to show that it was the duty of the plaintiff to inspect and report to the superintendent the condition of the stills. Upon that question there is no conflict.

At the conclusion of the evidence on behalf of the plaintiff, the defendant moved for a nonsuit upon the ground that the evidence failed to show any actionable negligence upon the part of defendant, and while said motion was under discussion plaintiff asked and obtained leave to amend his complaint. The original complaint alleged that it was not his duty to have control or supervision of the stills, and that he did not exercise any custody or supervision over them; that said vat or still was imperfectly constructed, defective, inadequate, and unsafe; that such unsafe condition could have been discovered by the defendant by the exercise of ordinary care, and was unknown to the plaintiff; that while he was engaged in heating oil and standing in front of said vat, which was filled with oil, it cracked across the bottom by reason of the imperfection and defectiveness aforesaid, and thereby the contents of the vat ran out and burned the plaintiff. The amendment added, in substance, that while the vat was in said cracked and unsafe condition, which was unknown to the plaintiff, the defendant, knowing its condition, negligently, and without the exercise of common prudence, ordered plaintiff to remove a certain burner which was located above the furnace door, and while plaintiff, in the execution of said order, was standing in front of the furnace door, the vat cracked entirely across the bottom, and the contents ran out, etc. Defendant objected and excepted to the order permitting the amendment. The motion for a nonsuit was renewed, with the statement, in addition to the former, that the averments of the amendment are not justified by the evidence, and that no negligence on the part of defendant is shown. The nonsuit was denied, and defendant excepted.

It would seem to be clear that in the absence of the amendment the nonsuit should have been granted. So far as the condition of the vat or still is concerned, no negligence on the part of the defendant is shown, while the testimony of the plaintiff is clear and explicit that it was his duty to examine the bottom of the still and report its condition to the superintendent. Whether that



duty was originally imposed upon him as a part of his employment, it is not necessary to inquire. He had assumed it, if it was not imposed upon him, and continued it for at least four or five years, and knew that it was expected of him. If at any time he concluded it was too burdensome, or the responsibility too great, he should have informed the superintendent, and given him an opportunity either to employ some one as stillman who would perform the duty, or otherwise provide for its performance. The citation of authorities to this proposition would be superfluous. There is not one word of testimony tending to show that the vat was improperly or imperfectly constructed, or that it was defective, inadequate, or unsafe, save from use, as to which it was the duty of plaintiff to watch and report.

I do not think it necessary to discuss or determine the question whether the court erred in permitting the plaintiff to amend his complaint; for, conceding that the amendment was properly allowed, no case was made thereunder which would justify a verdict for the plaintiff. The plaintiff testified that the removal of the burner had nothing to do with the fire or the giving way of the bottom of the still. The only possible connection it had with the accident was that it brought him for about "a half minute" in front of the furnace doors. Giving the plaintiff the benefit of the doubt as to whether the removal of the burner was ordered, or merely suggested, by the superintendent, it does not appear that the plaintiff had not as full knowledge of any possible danger as the superintendent. He had been for seven years in charge of these stills. No one, whatever his station, could be more familiar with them. Indeed, no one knew so well as the plaintiff whether there was danger of the bottom of the still giving way. He knew how long it had been in use, and he alone, so far as the evidence discloses, knew whether or not it had been regularly inspected. Before the superintendent reached the still, plaintiff had opened the furnace doors, knelt down in front, looked at the bottom of the still, and testifies that he saw a small crack about an inch long and about as thick as a knife blade. When the superintendent arrived he and the plaintiff both got down in front of the furnace and looked at the bottom, and the crack seemed to be closing. Neither of them appears to have apprehended any danger to themselves. The superintendent certainly did not, as he had a right to believe that it had been inspected when the still was filled at the beginning of the run, and therefore, though leaking, was sufficiently strong to sustain the weight within. There was no intention of continuing the run of that still. The oil spray had been turned off, though the coke was still burning, and the bricks were red hot. Nothing could be done but to let the fire burn out and the still cool. The removal of the burn-

er was solely to prevent the oil within it being coked by the heat of the furnace, and was regarded by the plaintiff as a proper thing to do under the circumstances.

At the time of the accident the run was approaching completion. The contents of the still were reduced to 12 or 14 inches of asphaltum. The small crack which was seen by the plaintiff only leaked "a little thin spray," and, according to the testimony of the plaintiff, Mr. Miller said it would take up. "Take up is the equivalent of cake up, or coke up." The accident did not occur because of anything, whether gas or oil, that escaped through that crack, or that could by any possibility escape through it in the condition of the contents of the still, which had been reduced to 12 or 14 inches of asphaltum. The conduct of both the plaintiff and Mr. Miller in getting down with their faces before the furnace door and watching it is conclusive of that fact, as the red or white heat of the bottom showed that the contents were reduced to a thick condition, which could not pass through a crack such as the plaintiff described. The accident was caused by a portion of the bottom, about the size of a man's hat, breaking out in the center of the bottom, and thus permitting a quantity of the asphaltum to fall upon the coke fire underneath. That was an occurrence which neither of them anticipated, and which, if likely to occur, should have been more readily anticipated by the plaintiff, who had the better opportunity of knowing the condition of the still, and whose duty it was to watch and report its condition whenever he deemed it unsafe. It was not the case of a latent defect in the material or construction of the still, but a case where the still wears out from use, and is under the immediate care of the employé who is charged with the duty of ascertaining and reporting its condition to his employer.

These works had been in operation, under the supervision of Mr. Miller, some 16 years, and during all that time the same tests as to the sufficiency of the still bottoms had been used without accident. The plaintiff was not a new or inexperienced man. He had been in charge of these stills for 7 years. He had not only an equal opportunity of knowing the condition of this particular still, but a better opportunity than the superintendent. That neither apprehended danger to the person is clear, not only because both got down in front of the furnace to inspect it, but because the plaintiff not only acquiesced in the direction to remove the burner, but testifies that he regarded the order as proper under the circumstances. Even if it were conceded that plaintiff had continued to make the torch inspections of the bottom up to the time the last charge was put in the still, we see no negligence or fault upon the part of the superintendent of which the plaintiff can complain. The plaintiff's actual knowledge was at least equal to that of the superintendent, while his

means of knowledge were greater. Where an employé, with his own consent, has undertaken, as a part of his employment, the duty of determining when an appliance which he constantly uses has become unsafe or insufficient from such use, and especially where he has shown himself capable, from long experience, to do so, he cannot hold his employer liable for an unforeseen accident resulting from its expected and inevitable impairment. One of the essential conditions of the right of recovery in case of defective appliances is "that the servant did not know of the defect, and had not equal means of knowing with the master." Wood, Mast. & Serv. § 414; *Malone v. Hawley*, 46 Cal. 409. This seems to have been understood by the plaintiff to be the law, since in his amended complaint he alleges that defendant knew the dangerous condition of the vat, and that he did not. The evidence does not sustain this allegation. Plaintiff testified that the average life of the still bottoms was from five to five and a half months. He had been in charge of these eight stills for seven years, and therefore he had probably seen at least 112 of these bottoms worn out and replaced. In *Shear. & R. Neg.* § 287, it is said: "The true definition is that, when circumstances make it the duty of the servant to inquire, it is contributory negligence on his part not to inquire. A servant is charged with actual notice as to the matters concerning which it was his duty to inquire; and especially should this rule be applied where the servant's action is founded upon the assumption that the master ought to have known of something which he did not actually know."

It is true the superintendent saw the crack from which he testified he saw gas escaping; but he further testified that that frequently occurred, and no evil results or dangers followed; that cracks appeared during the coking part of the process, when the still bottom had ample strength to sustain the weight resting upon it; and that, in an experience of about 25 years in the oil-refining business, he had never before known of such an accident occurring; and that, if no cracks were shown by sweating or seepage when the still was charged with cold oil before the fire was started, it was always considered safe for that run, unless the sagging of the bottom was unusual; and as to the condition of the still at the time it was charged for that run the plaintiff had, or should have had, full knowledge, while the superintendent had no knowledge, and had a right to rely upon plaintiff having discharged his duty in that regard, and we have already seen that the giving way of the bottom was wholly unexpected by both. If, therefore, we assume that the plaintiff had continued his inspection after each run, as it was his duty to do, and found no indications of dangerous weakness at the time the still was charged, neither the plaintiff nor the defendant were guilty of any negligence, and in such case there is no liability; and, if the inspections were not continued by the plaintiff, the su-

perintendent, having the right to rely upon the plaintiff having discharged his duty and made the required inspection at the beginning of the run, was, through the fault of the plaintiff, in ignorance of facts essential to the formation of an intelligent opinion as to the condition of the still, and whether or not there was danger in being near it. Several exceptions were taken to instructions given to the jury, some of which we think were rightly taken, but, in view of the full discussion of the case, we think it not necessary to discuss them here. They will sufficiently appear from what has been said. We advise that the judgment and order appealed from be reversed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

121 Cal. 503

SHERMAN v. WRINKLE. (L. A. 411.)<sup>1</sup>  
(Supreme Court of California. July 22, 1898.)  
PUBLIC LANDS—APPLICATION—UNSURVEYED  
LANDS.

An application for unsurveyed lands, under St. 1893, p. 341, is not vitiated by embracing more than 640 acres, it being provided that any one desiring to purchase any of the lands uncovered by the recession of waters of lakes shall make an application therefor, accompanied by his affidavit that he desires to purchase such lands (describing them by legal subdivisions, or, where these are unknown, by metes and bounds), for his own use, and that he does not own any state lands which, with that now sought to be purchased, exceed 640 acres, and that thereupon, when the land has not been sectionized, the surveyor general shall authorize the county surveyor to survey it.

Department 1. Appeal from superior court, Inyo county; N. D. Arnot, Judge.

Action by Flora M. Sherman against L. F. J. Wrinkle. Judgment for plaintiff. Defendant appeals. Reversed.

P. W. Bennett and P. H. Mack (W. E. F. Deal, of counsel), for appellant. Leon Samuels and P. W. Forbes (Mullany, Grant & Cushing, of counsel), for respondent.

VAN FLEET, J. The controversy herein arises from conflicting applications made to the surveyor general of the state to purchase certain unsurveyed lands situated on the margin of Owen's Lake, in Inyo county, and uncovered by the receding waters of the lake, lying between the present shore or water line and the original meander line previously established by the United States government survey; the applications being made under and in pursuance of "An act regulating the sale of lands uncovered by the recession or drainage of inland lakes," etc. St. 1893, p. 341. The features of that act material to our present consideration are:

"Section 1. Any person desiring to purchase any of the lands uncovered by the recession

<sup>1</sup> Rehearing denied.



or drainage of the waters of inland lakes, and inuring to the state by virtue of her sovereignty, \* \* \* shall make an application therefor to the surveyor general of the state, which application shall be accompanied by applicant's affidavit that he is a citizen of the United States, or has declared his intention to become such, a resident of this state, of lawful age, that he desires to purchase such lands (describing the same by legal subdivisions, or by metes and bounds, if the legal subdivisions are unknown) under the provisions of this act; that he desires to purchase the same for his own use and benefit, and for the use and benefit of no other person or persons whomsoever, and that he has made no contract or agreement to sell the same, and that he does not own any state lands which, together with that now sought to be purchased, exceeds six hundred and forty acres.

"Sec. 2. Upon the filing of said application, when the land has not been sectionized, the surveyor-general shall authorize the county surveyor of the county where the whole or the greater portion of the land lies to survey the same, who shall make an actual survey thereof, at the expense of the applicant, establishing four corners to each quarter-section, and connecting the same with a United States survey; he must within thirty days file with the surveyor-general a copy, under oath, of his field notes and plat, and a statement, under oath, showing whether or not the land is occupied by any actual settler."

The defendant's application and the survey in pursuance thereof were made prior to the filing of plaintiff's application, and the validity of defendant's application is the only question which demands consideration, since, in the view we take, it determines the rights of the parties. That application, as found by the court and as conceded by respondent, conformed in its statements to all the requirements of the statute, both in form and substance, and, if the material statements therein were true, established defendant's prior right to purchase the land in dispute.

The land, not having been previously surveyed or sectionized, was described in defendant's application by metes and bounds. Upon survey by the county surveyor, under the authority and direction of the surveyor general, it was found that the exterior lines of the tract described in the application contained an acreage in excess of 640, the maximum which defendant was entitled to purchase; and thereupon the surveyor, in closing his lines on the south end of the tract, excluded all except an area sufficient, according to his figures, to make a tract embracing 639.53 acres in extent, and duly returned such survey to the office of the surveyor general. By a computation made at the trial, however, and admitted in evidence, it was disclosed that the surveyor had in fact, though unintentionally, made a mistake in his figures, and had included within the lines of his survey a tract embracing about 642 acres, whereupon de-

fendant at once offered to and did relinquish and abandon any claim to such excess. The court below, while finding that the defendant was not the owner of any other state lands than those sought to be purchased, and that he, "when he embraced in his said application a tract of land containing more than six hundred and forty acres, did so innocently, unintentionally, and through a mistake as to the amount of land embraced within the description in his said application, and that he did not do so knowingly, willfully, fraudulently, or with intent to apply for or obtain title to more land than the law authorized him to apply for or obtain title to"; "that the said county surveyor, without the knowledge of the defendant, did make errors in making his computations of the areas of the several lots of lands described in the said field notes of the said survey made by him as set forth in defendant's answer filed in this action, and in reporting 639.53 acres as the total area of all the lots of land therein described;" and that defendant's application was in all other respects true, —found and concluded "that by reason of the excess of land over and above six hundred and forty acres, applied for and described in said application No. 58 of said defendant, the following statement contained in the aforesaid affidavit of defendant, to wit, 'that I do not own any state lands which, together with that now sought to be purchased, exceed six hundred and forty acres,' was and is not true." And by reason of that conclusion the court gave judgment against the defendant.

In reaching this conclusion the court below very evidently, and as disclosed by an opinion found in the record, proceeded upon the theory, now urged by respondent in support of the judgment, that the statement required by the statute, that the applicant "does not own any state land which, together with that now sought to be purchased, exceeds six hundred and forty acres," is the equivalent of requiring the statement of the fact that the tract embraced in the application contains that much land and no more; that this statement is a material one, and, being found untrue in this case, it vitiated defendant's application, and rendered it wholly invalid as a basis of a right to purchase, under section 3500 of the Political Code, which provides that any "false statement" contained in the affidavit there provided for "defeats the right of the applicant to purchase the land," etc. Whether this section of the Political Code may be regarded as having any application to the provisions of the act under consideration, which in no way refers to it in terms, need not be determined, for we are satisfied that the construction contended for by respondent cannot obtain. The very terms of the act refute the idea that it was the intention to require the applicant to state the precise and exact quantity of land embraced in the exterior lines of his description. No such requirement is found in the act, either in terms or

by necessary implication. To the contrary, the act expressly contemplates the sale thereunder of lands which have not, at the date of application, been surveyed, and the exact extent in acreage of which cannot, therefore, in the nature of things, be the subject of definite ascertainment or knowledge at that time, by any means therein provided. And in view, doubtless, of that fact, the act provides in terms for a description of the tract sought to be purchased by "metes and bounds,"—a character of designation in its very nature tending to negative the necessity of exactitude in the matter of quantity, or anything more than an approximate estimate thereof. The statute does intend that an applicant shall not seek or have the right in any case to purchase more than a certain limited number of acres, according to the extent of ownership, if any, of other state lands. But the fact that the description in his application may inadvertently, or by mistake, include more than the amount of land which he is entitled to purchase, is not in any way inconsistent with the idea that he is nevertheless seeking in good faith to purchase only so much as the law authorizes. The very evident contemplation of the statute is that the description, at least in the case of unsurveyed lands, shall be such as to enable the surveyor to identify the tract to be surveyed, but that the quantity of land which the applicant is entitled to purchase under the facts stated in his application is to be ascertained by the official survey made under the direction and authority of the surveyor general, and that the survey is intended to constitute the basis upon which the approval of the application is to be had. Any other construction would render the act inoperative as a means of securing title to unsurveyed lands, since no applicant could venture, at the peril of forfeiting his right to purchase, to state with exact precision the number of acres embraced within a given tract.

It is said that the question of quantity may be readily determined by a preliminary unofficial survey by the applicant. But no such method is suggested or countenanced by the act. On the contrary, the necessity of such a step is negated by the provision allowing a description by metes and bounds. The legislature very evidently recognized the inherent impossibility of an applicant making oath to something which, in the nature of things, he could not personally know. No one could pretend to state positively the exact acreage in a given tract even of surveyed land, unless he knew, of his own knowledge, the correctness of the surveyor's lines; and even then the area would depend upon a matter of computation, in which mistakes very frequently arise. That even surveyors make mistakes in their lines and computations is matter of common knowledge, and is evidenced by the facts before us in this case.

The case presented is not unlike in principle that which arises under a location of a mining claim under the statutes of the United States,

where it is provided that no applicant shall be entitled to a claim or location exceeding certain fixed dimensions. It has been the uniform rule of decision in such cases that a mere mistake in including in the boundaries of the location an excess above that authorized by law does not vitiate the location. The excess only is rejected and the location held good, to the limit which the locator is permitted to purchase. *Mining Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. 1055; *Thompson v. Spray*, 72 Cal. 528, 531, 14 Pac. 182; *Doe v. Tyler*, 73 Cal. 21, 23, 14 Pac. 375. And the case is not without analogy in *Fairbanks v. Lampkin*, 101 Cal. 520, 36 Pac. 6, where it was held that a mistake in describing all the land applied for as suitable for cultivation, whereas it was found that one legal subdivision thereof was not of that character, defeated the applicant's right to purchase only as to the latter portion. Of course, the mere mistake of the surveyor in including an excess of land within the lines of his survey did not affect or defeat the defendant's right to purchase to the limit authorized under the statute (*Hinckley v. Fowler*, 43 Cal. 56); and defendant, in relinquishing and abandoning any claim to such excess, did all that he was called upon to do in the premises. Under the facts found by the court, the defendant's application was clearly valid. The finding as to the falsity of that application in the particular mentioned was not a finding of fact, but an erroneous conclusion of law, not supported by the facts. There is nothing in the line of cases relied upon by plaintiff at variance with the conclusion we have reached. Those cases all involve instances where the application was found defective as to some substantive and essential fact required to bring it within the law. The judgment and order are reversed, and the cause remanded, with directions to the court below to enter judgment upon the findings establishing the validity of defendant's application.

We concur: HARRISON, J.; GAROUTTE, J.

(121 Cal. 233)

FERREA v. CHABOT et al. (S. F. 1,139.)  
(Supreme Court of California. July 21, 1898.)

In bank. On rehearing. Denied.

For report in department, see 53 Pac. 689.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause. It is very clear to my mind that the superior court erred in denying plaintiff's motion to be relieved from his stipulation waiving a jury trial. By amendment of the pleadings, new issues had been raised properly triable by jury, and the waiver of the right to a jury trial upon one issue was not a waiver of the right as to other issues. The order overruling the mo-



tion was an order of the court, not of the department or of the judge of that department. The plaintiff had taken and presented his exception to the order, and to have the benefit of that exception was not, in my opinion, obliged to renew his motion on the same ground when the cause came before another department for trial.

121 Cal. 546

QUIGG v. EVANS, Mayor, et al. (S. F. 1,198.)

(Supreme Court of California. July 28, 1898.)

MUNICIPAL CORPORATIONS—HARBOR MASTER—ABOLITION OF OFFICE—ALLOWANCE OF FEES—DISCRETION OF CITY COUNCIL—CONSTITUTIONAL LAW—STATUTES.

1. Pol. Code, §§ 2567-2572, creates a board of harbor commissioners for the port of Eureka, and prescribes its powers and duties. Pol. Code, § 2570, makes the town marshal of Eureka the harbor master. The act incorporating the town as a city (St. 1873-74, p. 91, § 9) provided that the city marshal, in addition to his other duties, should be the harbor master. St. 1895, p. 355, abolished the office of city marshal, and made no provision for any other officer of the city to perform the duties of harbor master. *Held*, that the office of harbor master was not thereby abolished, and that the governor could fill the vacancy under Const. art. 5, § 8, which empowers him to fill vacancies in offices where no mode is provided for filling the vacancy by granting a commission to expire when the next legislature meets.

2. Neither Const. art. 11, § 12, which prohibits the legislature from imposing taxes upon municipalities for municipal purposes, but which provides that it may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes, nor section 4 of article 11 of the old constitution, which required uniformity of town governments throughout the state, nor section 13 of article 11 of the old constitution requiring uniformity of taxation, are violated by the allowance by harbor commissioners of the fees of a harbor master some of whose services were performed outside the city, but were for the benefit of the city, where such commissioners are residents of the city, and its mayor is an ex officio member.

3. Under Pol. Code, § 2568, which authorizes the board of harbor commissioners of Eureka to make rules and regulations and take such action as may be necessary for the protection of navigation in Humboldt Bay, the harbor master is entitled to pay for services in the bay outside the city, under orders of such board.

4. Under Pol. Code, § 2572, which provides that the fees of the harbor master shall be prescribed by the board of harbor commissioners and paid monthly by the city, upon the certificate of the board of harbor commissioners, the council is not vested with any discretion, but must allow such claim as certified.

Commissioners' decision. Department 1. Appeal from superior court, Humboldt county.

Application of John A. Quigg for a writ of mandamus against David Evans, as mayor, and H. H. Buhn, J. S. Connick, P. F. Autonsen, W. W. Christie, and H. A. Poland, as councilmen, of the city of Eureka. From a judgment granting the writ, defendants appeal. Affirmed.

A. J. Monroe, for appellants. L. F. Puter and Mahan & Mahan, for respondent.

CHIPMAN, C. Mandamus. The facts are agreed. Plaintiff was duly appointed and commissioned harbor master of the port of Eureka, Humboldt county, June 2, 1897, by the governor, and he duly qualified June 9th, and entered upon the performance of his duties as such harbor master, and is still performing said duties. On June 12th the board of harbor commissioners duly made and entered its order fixing the fees of said harbor master at \$2.50 for each day's work as such. He performed certain services between June 9, 1897, and August 1, 1897, amounting to \$112.50, for which said board of harbor commissioners issued certificates approving and allowing the same. Plaintiff duly presented said certificates to defendants, and demanded that they issue or cause to be issued warrants on the city treasurer of the city of Eureka for said amount, which was refused, and defendant rejected said claims. The city of Eureka has a population of 8,000 people, and is the principal point on Humboldt bay, and carries on commerce with all of the places mentioned in defendants' answer (certain ports and towns on the waters of the bay and its estuaries) which are outside the limits of the city of Eureka. The services performed by plaintiff at all these various points was a benefit to the city of Eureka, and assisted in stimulating its commerce. Certain of the outside places are shipping points, from which commerce is carried on with Eureka, San Francisco, and other points. Humboldt bay is 14 miles long, and has a tidal area of 28 square miles, 35 miles of navigable channels, and an available water front of about 50 miles. Eureka is situated about 3 miles northeast of the ocean entrance thereto. The agreed statement of facts then locates many shipping points on the bay and its waters, and their relation to Eureka, and gives the report of plaintiff describing his services as harbor master in detail. The court gave judgment for plaintiff, directing the writ to issue commanding defendants to issue warrants as prayed for. Defendants appeal, the agreed statement of facts to be treated as if presented by a bill of exceptions.

Appellants claim (1) That there is not now, and never was, such an office as harbor master for Eureka; (2) and, if there was, it was abolished by the present charter of the city; (3) that the legislature could not compel the city to pay for services outside the city limits; (4) that whatever liability there may be is limited to the harbor master's fees for "enforcing and carrying into effect the rules and regulations" adopted by the board of harbor commissioners; (5) that, if the claim is illegal in part, the council could reject it as a whole; and (6) that this is not a case for mandamus.

1. The first and important question is, has the law created the office of harbor master for the port of Eureka, and, if so, did it exist

when plaintiff was appointed? The act of April 4, 1870 (St. 1869-70, p. 744), is an act entitled "An act to create a board of harbor commissioners for the port of Eureka, on Humboldt bay, and to prescribe their powers and duties." The first section creates a board of three commissioners whose duties are prescribed by the act. The chairman of the board of supervisors of Humboldt county and the president of the board of trustees of the town of Eureka are declared to be ex officio members of the board of harbor commissioners, the third member to be appointed by the governor. Section 2 prescribes the duties of the board. Section 3 gives it power to impose certain penalties. Section 4 provides as follows: "The town marshal of said town shall be the harbor master of the port of Eureka, whose duty it shall be to enforce and carry into effect such rules and regulations as the board of harbor commissioners shall, from time to time, adopt and publish, and to report to said board any and all violations thereof." Section 5 prescribes the compensation of the members of the board. Section 6 provides as follows: "The fees of the harbor master shall be as prescribed by the board of commissioners hereby created, and shall be paid monthly, by the board of trustees of the town of Eureka, upon the certificate of said board of commissioners, except such fees as may be provided to be otherwise paid by said board of commissioners." This act was substantially carried into the Political Code as originally enacted, by sections 2567-2572, inclusive. Sections 2570 and 2572 correspond with sections 4 and 6 of the act of 1870. Section 2570 now reads: "The town marshal of Eureka is the harbor master of the port of Eureka. He must enforce and carry into effect," etc. The office corresponding to that of harbor master, created by the acts relating to the harbors of San Francisco and San Diego, is called "chief wharfinger." The city of Eureka was incorporated by act of February 10, 1874. It repealed the act of 1859 by which the town of Eureka was incorporated, and created certain offices, among them a city marshal. St. 1873-74, p. 91. Section 9 provided as follows: "The city marshal, in addition to the duties prescribed by section 4389 of the Political Code, shall be harbor master of the port of Eureka. The mayor, in addition to his other powers, shall be ex officio harbor commissioner for the port of Eureka." February 8, 1895 (St. 1895, p. 355), the legislature approved the "freeholders' charter" of the city of Eureka which superseded the charter of 1874. It repealed the office of city marshal. No provision was made therein for any officer of the city to perform the duties of harbor master. The board was left without an executive officer until June 9, 1897, when plaintiff qualified under his appointment by the governor. This appointment was made under the provisions of section 8, art. 5, of the constitution, which reads: "When any office from any cause becomes

vacant, and no mode is provided by the constitution and law for filling such vacancy, the governor shall have the power to fill such vacancy by granting a commission, which shall expire at the end of the next session of the legislature or at the next election by the people." It seems to us that when the board of harbor commissioners was created by the act of 1870, and when its provisions were reenacted in the Political Code, the legislature contemplated that there should be connected with that board an executive officer to be known as "harbor master." The language of the law does not distinctly so declare, but we think it clearly inferable that such was the intent of the law. How could it be said that "the town marshal shall be the harbor master of the port of Eureka, whose duty shall be to enforce," etc., unless there was to be such office? If the legislature had intended merely to add certain duties relating to this board to those already imposed upon the marshal relating to the board of town trustees, there would have been no necessity for mentioning the name of the office of harbor master. Instead of saying, "the town marshal of said town shall be the harbor master, whose duty it shall be to enforce," etc., it would have said, "the town marshal of said town shall enforce," etc. Section 6 of the act provides that "the fees of the harbor master shall be as prescribed by the board," etc. Here it seems to us is a clear recognition of the office. This is further shown by the act of 1874, section 9 of which provides that the city marshal shall, in addition to his other duties, be harbor master. In the performance of the duties prescribed the marshal was acting as harbor master, and not performing added duties as marshal. These duties concerned the public, and the compensation came from the public treasury. "An office is the right to exercise a public function or employment and to take the fees and emoluments belonging to it." 3 Kent, Comm. 454. The duties devolved upon the harbor master at the port of Eureka were much less complicated than those required of the chief wharfinger at the port of San Francisco or the port of San Diego, and might at the time well be placed in the hands of the town marshal; but it is the nature of the duties to be performed, and not their extent, which makes a public office and a public officer. When the freeholders' charter was adopted in 1895 the office of city marshal was abolished, and no provision was made for any officer of the city government to perform the duties of harbor master. But we do not think that sections 2570 and 2572 of the Political Code were repealed, except so far as they relate to the duties of the marshal. The office of harbor master remained. No person being designated by law to perform the duties, the office of harbor master became vacant. There being no mode specially provided by law or by the constitution for filling such vacancy, the governor was authorized



to do so under the provision of the constitution already quoted.

2. Appellants contend that the legislature could not compel the city to pay claims for services rendered outside the city limits. The account rendered by plaintiff and the agreed facts show that a part of his services were performed at points on Humboldt bay outside the city limits, but it was agreed that this work "was a benefit to the city of Eureka, and served the necessary purpose of assisting and stimulating the commerce of said city." It was also agreed that the city of Eureka "is the principal shipping point on Humboldt bay, and carries on commerce with all the places" where plaintiff performed any service. It was also agreed that the harbor commissioners made an order "fixing the fees of the harbor master at two dollars and a half per day for each day's work," and that the claims of plaintiff presented and allowed were for fees for services as harbor master. It is said that section 12, art. 11, of the new constitution is violated by imposing this burden of caring for the whole bay upon the city of Eureka. The article referred to prohibits the legislature from imposing taxes upon municipalities for municipal purposes, "but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." But section 2572, Pol. Code, was passed before the new constitution, and it is conceded by appellants that "section 3 of the charter of 1873-74 and of the freeholders' charter of 1895, of Eureka, makes the present city liable for obligations that pertain to the preceding city and town." Section 1 of article 22 of the new constitution would seem to justify this concession. It is claimed, however, that the tax was unauthorized by the old constitution and we are cited to section 4, art. 11, of that constitution, requiring that "the legislature shall establish a system of town governments which shall be as nearly uniform as practicable throughout the state"; and to section 13 of the same article, requiring taxation "to be equal and uniform throughout the state"; and also to *People v. Lynch*, 51 Cal. 15; *Hoagland v. City of Sacramento*, 52 Cal. 142. We are unable to discover any infraction of these provisions in the legislation now challenged. In the early act the mayor of the town and the chairman of the board of supervisors were ex officio members of the board of harbor commissioners, and in the acts of 1873-74 and 1895 the mayor was a member, and the other two were required to be appointed from residents of the city, so that the tax was to be imposed by the local authorities and not by the legislature. We do not think the provisions of the old constitution relied upon were designed to place any restraint upon the legislature in creating boards of harbor commissioners and in prescribing their powers and duties. The nature of these duties, and the infrequency of occasion to create boards to

discharge them, forbade anything like a system of legislation which could be uniform throughout the state, or even among the few ports of entry in the state. Each port of entry and harbor called for legislation adapted to its peculiar condition and location and surroundings.

While it is admitted that some of the services were actually performed outside the city, for example, removing sunken logs so as to clear the channel from obstructions, all parties agreed that it was for the benefit of the port of Eureka and aided her commerce, although incidentally benefiting other points. Section 2568, Pol. Code, provides that "the board of harbor commissioners of the port of Eureka are authorized and empowered to make such rules and regulations, and take such action, as may be necessary or proper for the protection of navigation in Humboldt bay, or in any slough or creek emptying into the same so far as the tide ebbs and flows." Section 2569 confers even broader powers, and clearly gives the board jurisdiction beyond the city limits of Eureka. What the board may do, or where it may go, in the exercise of its powers, it may cause to be done by its executive officer, the harbor master, for it is made his duty "to enforce and carry into effect such rules and regulations as the board of harbor commissioners may from time to time adopt and publish." We see no reason why this officer should not be employed by the board to do for it what the law authorizes the board itself to do or cause to be done, to wit: "Prevent and remove obstructions to the regular ebb and flow of the tides," etc. Section 2569.

3. It is finally urged that this is not a case for mandamus. Section 2572, Pol. Code, provides that "the fees of the harbor master are prescribed by the board of commissioners, and paid monthly by the board of trustees of the town of Eureka, upon the certificate of the board of commissioners." Appellants contend that the claim of the harbor master should be presented to and passed upon by the council of the city of Eureka as any other claim, with the discretion in the council to approve or reject it, and that if rejected the charter (section 179), provides a remedy; that the charter "supersedes all laws inconsistent with such charter" (Const. art. 11, § 8); and that section 2572, supra, is inconsistent with the provisions of the charter and is superseded by it. If the harbor commissioners have the power to fix the fees, then it cannot rest with the council to reject. If the council is charged with the discretion to approve or reject the claim of the harbor master after the harbor commissioners have fixed his compensation, it would be within the power of the council to defeat the law by which the harbor commissioners act. We do not think that it was the intention of the charter to supersede, nor has it the effect of superseding, the sections of the political Code relating to the harbor commissioners.

and the harbor master. Section 53 of the new charter recognizes the existence of the harbor commissioners, and provides that the mayor shall be "ex officio harbor commissioner of the port of Eureka." Under the law the compensation of the harbor master is fixed by the commissioners at \$2.50 per day, and the law says (section 2572, *supra*) this must be "paid monthly by the board of trustees of the town of Eureka, upon the certificate of the board of commissioners." No question is made of the former liability of the municipality. If it be said that there is no longer a "town of Eureka," and therefore the section of the Code does not apply to the "city of Eureka," section 3 of the new charter answers: "The said city of Eureka \* \* \* shall be subject to all the obligations, debts, liabilities, dues and duties of the existing municipality." We think the law as it now exists specially enjoins upon the city the duty of paying the harbor master's fees as fixed by the harbor commissioners, and that upon their certificate being presented it became the duty of the council to order a warrant drawn in favor of plaintiff for the amount certified by the harbor commissioners. Section 1085, Code Civ. Proc., provides that the writ of mandate may issue in such case. The judgment should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

121 Cal. 529

PEOPLE v. BURNS. (Cr. 389.)

(Supreme Court of California. July 25, 1898.)

POLICE COURTS—ABOLITION—CLERK OF COURT—  
VERIFICATION OF INFORMATION—CRIMINAL LAW  
—SEPARATE EXAMINATION—GRAND LARCENY—  
EVIDENCE—INSTRUCTIONS.

1. A police court established in Los Angeles, under St. 1885, p. 213, providing for police courts in cities of between 30,000 and 100,000 inhabitants, is not abolished by a census showing a population of over 100,000, taken under St. 1897, p. 28, providing for a state census of any city, where St. 1883, p. 24, fixes the United States census as the basis of enumeration for the purpose of classifying municipal corporations.

2. Under Code Civ. Proc. § 2093, empowering every clerk of court authorized to take testimony to administer oaths, the police clerk of Los Angeles has authority to administer an oath by which a verification to an information is made, notwithstanding Pen. Code, § 811, requiring a complaint on which a warrant of arrest is issued to be sworn to before a magistrate.

3. The statute does not confer on one jointly charged with another the right to a separate examination before the magistrate.

4. Even though the statute conferred on one jointly charged with another the right to a separate examination, error in refusing it would not be jurisdictional.

5. The information charged that accused did "take, steal, and carry away from the person of W. M. one gold-filled case watch and chain,

and one diamond ring." Held that, though the description of the property was very general, the offense was sufficiently described, which was all that was necessary.

6. No injury can result from the court changing an instruction that the jury must be convinced of the guilt of defendant beyond "all" reasonable doubt, to "a" reasonable doubt.

7. Where two witnesses testified to seeing accused in the act of removing a ring from the cravat of a sleeping person, though they could not see the ring on account of accused's hand being in the way, but had seen it on the cravat, and noticed afterwards that it was gone, it cannot be said that the prosecution relied entirely or mainly on circumstantial evidence; and instructions based on such an assumption were properly refused.

8. Where a witness as to good moral character of accused was asked on cross-examination a question hinting at a former crime of accused, which, with the answer, was stricken out, and it was not shown to have been asked in bad faith and without grounds for expecting an affirmative answer, it is not ground for a new trial.

Department 2. Appeal from superior court, Los Angeles county.

John Burns was convicted of grand larceny, and from the judgment and a denial of a new trial he appeals. Affirmed.

Tanner & Taft, for appellant. Atty. Gen. Fitzgerald, for respondent.

TEMPLE, J. The defendant was convicted of the crime of grand larceny, and this appeal was taken by him from the judgment, and from a denial of a new trial.

1. The first point made is that the court erred in overruling the defendant's motion to set aside the information because the defendant had not been legally committed by a magistrate. This is based upon the contention that there is legally no such officer as the clerk of the police court of Los Angeles, before whom the complaint upon which the warrant of arrest was issued purported to have been sworn to; and it is further contended that, conceding the existence of such an officer, still such officer is not a magistrate, and, under section 811 of the Penal Code, the complaint must be sworn to before a magistrate. The first proposition was decided adversely to the appellant in *Re Mitchell* (Cal.) 52 Pac. 799. The second proposition was also decided adversely to him in *People v. Vosalo* (Cal.) 52 Pac. 305.

2. It is also contended that the defendant was not properly committed, because he was jointly charged with one Tollman, and demanded from the magistrate a separate examination. The statute does not confer this right upon an accused person, and, if it did, the denial of it is not a ground for setting aside the information. Such an error (granting it to be one) would not be jurisdictional.

3. A demurrer to the information was interposed, and upon that the point is made that the description of the property alleged to have been stolen is insufficient. It is charged that the accused did "take, steal, and carry away from the person of Walter McStay one gold-filled case watch and chain,



and one diamond ring." The description is a very general one; but the fact that the property is charged to have been stolen from the person of Walter McStay will prevent any embarrassment at the trial, and any difficulty in establishing a plea of former jurisdiction in the possible event of a second prosecution. The offense is sufficiently described, and that is all that is necessary.

4. The contention that there was not sufficient evidence to sustain the verdict cannot be maintained. The evidence is ample, though conflicting.

5. In the instruction to the effect that the jury must be convinced of the guilt of the defendant "beyond all reasonable doubt," the court changed the word "all" to "a." The difference made, counsel has not been able to state; but they think that the fact of the change may have induced the jury to believe that the word "all" was too comprehensive, and that they need only be convinced beyond some particular reasonable doubt. Why the judge made the change I cannot imagine, nor yet how any injury could result from the change.

6. The court refused two instructions in regard to circumstantial evidence. One refers to criminal cases, "where the prosecution rely upon circumstantial evidence for a conviction"; the other case "where circumstantial evidence is relied upon to connect a defendant with the commission of a public offense." It cannot be said that the reliance in this case was entirely or mainly upon circumstantial evidence. I think two of the witnesses testified to seeing the defendant in the act of removing the ring from the cravat of the prosecuting witness, while he was asleep. True, they could not see the ring during the operation, for the hand of the defendant was in the way; but they had seen the ring upon the cravat, and saw him apparently slipping it off, and noticed, after the operation, that it was gone. This can hardly be said to be a case of circumstantial evidence.

7. One Summerville was examined as a witness on behalf of the defendant to prove his good moral character. On cross-examination the district attorney asked him who he had heard speak of the defendant. The witness mentioned one Mr. Davis, who was an attorney, and said that Mr. Davis had said defendant was a nice man. He was asked if Mr. Davis had not said that Burns had paid him in full for defending him upon a charge of larceny. The witness replied, "He did not." At this point the defendant objected, and asked the court to strike out the evidence, which the court did. It is contended that this was misconduct on the part of the district attorney, and that a new trial should be had on that ground. Whether the district attorney was guilty of misconduct or not depends upon whether the question was asked in good faith or not. If the district attorney had reason to think there

was no truth in the charge of former delinquency so hinted at, his conduct was most reprehensible; but we have no right to assume that such was the case. If the district attorney did have reason to expect an affirmative answer, it is not entirely clear that the examination was not proper. At all events, it is not so plain that we can say that the question was not asked in good faith, and that it was not proper to take the judgment of the court upon the subject.

Objection is made to the refusal to give two other instructions, not noticed heretofore; but it is evident as to them that the court was only asked to repeat charges already given, and there can be no benefit in our going over them seriatim. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

121 Cal. 494

PEOPLE v. LONG (two cases). (Cr. 405, 402.)

(Supreme Court of California. July 21, 1898.)

CRIMINAL LAW—APPEAL—RECORD.

Order sustaining demurrer to indictment can be reviewed only on exceptions and bill of exceptions provided by Pen. Code, §§ 1172, 1174, there being no judgment roll or record in a criminal case, except on conviction (section 1207).

Department 2. Appeals from superior court, Riverside county; J. S. Noyes, Judge.

Demurrers to indictments against S. C. Long and Ida Long were sustained, and the people appeal. Affirmed.

Atty. Gen. Fitzgerald, for the People. Chas. R. Gray, for respondents.

TEMPLE, J. These two appeals involve the same questions, presented upon facts in all respects similar. Each is taken from an order sustaining a demurrer to an indictment for perjury. There are no bills of exceptions in the transcripts, and respondents make the point that there are here no records upon which the appeals can be heard. There does not seem to be any judgment roll or record in a criminal case except upon conviction. Pen. Code, § 1207. It is by virtue of that section only, making the minutes of the court a part of the judgment roll, that the minutes get into and become a part of the record on appeal. Section 1007 of the Penal Code provides that upon a demurrer being submitted the court shall give judgment either allowing or sustaining it, and an order to that effect shall be entered upon the minutes. Conceding that this order can be regarded as a final judgment in a case like this, where the case is ordered to be resubmitted, the statute does not provide for a judgment roll or a record of any kind except through a bill of exceptions. If the order is a judgment, still the exceptions to the ruling,

though properly enough entered in the minutes, are not a part of the judgment rendered by the court. Sections 1172 and 1174 provide for exceptions and for a bill of exceptions to this very ruling. It may well be held that these provisions are exclusive of any other mode of obtaining a review, even when there is a judgment roll. But, however that may be, there can be no possible doubt about it in a case like this, where there is no other mode provided for a record upon appeal. There being no legal record from which we can determine whether the court erred, the orders or portions of the orders appealed from are affirmed in each case.

We concur: MCFARLAND, J., HENSHAW, J.

121 Cal. 492

PEOPLE v. GEORGE. (Cr. 404.)  
(Supreme Court of California. July 21, 1898.)

CRIMINAL LAW—COMPLAINT—SUFFICIENCY.

The misstatement of the name of an affiant in a complaint charging an offense will not invalidate subsequent proceedings based on such complaint, which was subscribed by affiant.

Department 2. Appeal from superior court, Merced county; J. K. Law, Judge.

Information against James George for felonious assault. Appeal by the people from an order sustaining a motion to set aside information. Reversed.

Atty. Gen. Fitzgerald, for appellant. V. G. Frost, for respondent.

MCFARLAND, J. This is an appeal taken by the people from an order of the superior court sustaining a motion of the respondent to set aside the information, which charged him with felonious assault upon Frank Botano. The motion was made "upon the ground that before the filing thereof the defendant had not been legally committed by a magistrate for the offense charged in the information." The point rests entirely upon the alleged insufficiency of the complaint made before the magistrate upon the preliminary examination. The part of said complaint necessary to be considered is as follows: "Personally appeared before me this 4th day of October, A. D. 1897, Frank Bartino, of Merced, the county of Merced, who, first being duly sworn, complains and accused James George of the crime of assault with a deadly weapon with intent to murder, committed as follows: That said James George, on or about the 3d day of October, A. D. 1897, at and in the said county of Merced, state of California, did willfully, unlawfully, and feloniously assault affiant, the said Frank Bartino, with a deadly weapon, with the intent then and there to kill and murder the said affiant. \* \* \* Said complainant, therefore, prays that a warrant may be issued for the arrest of the said

James George, and that he may be dealt with according to law. Frank Botano. Subscribed and sworn to before me, this 4th day of October, A. D. 1897. Jno. Naffziger, Justice of the Peace No. 2 Township, County of Merced." We think that upon these facts the court erred in setting aside the information. The preliminary examination and the commitment following it were certainly not void on account of any defect in the complaint. The most that can be said against the complaint is that it is somewhat ambiguous. The justice before whom the affidavit was made recites, at the commencement of it, that Frank Bartino "personally appeared before me," etc.; but in the body of the instrument the affiant testifies that the defendant, George, feloniously assaulted "affiant," and the affidavit is subscribed by Frank Botano, as affiant; and, as thus subscribed, it was certified by the justice to have been "subscribed and sworn to" before him. It is clear enough that Frank Botano was the person who was the affiant and made oath that the assault was made upon him; and the word "Bartino" was evidently inserted by mistake. The fact that in the recital the justice misstated the name of the real affiant, who actually subscribed the complaint, could not have prejudiced the respondent; and there is no doubt that he could successfully protect himself against any other prosecution for the offense charged. The court below directed the district attorney to file a new information, but it is difficult to see how a better one could be prepared. The information was sufficient in form and substance, and it does not appear "that before the filing thereof the defendant had not been legally committed by a magistrate." The order appealed from is reversed.

We concur: TEMPLE, J.; HENSHAW, J.

121 Cal. 495

PEOPLE v. BRENNAN. (Cr. 364.)  
(Supreme Court of California. July 21, 1898.)

THREATENING LETTERS—INFORMATION—EVIDENCE—STIPULATION.

1. An information which, after elimination of the word "extortion" in the general designation of the offense with which the accusation opens, properly charges the sending of a threatening letter with intent to extort money, will be held to charge the latter offense.

2. Evidence taken on a preliminary examination on one charge cannot, on subsequent stipulation that it be considered the evidence on another charge, be given in evidence on trial of the latter case; Pen. Code, § 686, providing merely that in a criminal action, where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of defendant, who has had an opportunity to cross-examine the witness, the deposition may be read, on its being shown that the witness is dead.

3. Stipulation, on preliminary examination of one charge, that there be considered, as evidence thereon, evidence taken on the examina-



tion of another charge, is not a stipulation that on the trial of the case the evidence be admissible without regard to objections to its relevancy, materiality, and competency.

Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Nicholas Brennan was convicted of sending a threatening letter with intent to extort money, and appeals. Reversed.

E. L. Forster and Richard Gibson, for appellant. Atty. Gen. Fitzgerald, for respondent.

TEMPLE, J. An information was filed in the superior court of the city and county of San Francisco which accused defendant "of the crime of felony, to wit, extortion," in that he, with intent to extort money from one Theresa Tarpey, willfully, unlawfully, and feloniously sent her a letter which expressed and implied a threat to do her person an unlawful injury. The letter is set out in full. The defendant was convicted, and this appeal is taken from the judgment and from the order denying his motion for a new trial. At the proper time the defendant moved the court to set aside the information because it did not comply with certain sections of the Penal Code, but he did not demur.

It is now contended that the information attempts to charge two offenses, and charges neither effectively. This claim is founded upon the use of the word "extortion" in the general designation of the offense with which the accusation opens. The word can be eliminated, and the information will still be good. Regarded as a charge of sending a threatening letter with the intent of extorting money, the information seems all that can be required. And it is plain that there is no attempt to charge any other offense. The defendant could not have been, and was not, misled by the unnecessary use of the word "extortion."

The charge was fully and accurately explained to the jury by the learned judge of the court. He said: "The real accusation, as set forth in the information, though denominated therein as 'extortion,' is not an accusation of an extortion committed,—an accusation that money was actually obtained by extortion,—but that a threatening letter was sent by the accused with intent to extort money," etc. The defendant had been held upon three criminal charges, in all of which it was alleged that Theresa Tarpey was the victim of the crime charged. The complaints in the several cases, though put in evidence, are not in the transcript. Counsel and the court, in speaking of them, designated them, respectively, as the charge of rape, or the rape case; the charge of extortion; and "taking a female by inducements for the purposes of prostitution, in which Theresa Tarpey is named as the female." The complaint charging the defendant with rape was filed December 4, 1896. The preliminary examination was commenced on the 15th of the same month, and, after

some testimony had been taken on the charge of rape, Officer Handley verified and filed with the magistrate the so-called charge of extortion. Mr. Vernon, the stenographer, was examined as a witness, and testified that a stipulation was made to the effect that the testimony taken in the rape case should be considered the evidence in the extortion case. It was made in open court and entered by him in his notes. As to the time or the stage in the proceedings when the stipulation was entered into, the following evidence was given: "Mr. Black: What was the date of that stipulation,—that is, on the charge of extortion? A. That occurred twice. Mr. Van Duzer agreed to that at the time he took the testimony at the house, I believe. Q. What was the stipulation on that very day, though,—what date was that? A. That was the 15th day of December. The examination of witness was entered on the 28th of December. It was continued once or twice before that. The examination of witnesses on the charge of extortion was commenced on the 28th of December, and it was after two witnesses had been examined that this stipulation was entered of record and taken down by me, referring to the testimony that had already been taken on the other charge. That was the stipulation entered into by Mr. Long, who subsequently came into the case. Mr. Forster: Now, Mr. Vernon, what papers—what record—are you taking that stipulation from? A. I was looking at the extortion charge then. I find a stipulation in the extortion charge here. It is: 'Mr. Mogan: It is stipulated that the testimony taken in the rape case be considered as the testimony in this case. Mr. Long: Yes; that is the case for the defense in the extortion matter.' Q. Well, now, wasn't there a stipulation in the record of the rape case also, Mr. Vernon, to that effect? A. Yes, sir. Q. And isn't that stipulation in the extortion record there a copy? Isn't that a part of the same record that is in the rape case? A. No; this is just at the end of the extortion case, before the testimony in the rape case comes on. That is the last thing before the testimony in the rape case comes on. Q. Well, isn't there a good portion of the record in the extortion case exactly the same as the record in the rape case? A. Well, there was additional testimony in the extortion case, and then the whole of the testimony in the rape case went in in the extortion case. Q. So the stipulation you are reading now from the extortion case is not the stipulation as would appear in the rape case, and as having been transferred from one record to the other? A. There was just the one stipulation made at that time,—that was the time that the extortion case was through,—that is, the additional testimony was through. Then that stipulation was made, but Mr. Van Duzer had previously made a stipulation at the house to that effect." Against the objections of defendant, the court then permitted the deposition to be read. It is not objected that the depositions were not properly certified. It is

contended that this deposition does not come within the statute, because it is not a deposition taken upon a preliminary examination of the defendant upon the charge upon which he was being tried.

The evidence was offered under the provisions of section 686 of the Penal Code, which, so far as material here, reads as follows: "In a criminal action the defendant is entitled: \* \* \* (3) To produce witnesses on his behalf, and to be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in the like manner in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state."

As to that portion of the deposition which was taken before the stipulation was entered into, I can conceive of no theory upon which it can be brought under the provisions of the Code. Such testimony was not taken in the presence of the defendant, upon the charge then on trial.

The contention that none of the testimony was taken upon a preliminary examination of the charge upon which he was being tried is based upon the proposition that the examination was upon a charge for extortion, while the trial was held to be upon a charge for sending a threatening letter with intent to extort money. The complaint upon which the examination was held is not in the record. It is assumed to have been a charge of extortion rather than for sending a threatening letter, because the attorneys and the court, as well as the stenographer, so designated it when it was offered. It was before the court at the trial, and, for aught we know, may in fact have been identical with the present charge.

It is incumbent upon the appellant to make error appear. As in civil cases, where there is a specification of insufficiency of the evidence upon some point, we will presume that all the evidence upon such points has been put into the bill of exceptions. Here the bill contains no specifications as to any insufficiency, unless it be in regard to proof of venue. Under such circumstances, this point cannot be sustained.

The objections having been overruled, the district attorney proceeded to read the deposition of Theresa Tarpey, such witness

having died. The threatening letter is alleged to have been sent on the 21st day of December, 1895, and as to dates the testimony corresponds with the allegation. The deposition commences by showing when the witness became acquainted with defendant, and then as follows: "Did you meet him in January, 1895? A. Yes, sir. Q. Did you go to any place with him? A. Yes, sir. Q. On or about the 4th day of January, did you go to what place? A. Pacific Heights. Q. In the day or night? A. Night." At this point the following occurred at the trial: "Mr. Forster: We object to all that testimony, if your honor please, as not competent, relevant, or material. This defendant is now being tried on a charge of extortion, having extorted through the alleged sending of a certain letter. Anything outside of that we object to, and in particular all that matter that is being read. The Court: This is the testimony, I understand, that was given before the committing magistrate on the hearing of that charge? Mr. Forster: On the charge of rape; this testimony gets into the case by reason of the fact that it was taken during the preliminary examination on the charge of rape. The Court: But it was stipulated as the evidence also in this extortion case. Mr. Forster: Well, I presume that stipulation would only go so far as the parts are relevant to this case. The Court: It is admissible because it was stipulated; it is what the magistrate had before him; it is what the woman swore to. It seems she is dead, and they can't bring her here. Mr. Forster: Well, we will renew the objection. The Court: Well, I will overrule the objection. Mr. Forster: Exception. Well, I wish, if your honor please, to have a general objection go on record as to all the testimony outside of the actual sending of this letter, and have it understood that that is objected to, and objection overruled and exception taken. Mr. Black: That is the objection; there is no doubt about that (continuing reading)." The witness then proceeded to relate circumstantially the commission of the crime of rape upon her person by the defendant on the 4th day of January, 1895, which was, lacking just 14 days, one year before the sending of the threatening letter. It was not claimed that there was any connection between the charge of rape and the offense for the commission of which defendant was being prosecuted, other than that the testimony was given at the preliminary examination, or, rather, by virtue of the stipulation, was to be deemed as so given. It was not admitted because relevant or material, but "because it was stipulated." No evidence could possibly be better calculated to create a prejudice against the defendant, and nothing could be more obviously irrelevant. Page after page of it was read with remarks of counsel and the judge in the police court. Even there, much of the evidence was objected to, and the judge let



it all in without ruling upon its admissibility, taking it subject to a motion to strike out.

The third charge upon which defendant was examined was a charge of enticing a female to become an inmate in a house of prostitution. When this charge was reached during the examination in the police court, as appeared from the notes of the evidence read at the trial, the attention of the witness was called to her complaint. In the superior court the following occurred: "Mr. Forster: We again renew our objection at this point, if your honor please, on the same ground, that all this matter is irrelevant and immaterial, and not bearing on the issues in this case. The Court: Well, it is her testimony, given under this charge, isn't it? Mr. Forster: On the charge of rape, as I understand it. The Court: Of course, I suppose it would be admissible as showing the relations of these parties. Mr. Forster (after discussion): Well, do I understand your honor to let this testimony go in? The Court: Yes, sir. Mr. Forster: Exception. The Court: It goes in by stipulation of counsel and parties. Mr. Forster: Well, if that is the case, just consider that I have objected. With Mr. Black's consent, it is stipulated that I object to all of this testimony outside of the direct testimony in relation to the sending of the letter." The testimony was then read, and contained a long statement of how the defendant enticed her to a disreputable house. His promise to get some one "to show her how," etc. She also stated that he compelled her to go there; that she went because she was afraid of him; and there consorted with Chinamen, giving defendant the wages of her shame.

All this was alleged to have happened some two months after the sending of the threatening letter, and could not have thrown any light upon that charge, and it was not and is not claimed that it did. It was admitted because of the stipulation, and because the witness was dead at the time of the trial. There was no stipulation that the testimony could be read in evidence anywhere. All that the stipulation purported to be was that the evidence taken should be considered as taken in each of the three charges. So far as the preliminary examination was concerned, it should apply to all. There was no intent to stipulate to anything beyond. The deposition was not taken for the purpose of being read as evidence upon the trial. It was so read because of the death of the witness, which was not a thing to be anticipated.

Conceding that the testimony was taken at a preliminary examination upon which he was then being prosecuted, there is no use of a stipulation. The ruling was then based upon the proposition that all the evidence taken before a committing magistrate can, in the event of the death of the witness, be read at the trial, though not relevant, material, or competent, and yet injurious in the highest degree. I shall assume that there

is no occasion for argument on such a proposition.

There are other alleged errors in regard to the admission of testimony, but there must be a new trial, and most likely the same rulings will not be repeated. I am not able to make out from the record that the defendant has been denied a speedy trial. It is only fair to the defendant to state that evidence was produced in his behalf which tended to prove that Theresa Tarpey upon her deathbed retracted all that she had said in reference to the charge of rape, and for enticing her to a house of prostitution; that she sent for defendant's mother and sister, and made the retraction to them; and also signed a statement to that effect before a notary, who verified the same as a witness. The defendant, also on oath, denied their truth. Judgment and order reversed, and a new trial granted.

We concur: McFARLAND, J.; HENSHAW, J.

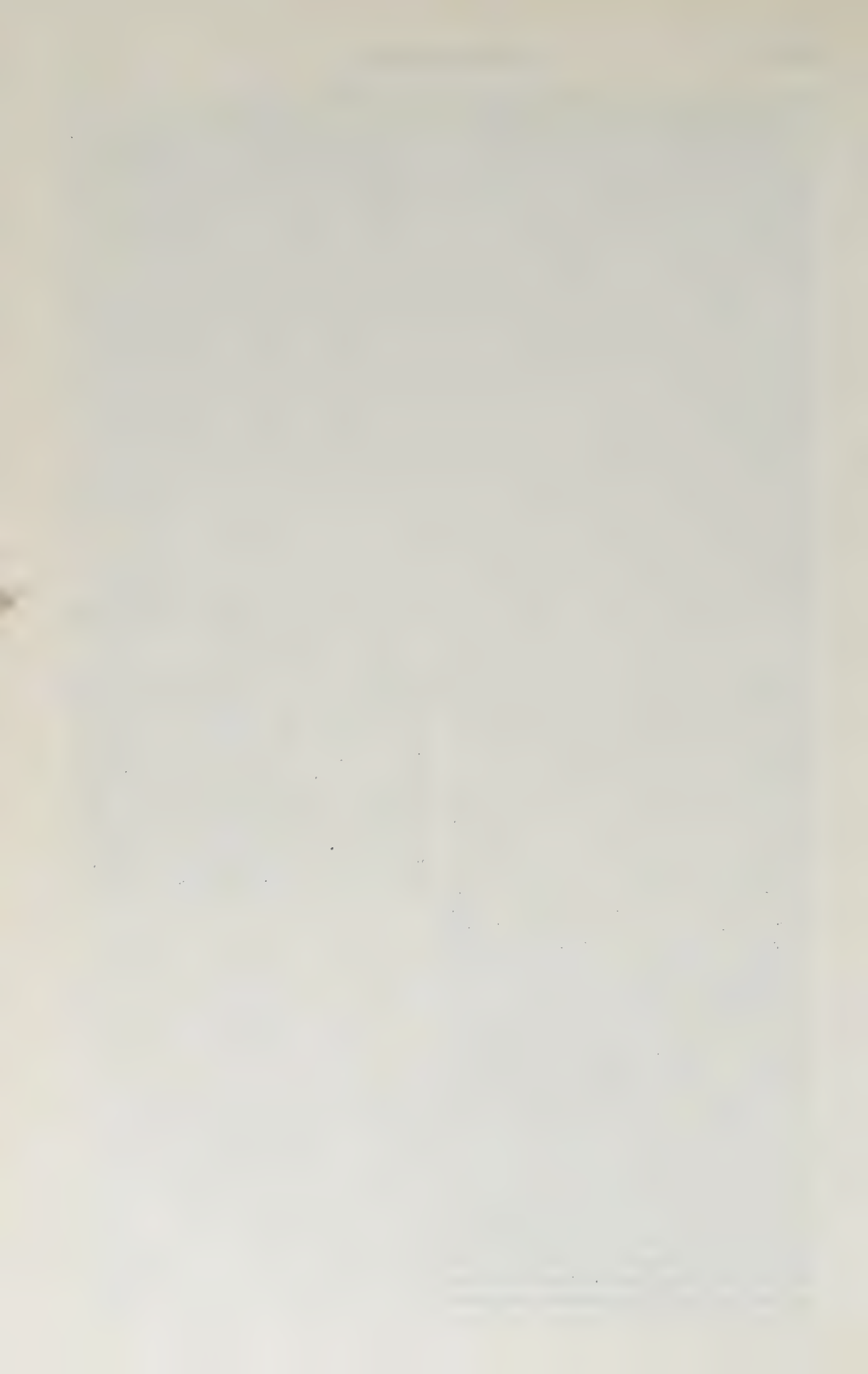
121 Cal. 257

ISAACS v. JONES et al. (Sac. 250.)

(Supreme Court of California. July 23, 1898.)

In bank. Dissenting opinion. For majority opinion, see 53 Pac. 793.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause, and from the decision of the department. The matter in litigation in this action is the amount of surplus assets of the firm of Michael and Bernhard Isaacs, and the respective shares of the parties. Appellant had a lien upon Bernhard's share. Its lien was a valuable interest. The property and its value to which the lien attached not only can be, but must be, determined in the action; and, in my opinion, it is a plain case for intervention.





(121 Cal. 604)

**BAGLEY v. COHEN et al.** (Sac. 219.)<sup>1</sup>

(Supreme Court of California. Aug. 2, 1898.)

**GUARANTY—PARTIES—LIABILITY—CONTRACTS—  
BREACH—JUDGMENT—VACATION—  
APPEAL—RECORD.**

1. Under Civ. Code, § 2808, providing that the liability of one who guaranties a conditional obligation is commensurate with that of the principal, guarantors of a promise to pay a sum certain out of the profits of a business for a particular year, their agreement being part of the same transaction with the principal obligation, are absolutely liable on the principal's failure to meet his agreement.

2. Where one agreed to pay a fixed sum out of the profits of his business, and, before the close of the season, voluntarily prevented its fulfillment by selling the business, his liability thereupon became fixed.

3. Under Civ. Code, § 1660, establishing a presumption that a promise in the singular number, but signed by several persons, is joint and several, a guaranty, "I, E. C., do hereby guaranty," etc., when subscribed by him and another, cannot be deemed the obligation of only one, with the other as witness merely.

4. Where defendants had prepared a demurrer to the complaint for failure to state a cause of action, but it was, as they claimed, by mistake and excusable neglect, not filed, and default was taken against them, on a motion to open the default such demurrer does not satisfy a rule of court requiring the party moving for such relief to serve a copy of his proposed "answer" with the motion.

5. An appeal from an order cannot be entertained where the record does not contain a copy of the order.

In bank. Appeal from superior court, Fresno county; E. W. Risley, Judge.

Action by F. S. Bagley against E. A. Cohen and others. There was judgment for plaintiff, and defendants appealed from that, and from an order refusing to open a default, and from an order denying a change of place of trial. Affirmed.

Alfred H. Cohen, for appellants. George W. Harlow, for respondent.

**HARRISON, J.** This action is brought against the defendants upon their guaranty of a contract made to the plaintiff by one Gould. The contract is as follows: "On or before sixty days, I, E. H. Gould, do hereby agree to pay to F. S. Bagley, or order, out of the profits realized by me from my business of packing raisins at Malaga, during the

present season, the sum of three hundred and ten (\$310) dollars, in gold coin of the United States of America. Dated Fresno, September 12, 1894. E. H. Gould. [Seal.]" Prior to the delivery of this contract, and as a part of the same transaction, the defendants subscribed the following guaranty, which was written beneath the contract: "I, E. A. Cohen, do hereby guaranty the payment of the foregoing note in accordance with the conditions thereof. E. A. Cohen [Seal], by L. L. Cory, Agent. Edgar A. Cohen. J. B. Cohen." Within 10 days after the execution of the foregoing instrument, Gould sold and conveyed all his right, title, and interest in and to his business of packing raisins at Malaga, and thereby prevented himself from realizing any profits out of said business. Judgment by default was entered against the defendants, and they have appealed therefrom, upon the ground that the complaint fails to state a cause of action.

The contract of the defendants being a part of the same transaction with the contract of Gould, the two instruments make but a single contract on their part. *Hazeltine v. Larco*, 7 Cal. 32. Their guaranty that Gould would perform his contract was an original undertaking by them, and their liability as guarantors is commensurate with that of Gould. Civ. Code, § 2808. Their promise that he would perform his contract, "in accordance with the conditions thereof," made them absolutely liable for his failure to perform it when he should be so liable. *Otis v. Hazeltine*, 27 Cal. 80.

By the sale and conveyance of his business, Gould voluntarily prevented himself from fulfilling his contract according to its terms, by putting it out of his power to make any profits in the business, and his liability became thereupon fixed and absolute. *Bish. Cont.* § 1426; *Whart. Cont.* § 885a; *Wolf v. Marsh*, 54 Cal. 228; *Love v. Mabury*, 59 Cal. 484; *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962.

The name of E. A. Cohen alone in the body of the guaranty does not make him the sole guarantor. Both of the defendants signed the instrument, and the averment that both of them "made and subscribed it" destroys the contention that J. B. Cohen was only a witness to its execution. Civ. Code, § 1660.

Prior to the entry of judgment, an application was made on behalf of the defendants for a change of the place of trial. They did not appear or answer or demur at the time the motion was made, and the court denied their motion. Code Civ. Proc. § 396. After the judgment was entered, they filed a demurrer to the complaint, together with an affidavit of merits, and gave notice of a motion for an order changing the place of trial, and at the same time gave notice of a motion to set aside their default on the ground of mistake, surprise, and excusable neglect. In support of the latter motion an affidavit of

their attorney was filed, to the effect that he had seasonably prepared a demurrer and affidavit of merits, with the notice of his motion and demand for a change of the place of trial, and had instructed his clerk to forward them to an attorney in Fresno, with directions to have them served and filed, but that he did not discover that, through the mistake of his clerk, the demurrer had not been sent until after the default of the defendants had been entered. No affidavit of the clerk was presented showing the character of the mistake, or from which it could be determined whether the neglect was excusable, or why the papers had not been sent. The court denied the motion upon the ground that, under its rules upon such a motion, the moving party must serve with the notice of his motion a copy of the answer he proposed to file. From this order the defendants have also appealed.

The demurrer filed by the defendants was not an "answer," within the meaning of this rule. The only ground stated in the demurrer was the want of facts in the complaint sufficient to constitute a cause of action, and this objection could be presented upon an appeal from the judgment by default, and has been here presented and found untenable. If the complaint states a cause of action, there is a manifest propriety in requiring a defendant who has suffered a default by reason of his neglect to make it appear to the court that he has some defense to the plaintiff's claim, as a condition upon which he shall be relieved from his neglect. In their notice of appeal the defendants state that they appeal also from the second order denying a change of the place of trial, but the record contains no copy of such order. The judgment and orders are affirmed.

We concur: BEATTY, C. J.; VAN FLEET, J.; TEMPLE, J.; HENSHAW, J.; McFARLAND, J.

121 Cal. 511

SISKIYOU LUMBER & MERCANTILE  
CO. v. ROSTEL et al. (Sac. 384.)

(Supreme Court of California. July 23, 1898.)

PUBLIC NUISANCE—RIGHT OF INDIVIDUAL TO  
ABATE—PLEADING.

1. In a private action to abate a public nuisance, the complaint should affirmatively disclose either that there are no other properties than plaintiff's so situated as to be injured by the alleged nuisance, or, if there are such, that they are not injured by it as are plaintiff's.

2. Construction of a building, so that part of it overhangs a street in a town in such a manner that a neighbor's property is rendered more liable to fire than before, thereby increasing the cost of insurance and depreciating the market value of the property, ordinarily gives no right of action to the party aggrieved.

3. Where, in a private action to abate a nuisance, it is necessary to aver the existence or nonexistence of other property owners than plaintiff, an averment that the premises alleged to be injured are in a certain town gives rise

to the presumption that there are other property owners therein.

4. In a private action to abate a public nuisance, the complaint should show the relative situations of the nuisance and plaintiff's property.

5. The complaint in a private action to abate a public nuisance alleged that the building that constituted the nuisance was on block 26, and that plaintiff's premises were in blocks 27 and 30, "as designated on the Pacific Improvement Company map of said town." The map was not made a part of the complaint, and it did not appear where it could be found. *Held*, that the description was insufficient.

Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by the Siskiyou Lumber & Mercantile Company against H. Rostel and others. From an order overruling a demurrer to the complaint, and a judgment for plaintiff, defendants appeal. Reversed.

J. H. Magoffey, for appellants. Gillis & Tappscott and J. W. Parker, for respondent.

VAN FLEET, J. The action is to abate a nuisance and for damages. The complaint alleges as the first cause of action, in substance, that plaintiff is the owner of certain lots in blocks 27 and 30, in the town of Sisson, in Siskiyou county, upon which there are valuable buildings, consisting of dwelling houses, barns, warehouses, and stores, and that defendant Rostel is the owner of lot 17 in block 26, in said town, which last-mentioned property is situated on the northwest corner of Walnut and Castle streets,—public highways; that defendants are erecting a large building on said lot 17, which is being so constructed that the second story thereof, at a height of about 12 feet from the ground, is being extended and projected over and into said Castle street, to a width of 10 feet, and for a length of 60 feet, so that to that extent it overhangs and protrudes into said public highway; and it is alleged in the sixth paragraph of said first count that said building "will constitute a nuisance to this plaintiff by greatly endangering his property and buildings hereinbefore described, and making them more liable to be destroyed by fire, and also by materially increasing the rate of insurance upon the same, and by materially damaging their market value," and, if allowed to be constructed as defendants now intend, will cause damage to plaintiff which cannot be estimated, etc. In the second count the same facts, except those alleged in said sixth paragraph, are reasserted, and alleged to constitute a public nuisance. The prayer is for an injunction, both prohibitory and mandatory, forbidding further construction, and requiring the removal of said building as to that portion which obstructs the street, and for damages and costs. Defendants demurred to the complaint, generally for want of facts, and specially that it does not show wherein plaintiff is injured in any manner different or greater than the general public. The demurrer was overruled, and the pro-



priety of this ruling constitutes the only question which we deem it essential to notice.

It may be inferred, although nowhere expressly so alleged, that the fact relied upon as constituting the nuisance and cause of injury to plaintiff, in the manner of constructing the obnoxious building, is its projection into and over the public highway, as described, since nothing else is alleged which may be regarded as in any way infringing upon plaintiff's rights. Anything which is an obstruction to a public street or highway constitutes a public nuisance. Pen. Code, § 370; *Taylor v. Reynolds*, 92 Cal. 573, 28 Pac. 688; *Marini v. Graham*, 67 Cal. 130, 7 Pac. 442; *Vanderhurst v. Tholcke*, 113 Cal. 147, 150, 45 Pac. 266. And a private individual cannot maintain an action to abate such a nuisance unless it be made to appear by proper averment that the plaintiff will suffer therefrom some injury in its nature special and peculiar to him, and different in kind from that to which the public is thereby subjected. Civ. Code, § 3493; *Lewiston Turnpike Co. v. Shasta & W. Wagon-Road Co.*, 41 Cal. 562; *Payne v. McKinley*, 54 Cal. 532; *McCloskey v. Kreling*, 76 Cal. 511, 18 Pac. 433; *Gardner v. Stroever*, 89 Cal. 26, 26 Pac. 618.

It is alleged that the construction of the building in the manner stated will endanger plaintiff's property by rendering it more liable to fire, by increasing the rate of insurance, and by depreciating its market value. Ordinarily, these are not elements of damage which give a right of action to the aggrieved party. They constitute a detriment, incident to the right of owning and enjoying property in a city or town, and for which there is no redress. *McCloskey v. Kreling*, supra; *Rhodes v. Dunbar*, 57 Pa. St. 274. But, assuming that the fact that the alleged endangering of plaintiff's property and injury thereto arising solely from the character of defendant's building as a public nuisance would give plaintiff a right of redress which the law does not otherwise afford (see *McCloskey v. Kreling*, supra), the complaint is nevertheless fatally defective, in that it wholly fails to show that other and adjacent property owners in the town will not suffer like detriment and injury with the plaintiff. It is true, the complaint does not allege in terms that there are such other property owners; but the pleading in this respect is to be construed most strongly against the pleader (*Lewiston Turnpike Co. v. Shasta & W. Wagon-Road Co.*, supra); and the designation of the premises as "in the town of Sisson" gives rise to the presumption that there are other inhabitants and owners of property therein. The term "town" implies and signifies an aggregation of inhabitants, and a collection of occupied dwellings and other buildings. *Klauber v. Higgins*, 117 Cal. 451, 460, 49 Pac. 466; *Webst. Dict.* definition of word "Town." Moreover, if there were no other inhabitants of the town so situated

as to be injured by the alleged nuisance, the complaint should in some form affirmatively disclose that fact, since it was essential that it show special injury to the plaintiff. So far as the averments of the complaint are concerned, they do not even show that plaintiff's property is situated next adjacent to that of defendant, nor in its immediate vicinity. For all that appears, it may be widely separated therefrom by the intervening property of others. Aside from the fact that they are alleged to be in the same town, the relative situation of the buildings of plaintiff and that of defendant cannot be determined from the complaint. The lots of plaintiff are alleged to be in blocks 27 and 30, and that of defendant in block 26, "as designated on the Pacific Improvement Company map of said town"; but no such map is made a part of the complaint, nor does it appear where it can be found, and the reference is therefore meaningless as indicating the relative location thereon of said designated blocks, except by mere inference to be deduced from their respective numbers. The complaint therefore fails to state facts from which the conclusion could be drawn that plaintiff will be in any way specially damaged; and, as this was essential to authorize plaintiff to maintain the action, the demurrer should have been sustained. Judgment and order reversed.

We concur: HARRISON, J.; GAROUTTE, J.

121 Cal. 515

FERNANDEZ v. TORMEY et al. (S. F. 858.)

(Supreme Court of California. July 23, 1898.)  
PLEDGES—WHAT ARE—NEGLIGENCE OF PLEDGEE—  
CONVERSION—PLEADING—MORT-  
GAGES—CONSTRUCTION.

1. Mortgagee was accommodation co-maker with the mortgagor on two notes to a bank. A stock-yard company was indebted to the mortgagee in a large sum, evidenced by notes of third persons and a mortgage and contract incident thereto. These securities were assigned to another third person as a pledge holder, to secure said accommodation notes. Mortgagor then executed the mortgage in question to secure his note to the mortgagee, and to secure his said co-maker "against any loss which he may ever sustain by reason of the assignment" of the stock-yard securities, and to "indemnify" him "from any loss by reason of the execution" of the two notes to the bank; and it was further stated that the assignment was by way of security for a third note made by the mortgagor to one S. It was read to the mortgagor, who made no objection. Afterwards a suit by the aforesaid assignee was brought to foreclose the stock-yard mortgage, and this mortgagee was made a defendant, but no personal judgment sought, and the suit not prosecuted, and the stock-yard company shortly became insolvent. The mortgagee paid one of the two notes to the bank, and half of the other. It did not appear that the note to S. was due. The stock-yard securities had meanwhile greatly depreciated in value, and the mortgagor tendered a reassignment of

them, a cancellation of the instruments on which mortgagee was jointly indebted, and payment of the sums paid thereon, with interest and counsel fees. *Held*, that the assignment was a pledge, which did not divest the title of the mortgagee; and hence he did not sustain loss thereby.

2. Where a mortgage was given solely to indemnify the mortgagee from loss as security for the mortgagor's obligations, the circumstance that the mortgage note was absolute in terms is unimportant; and recovery is restricted to the amount actually paid and loss actually sustained, with interest and counsel fees to the time a tender was made.

3. It is not a conversion or a divesting of the pledgor's title in mortgage securities for the pledgee to institute suit to collect same.

4. Where a mortgage was given to indemnify their owner against loss resulting from the pledge of certain securities, the fact that they depreciated in value, and the obligors became insolvent, and the assumed fact that the delay of the pledgee to protect such securities by suit caused the loss, in the absence of allegation or proof that such resulted from the giving of the pledge, does not charge the mortgagor with the loss.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; Joseph P. Jones, Judge.

Suit by Bernardo Fernandez against Patrick Tormey and others. From a decree for plaintiff, and from an order denying a new trial, defendants appealed. Reversed.

Stanley, Hayes & Bradley and F. W. Hall, for appellants. Gunnison, Booth & Bartnett and W. O. Tinning, for respondent.

BRITT, C. Suit to foreclose a mortgage executed to Bernardo Fernandez, the plaintiff, by defendant Patrick Tormey, on August 23, 1893. At that time, the Union Stock-Yard Company of San Francisco, a corporation, was indebted to Fernandez in the sum of \$50,742.12, to fall due, with accruing interest, on August 23, 1893, which indebtedness was evidenced by the promissory note of a certain third person, a mortgage of lands securing the same, and a contract in writing whereby said corporation had assumed and agreed to pay the amount unpaid on said note to Fernandez, and he had released the original maker thereof from personal liability thereon. Said Tormey, having occasion to raise a considerable sum of money, borrowed \$45,135.60 from one John A. Stanly, and \$16,000 from the Commercial Bank of Vallejo. On said August 23, 1893, the following transactions occurred at the office of said Stanly: Tormey and Fernandez (the latter acting for the accommodation of the former) executed two joint notes, for the sum of \$8,000 each, to the said Commercial Bank, payable, with interest, one year from date, and, to secure one of them, Fernandez made to the bank a mortgage of land owned by him; as security for the other, Fernandez and Tormey made a mortgage to the bank of lands owned by them as tenants in common. Tormey executed his note to Stanly for said sum of \$45,135.60; and Fernandez made to one Henry Rogers a formal written assignment of the aforesaid note, mortgage, and contract of the

stock-yard company, he being informed that Rogers took the same as pledge holder to secure the said note of Tormey to Stanly. Tormey also deposited with Rogers, for the same purpose, other evidences of debt to a large amount. At the same time and place, Tormey made to Fernandez the note and mortgage on which the latter sues in this action. It is first stated in this mortgage that for the purpose of securing payment of a promissory note dated August 23, 1893, copied at length, by which in terms Tormey promised to pay Fernandez the sum of \$62,742.12 on or before two years after date, with interest, etc., the mortgagor mortgages to the mortgagee certain described tracts of land. It is then provided that "this mortgage and the note secured hereby are given to secure the said Fernandez against any loss which he may ever sustain by reason of the transfer and assignment by him to Henry Rogers of" the aforesaid obligations of the stock-yard company, particularly described; also "to indemnify and save the said Fernandez harmless from any loss or liability which he may ever sustain by or on account of the execution by him" of said notes and accompanying mortgages for \$16,000 to the Commercial Bank. It was further stated in the mortgage that said assignment to Rogers was given as security for the payment of Tormey's note to Stanly, and that said notes to the Commercial Bank were given for money advanced by the bank to Tormey. The mortgage was read to Fernandez, and he made no objection to any of its provisions. On June 24, 1895, Rogers instituted an action in the proper court to foreclose the said mortgage of the Union Stock-Yard Company. Fernandez was joined with the company as a defendant, but no personal judgment was asked against him (*Haber v. Brown*, 101 Cal. 446, 35 Pac. 1035); and no steps seem to have been taken in that action beyond filing a complaint. On June 27, 1895, said stock-yard company, on its own petition in insolvency, was adjudged an insolvent debtor. On November 19, 1895, Fernandez paid to the Commercial Bank \$12,400, satisfying the amount due on the mortgage he had made to the bank for Tormey's accommodation on land owned by himself in severalty, and paying also one-half the amount due on the mortgage which covered land held by himself and Tormey in common. It does not appear whether Tormey's note to Stanly is yet due. November 20, 1895, Fernandez commenced this action. After trial the court found as facts, among other things, that by the assignment of August 23, 1893, the plaintiff conveyed and transferred to Rogers all his right and interest in and to said obligations of the stock-yard company, and that, in consequence thereof, plaintiff has sustained a loss of \$50,742.12, the value of those securities at the date of the assignment, together with interest from that date; that, after the commencement of this action, Tormey tendered to plaintiff repayment of the sums plaintiff had paid to the Commercial Bank, and inter-



est thereon, together with the note duly canceled and certificate of satisfaction of the mortgage to said bank which plaintiff had discharged in part only, also a reassignment by Rogers to plaintiff of the said obligations of the stock-yard company, etc., and offered to pay plaintiff's expenses of the action, including such reasonable counsel fee as the court might fix, which tender was followed by deposit in court of the money and instruments tendered. The court further found that the value of said stock-yard company securities, after they were assigned to Rogers by plaintiff, depreciated from 20 to 33 per cent., and that said tender included nothing on that account. From these and other findings the court concluded that Tormey is indebted to plaintiff on the note and mortgage in suit to the full amount of the principal thereof, \$62,742.12, and a further sum of \$10,176.41 for interest thereon; and for these sums, with counsel fees, etc., a decree of foreclosure was rendered.

On appeal defendants raise no question as to the right of plaintiff to sue for the enforcement of the mortgage to the extent necessary to reimburse him for the money he paid to the Commercial Bank, with interest and expenses; nor does plaintiff dispute that Tormey's tender after suit brought covered all the detriment he sustained in that behalf. The principal contest in this court relates to the effect and consequences of plaintiff's assignment to Rogers of the stock-yard company's paper. The express purpose of the mortgage in suit is security to plaintiff against "loss which he may ever sustain" on that account; hence, it was essential that he should have sustained actual loss, as distinguished from liability thereto, resulting proximately from said assignment, in order to vest him with any right of action on that branch of the mortgage. Civ. Code, § 2778, subd. 2; *Oaks v. Scheifferly*, 74 Cal. 478, 16 Pac. 252; *Elder v. Kutner*, 97 Cal. 490, 32 Pac. 563; *Ide v. Spencer*, 50 Vt. 293; *Shepard v. Shepard*, 6 Conn. 37. It is the main proposition of plaintiff, as we understand the argument of his learned counsel, with which the findings of the trial court seem to be in accord, that, by the immediate effect of said assignment, plaintiff lost the securities which were the subject thereof, and that the mortgage here sued on was intended to secure to him absolutely payment for the same at the price of \$50,742.12, the amount unpaid thereon on August 23, 1893. Plaintiff testified at the trial to some parol negotiations had with him by Tormey, prior to the date just mentioned, which testimony, although neither clear nor very convincing, may yet perhaps, if it could be considered, tend to sustain such contention.

The case, however, cannot be reconciled with that view. Nothing can be clearer on the evidence than that Rogers, on his part, took the obligations assigned to him by plaintiff to hold in pledge for the payment of Tormey's note to Stanly. We may concede, as

counsel insist, that the statement in the mortgage to that effect does not estop plaintiff (*Osborne v. Endicott*, 6 Cal. 149); but the statement harmonizes with all the parol evidence of the occurrences at the time of the assignment, and its correctness, as concerns Rogers and Stanly at least, must be said to have been established without conflict. It, of course, follows that plaintiff was not divested of his title in the assigned securities by force merely of the assignment. Civ. Code, §§ 2888, 2986. Now, it may be admitted that there might have been such a contract between plaintiff and Tormey that, as to them, the assignment to Rogers would be held equivalent to an outright sale of the stock-yard company securities, Tormey becoming responsible to plaintiff for the purchase price. But security for any such responsibility is not included within the terms of the mortgage, interpreted in the light of attending circumstances. The provision that "this mortgage and the note secured hereby are given to secure the said Fernandez against any loss which he may ever sustain by reason of the transfer and assignment by him to Henry Rogers" of the stock-yard company's obligations is of the essence of the contract, and estops both parties. Its natural import is indemnity against loss contingent, and not yet accrued. That such agreements shall have a prospective operation, when a different intent is not expressed, is the rule of law concerning their interpretation. *Warwick v. Hutchinson*, 45 N. J. Law, 61. It is beyond peradventure that the mortgage provides for indemnity only as it relates to the hypothecation of plaintiff's property and credit to the Commercial Bank, and it is reasonable to suppose that, if any different purpose had been intended as regards his property assigned to Rogers, such different purpose would have been made clear; *noscitur a sociis*. Plaintiff can enforce the mortgage only to accomplish the object for which it was made. So far as the matter under view is concerned, such object appears plainly from the terms employed, understood in connection with the concurrent fact that Rogers held the assigned obligations in pledge, to have been indemnity against the consequences of such pledge, and not security for some other and different engagement of Tormey with plaintiff resting in parol. Code Civ. Proc. § 1856. The circumstance that the mortgage note was absolute in its terms is unimportant. *Vogan v. Caminetti*, 65 Cal. 438, 4 Pac. 435. Hence, for any purpose of the mortgage, plaintiff must be regarded as a pledgor of the evidences of debt he delivered to Rogers. As a pledgor, he did not part with his interest therein, and the findings that he did, and so sustained loss to the amount of the value thereof, are contrary to the evidence.

Regarding plaintiff's further insistence that the action of Rogers in suing on the pledged securities was an application of the same on the debt of Tormey to Stanly, and, virtually, a conversion of the same, we observe that,

as pledge holder, it was Rogers' right to collect the money which became due on such securities, and his suit for that purpose was not a conversion of them. Civ. Code, §§ 2996, 3006; *McArthur v. Magee*, 114 Cal. 126, 45 Pac. 1068.

Loss to plaintiff is also said to have accrued from the facts in evidence that, subsequently to the assignment to Rogers, the stock-yard company was adjudged insolvent, the land on which its debt to plaintiff was secured depreciated in market value, and the further fact assumed (whether with or without proof we need not decide) that the statutory recourse for such debt against the stockholders of said company was lost by delay of Rogers to sue thereon. There was, however, no evidence that the mere fact of decline in market value of the incumbered land was in any degree attributable to the said assignment. So far as appears, the decline would have been the same had the assignment not been made. The indefinite finding of depreciation in that behalf "from twenty to thirty-three per cent." evidently had reference only to the sufficiency of the plea of tender, and was not designed as the basis of any part of the affirmative judgment for plaintiff. As to the asserted consequences of neglect of Rogers to proceed against the stock-yard company or its stockholders, there was neither allegation in the complaint, nor finding by the court, of such neglect or of loss for that reason. On the contrary, it was a postulate of both the complaint and the findings that, if the assignment itself by plaintiff to Rogers did not deprive the former of his property in the securities, yet such result followed when Rogers at length sued on the same, and that his action was to that extent wrongful. Plaintiff could not recover for loss caused by Rogers' failure to sue earlier without alleging and proving it. *Thomas v. Davis* (Tex. Civ. App.) 39 S. W. 579. See *Northwestern Nat. Bank of Aberdeen v. J. Thompson & Sons Mfg. Co.*, 17 C. C. A. 638, 71 Fed. 113; *Sampson v. Fox*, 109 Ala. 662, 19 South. 896. Upon the record before us, plaintiff was entitled to no recovery beyond the sums of money tendered to him by Tormey after suit brought, together with reasonable attorneys' fees to the time of tender. The judgment and order denying a new trial should be reversed.

We concur: BELCHER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

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## MEMORANDUM DECISIONS.

**CHURCH et al. v. McCABE.** (S. F. 1,341.) (Supreme Court of California. June 10, 1898.) Department 1. Action by J. S. Church and others against Ulty McCabe, special administrator. Judgment for plaintiffs, and defendant appeals. Dismissed.

**PER CURIAM.** After this motion to dismiss the appeal was submitted, another motion for its dismissal was made and granted upon the ground that the appellant had failed to file the transcript within the time prescribed by the rules of this court. That order has accomplished the purpose of the present motion, and the motion is therefore dismissed.

**COLUSA COUNTY v. SEUBE.** (Sac. 274.) (Supreme Court of California. June 27, 1898.) In bank. Appeal from superior court, Colusa county; E. A. Bridgford, Judge. Action by Colusa county against B. Seube. There was a judgment for plaintiff, and defendant appealed. Affirmed. For decision in department, see 53 Pac. 654. W. G. Dyas and B. F. Howard, for appellant. Ernest Weyand, for respondent.

**PER CURIAM.** The only question involved in this appeal is as to the validity of an ordinance of the board of supervisors of Colusa county regulating and licensing the sale of intoxicating liquors within that county. The same ordinance was involved and under consideration in *Ex parte Seube*, 115 Cal. 629, 47 Pac. 596, where it was held to be one within the power of the board to enact, and valid; and upon the authority of that case the judgment herein appealed from must be affirmed. It is so ordered.

**DE LONG v. STATE.** (Sac. 278.) (Supreme Court of California. May 31, 1898.) Department 1. Appeal from superior court, Sacramento county; J. E. Prewett, Judge. Action by Tully P. De Long, by Rachel M. Wright, his guardian, against the state of California. From an order granting the motion of defendant for a new trial, plaintiff appeals. Affirmed. White, Hughes & Seymour, for appellant. Wm. F. Fitzgerald, Atty. Gen., for the State.

**PER CURIAM.** This is an appeal by the plaintiff from an order granting a motion of defendant for a new trial. The case is founded upon the same accident, is based upon like facts, involves the same questions, and is subject to the same principles with that of *Melvin v. State* (Sac. 287; this day decided) 53 Pac. 416. For the reasons given in the opinion in that case the order here appealed from is affirmed.

**In re DISBARMENT OF COFFEY.** (Supreme Court of California. June 7, 1898.) In bank. In the matter of the disbarment of John J. Coffey. Rule to show cause.

**PER CURIAM.** A certified copy of a judgment convicting John J. Coffey of a misdemeanor involving moral turpitude, to wit, attempt to extort money by means of a verbal threat, having been filed in this court, it is hereby ordered that the said John J. Coffey be and appear before the supreme court, sitting in bank, at the city of San Francisco, on Tuesday, the 5th day of July, 1898, to show cause, if any he can, why he should not be expelled

from the bar. It is ordered that a copy of said citation and of said judgment be served upon the said John J. Coffey, by the bailiff of this court, 10 days prior to the hearing.

**In re HALE'S ESTATE.** (S. F. 1,051.) (Supreme Court of California. June 2, 1898.) Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge. In the matter of the estate of Joseph P. Hale, deceased, an appeal was taken from an order of partial distribution. Reversed. Alexander D. Keyes and Galpin & Ziegler, for appellant. M. Cooney, for respondent.

**PER CURIAM.** This appeal involves an order of partial distribution made upon the same evidence, and similar in all material respects, to that considered in *Re Hale's Estate* (S. F. 935; this day decided) 53 Pac. 429; and upon the authority of that case the order herein is reversed.

**MEYER v. CITY OF SAN DIEGO et al.** (CAPRON et al., Interveners. L. A. 333, 373.) (Supreme Court of California. May 31, 1898.) In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge. Actions by Albert Meyer against the city of San Diego and others, and the San Diego Water Company against the city of San Diego and others. The actions were consolidated, and from the judgment R. Niccolls and others and the San Diego Water Company appeal. Reversed. Works & Lee, Works & Works, and L. L. Boone, for appellants. W. H. Fuller, Gibson & Titus, and H. E. Doolittle, for respondents.

**PER CURIAM.** These are appeals in the consolidated action brought to enjoin the issuance of certain municipal bonds of the city of San Diego, and to annul a contract which had been entered into by the city with the Southern California Mountain Water Company, a corporation. It has been this day decided, in *Meyer v. City of San Diego* (L. A. 331) 53 Pac. 434, that the trial judge was disqualified by interest, and that the motion made for a change of venue should have been granted; and the order denying a change of venue was therefore reversed. It may be regretted that the expense and labor necessarily incurred in the preparation and presentation of these appeals should thus be wasted; but as, under the circumstances, the judgment rendered is of no force or validity, the questions cannot be considered upon their merits, and naught remains but to reverse the judgment. The judgment and order are reversed, and the cause remanded.

**PEOPLE v. CARCOPO.** (Cr. 363.) (Supreme Court of California. July 25, 1898.) Department 2. Appeal from superior court, Alameda county. Appeal by the people from an order dismissing an information charging Anthony Carcopo with an assault with a deadly weapon. Affirmed. Atty. Gen. Fitzgerald, for the People. James A. Devoto, for respondent.

**TEMPLE, J.** This is an appeal taken by the attorney general from an order dismissing an information charging the respondent with an assault with a deadly weapon. The information was based upon a commitment made by one W. H. H. Gentry, Esq., who claimed to be a justice of the peace in and for the town of



Berkeley. At the proper time the defendant moved the court for a dismissal upon the grounds: (1) The pretended court before which the pretended preliminary examination was held had no legal existence; (2) that W. H. H. Gentry, who assumed to act as justice of the peace, and as such held the examination and made the pretended commitment, was neither *de jure* nor *de facto* a justice of the peace, judge, or magistrate; and (3) the defendant has never been legally committed by a magistrate. These points are all in reality the same, and have been fully considered and decided in the very recent case of *Miner v. Justice Court* (Cal.) 53 Pac. 795. Upon the authority of that case, the order is affirmed.

I concur: HENSHAW, J.

McFARLAND, J. I concur solely upon the authority of *Miner v. Justice Court*, supra. I dissented in that case, but it must now be taken as declaring the law on the question there involved.

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SAN DIEGO WATER CO. v. CITY OF SAN DIEGO et al. (L. A. 326.) (Supreme Court of California. May 31, 1898.) In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge. Action by the San Diego Water Company against the city of San Diego and another. From an order refusing a change of venue, plaintiff appeals. Reversed. Works & Works and Trippet & Neale, for appellant. Gibson & Titus and H. E. Doolittle, for respondents.

PER CURIAM. This is an appeal from the same order refusing to grant a change of venue which has been considered and disposed of in the decision this day rendered in *Meyer v. City of San Diego* (L. A. 331) 53 Pac. 434. For the reasons therein given the order is reversed.

SAN FRANCISCO SAV. UNION v. RAY et al. (Sac. 252.) (Supreme Court of California. July 2, 1898.) In bank. Appeal from superior court, Tulare county. Action by the San Francisco Savings Union against T. J. Ray and others. Judgment for plaintiff, and T. J. Ray appeals. Affirmed. Lamberson & Middlecoff, for appellant. Bradley & Farnsworth, for respondent.

PER CURIAM. Upon the authority of the decision in *Bank v. Alcorn* (Sac. 332) 53 Pac. 813, the judgment and order appealed from are affirmed. BEATTY, C. J., did not participate in the foregoing.

STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS v. HAMBURG-MAGDEBURG FIRE INS. CO. (Sac. 259.) (Supreme Court of California. June 10, 1898.) Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge. Action by the Stockton Combined Harvester & Agricultural Works against the Hamburg-Magdeburg Fire Insurance Company. Judgment for plaintiff. Defendant appeals. Affirmed. Van Ness & Redman, for appellant. Nicol & Orr and J. C. Campbell, for respondent.

CHIPMAN, C. This case is submitted on the same brief and record as Sac. 262 (*Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co.*, 53 Pac. 565). On the authority of the decision in that case, the judgment and order in this case should be affirmed. We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS v. HARTFORD FIRE INS. CO. (Sac. 261.) (Supreme Court of California. June 10, 1898.) Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county; Ansel Smith, Judge. Action by the Stockton Combined Harvester & Agricultural Works against the Hartford Fire Insurance Company. Judgment for plaintiff. Defendant appeals. Affirmed. Van Ness & Redman, for appellant. Nicol & Orr and J. C. Campbell, for respondent.

CHIPMAN, C. It is stated in appellant's brief that the record in this case is identical with that in *Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co.* (Sac. 262) 53 Pac. 565, and is submitted on the briefs in that case filed. Upon the authority of the decision rendered in the latter case the judgment and order in this case should be affirmed. We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

WOODBURY v. NEVADA SOUTHERN RY. CO. (L. A. 243.) (Supreme Court of California. June 7, 1898.) Department 1. Action by R. W. Woodbury against the Nevada Southern Railway Company. Judgment for plaintiff. Defendant appeals. Dismissed.

PER CURIAM. The above named parties having filed a stipulation herein that the appeal taken from the judgment rendered in the action by the superior court of the county of San Bernardino may be dismissed at the cost of the appellant, it is now ordered that the said appeal be dismissed, and that the respondent recover of the appellant the costs incurred by him upon said appeal.











# CALIFORNIA REPORTER

54 PACIFIC REPORTER





(121 Cal. 662)

**NORTH FORK WATER CO. v. EDWARDS**  
et al. (L. A. 434.)<sup>1</sup>

(Supreme Court of California. Aug. 13, 1898.)

**WATERS—ARTIFICIAL DITCHES—EASEMENTS—PRESCRIPTION—SURFACE WATER.**

Plaintiff was the owner of an open cement and stone ditch, built for carrying water used for domestic and other purposes. Its easement was based on prescription. The ditch was constructed along a hillside, and defendants' land extended to its center. The ditch received the wash of the hillside, and carried away the water and debris. Defendants, at great expense, graded and planted their land in trees to within 10 feet of the ditch, relying on the surface water being collected therein and carried away. The hillside under cultivation and the amount of debris washed into the ditch being increased, plaintiff constructed aprons for carrying same across the ditch upon defendants' lands. The flow of this volume of water worked an injury to defendants, and thereupon they built dams on their land, which caused the water to flow back into the ditch. It did not appear that plaintiff could not dispose of the water in some other way. *Held*, that defendants would not be enjoined from maintaining the dams, since the aprons were a burden not contemplated when the easement was acquired.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Bill by the North Fork Water Company against J. S. Edwards, B. F. Edwards, and Eva Edwards, for an injunction. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

Otis, Gregg & Hall, for appellant. C. C. Haskell and Rolfe & Rolfe, for respondents.

CHIPMAN, C. Plaintiff is the owner of a ditch used to convey water to a large number of families, and to the inmates of the Southern California Insane Asylum, for domestic and other uses. The course of the ditch at the point in question was along a hillside, and above the ditch the lands were uncultivated, and not owned by defendants. Below the ditch, and extending to its center, are defendants' lands. Plaintiff acquired a right of way or easement over defendants' lands by prescription. When the ditch was first dug, it followed generally the contours of the land.

There were two depressions running down the hillside to defendants' lands. A short flume carried the water of the ditch across one of these depressions originally. At the other the ditch was built on the ground. These depressions were slight, but formed drains for the land above the ditch, and led into, and some little distance over, defendants' land, where they spread out and disappeared as distinct channels. The ditch was reconstructed later,—about eight years before the action was commenced,—and was converted into an open cement and stone walled ditch, and was built upon the ground at the depressions referred to, leaving no passageway for storm waters to pass beyond it. The flume mentioned was dispensed with. The ditch received the storm water, and prevented it from flowing onto defendants' land. Defendants thereupon graded and leveled their lands at considerable cost, filling up these depressions, and planted the lands to fruit trees up to within 10 feet of the ditch. The easement acquired by plaintiff dates from the construction of this cemented ditch. Plaintiff never exercised or claimed the right to construct aprons at these points, and pass the storm water over the ditch onto defendants' land, until 1895, but up to that time always received this water in its ditch, with such sand and other debris as it might carry. In the spring of 1895 the land above the ditch along these depressions, owned by other persons, was cleared and planted to fruit trees; and the cultivation of the soil caused additional sand and detritus to flow into the ditch, to the injury of plaintiff and the quality of the water, to avoid which two aprons were constructed in December, 1895, to carry the storm water over the ditch at these depressions, and discharge it upon defendants' lands. It appeared that the water conveyed to consumers was injured in quality more than it had been hitherto, although it appeared that the water was always more or less muddy just after storms, and that at many places along the ditch plaintiff had diverted the surface waters at similar depressions into its ditch. The evidence was that defendants would be materially injured by the flow of storm waters across these aprons, as constructed, and that the water would form new and different channels from the depressions formerly existing. One of these aprons was 110 feet wide, and the other 80 feet wide; and the necessity for resorting to them grew out of the cultivation of the lands above the ditch, and not by any act of defendants. It was found by the court that the aprons "are in all respects a suitable and proper appliance for so conducting said storm and other waters for the protection of said ditch." It was also found that the consumers of water had no other adequate supply than by means of this ditch. It was not found, and did not appear, that plaintiff could not divert these storm waters in some way other than by the aprons. Defendants constructed dams below these

<sup>1</sup> Rehearing denied September 12, 1898.

aprons to turn back the overflow, and compel it to enter the ditch as before. The action was to restrain defendants from maintaining these dams. The only question discussed is, has plaintiff the right to maintain the aprons? It seems to be conceded that, if plaintiff has no such right, then the dams are rightfully erected, and, if it has such right, they should be removed.

It seems to me that the right of way here, so far as defendants' servient estate is affected by it, must be regarded as a right only to build a ditch by closing the depressions, as was done, and receiving the surface water formerly flowing down these depressions into the ditch, and conveying it by means of the ditch alone and away from defendants' land. Defendants had a right to assume that plaintiff would continue to use the ditch in the manner it had used it in acquiring the right; and they had the right to grade their lands, and fill up the depressions, and plant trees, upon the assumption that plaintiff would continue to provide for the surface storm waters. The case stands precisely as though no depressions or drainage channels ever existed over defendants' lands. If plaintiff had constructed aprons at the beginning of its use, and had discharged the water, as it is now proposed to do, upon defendants' land, or had built culverts to carry the water under the ditch, the easement would clearly now include such right; but no such privilege was exercised or claimed. It may be that the acquiescence of defendants in the occupation by plaintiff was partly due to the benefit derived from damming these depressions, and stopping the flow of water over defendants' land; and the court found, upon sufficient evidence, that defendants, at great cost, graded and planted their lands, "relying upon the surface water flowing above said ditch being collected therein, and thereby carried off, and prevented from flowing on their said lands." The necessity for these aprons is of recent origin, in no wise connected with the origin of the easement. Until this necessity arose, there was no occasion for using aprons at this point. Every easement includes what are termed "secondary easements"; that is, the right to do such things as are necessary for the full enjoyment of the easement itself. But this right is limited, and must be exercised in such reasonable manner as not to injuriously increase the burden upon the servient tenement. The burden of the dominant tenement cannot be enlarged to the manifest injury of the servient estate by any alteration in the mode of enjoying the former. The owner cannot commit a trespass upon the servient tenement beyond the limits fixed by the grant or use. Rights by prescription are *stricti juris*, and should not be extended beyond the user. Doubtless the right to make repairs is incident to the right of way acquired by plaintiff and would be implied, even though it is a prescriptive right, but

we do not think the building of these aprons can be said to come under the denomination of "repairs." They were in the nature of changes in the mode of enjoyment, and, while they might be made if not harmful to the servient estate, they cannot be made to its material injury. The necessity for them arises from the rightful use of the lands above the ditch. It is a condition which should have been provided for when the way was being acquired. The character and extent of a way claimed by prescription are fixed and determined by the user under which it is gained. Washb. Easem. p. 135. It was held in *Capers v. McKee*, 1 Strob. 164, that the owner by prescription of a private way over another's land has no right to cut ditches for the improvement of his way without the consent of the owner of the soil, unless he has acquired such right, also, by prescriptive use. And, where a grant is presumed from the use, then the use must define the extent of what is presumed to have been granted. Jones, Easem. §§ 818, 819.

Appellant quotes from *Ware v. Walker*, 70 Cal. 591, 12 Pac. 477: "Where the use of a thing is granted, everything is granted essential to such use. Such a right carries with it an implied authority to do all that is necessary to secure the enjoyment of such easement." Gale & W. Easem. (Am. Ed.) 231, 232, is cited in support of this statement of the law. It is obvious that as a rule of universal application the quoted paragraph is too broadly stated; and the context shows that it was not intended to apply to all cases, but to the case then in hand, which was the exercise of the right in a reasonable manner, and without damage to defendant, namely, removing deposits in the bed of the stream which obstructed the flow of water to plaintiff's ditch. Appellant cites *Burris v. Ditch Co.*, 104 Cal. 248, 37 Pac. 922; *Joseph v. Ager*, 108 Cal. 517, 41 Pac. 422; *Jacob v. Day*, 111 Cal. 571, 44 Pac. 243. In the case of 104 Cal., 37 Pac., the right was upheld to clean out a ditch to make it uniform, and without increasing the flow of water, and without damage to plaintiff's lands, or increase of the burden upon them. The case in 108 Cal., 41 Pac., by no means supports appellant's contention, but quite to the contrary. Quoting from Gale & W. Easem. 237, it was said: "As every easement is a restriction upon the right of property of the owner of the servient tenement, no alteration can be made in the mode of enjoyment by the owner of the dominant heritage, the effect of which will be to increase such restriction. Supposing no express grant exist, the right must be limited by the amount of enjoyment proved to have been had." The rule was stated in 111 Cal., 44 Pac., to be that, while the owners of a ditch "have a right to operate their ditch, they have no right so to operate it as to render it a nuisance to, or destructive of, the servient tenement." We discover no error in the rulings of the court at the trial,



and, as we think the judgment and order were correct, they should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(121 Cal. 533)

SMITH v. THOMAS. (Sac. 362.)

(Supreme Court of California. July 26, 1898.)

ELECTIONS—BALLOTS—CONTEST—LIST OF DIS-  
PUTED VOTES—EVIDENCE—WITNESSES—  
RESIDENCE OF VOTER.

1. Where a ballot was found at the recount to be so marked that it could be identified, and there was some evidence that the mark was not on the vote when first taken from the box, the court's finding that it was made subsequently was warranted.

2. Under Code Civ. Proc. § 1116, requiring the contestant of an election canvass to serve a list of alleged illegal votes on defendant, evidence offered by contestant to prove the illegality of a vote not so specified was properly excluded, though it was named on a similar list served on contestant by contestee.

3. Testimony at a recount that one not a legal voter stated to witnesses that he did not vote, and for certain reasons would not vote, for defendant, is admissible to impeach his testimony that he did so vote.

4. In an election contest, clear evidence must be furnished as to how an illegal voter cast his ballot, before his vote can be deducted from the total of contestee.

5. A vote was not necessarily illegal on account of nonresidence of the voter, where he testified that he was often absent from the town, performing different jobs, but that he always left with the intention of returning when his work was done.

In bank. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by M. W. Smith against J. W. Thomas. From judgment for defendant, plaintiff appeals. Affirmed.

Power & Alford and Hannah & Miller, for appellant. Chas. G. Lamberson and W. B. Wallace, for respondent.

TEMPLE, J. This is an election contest involving the right to the office of supervisor in district No. 3, county of Tulare. Defendant was declared elected by the board of canvassers. At the trial the court found that each received the same number of legal votes, and, as a conclusion of law, that plaintiff take nothing by the action.

1. The first point made upon the appeal is that a certain ballot which had been counted for the defendant is illegal, because it was marked so that it could be identified. There clearly was such a mark upon the ballot, and, if it was upon the ballot when voted, it should be rejected. The court found that the mark was not upon the ticket when taken from the box, but was made subsequently. There was some evidence to sustain this finding, although apparently the preponderance was the other way. After the preliminary showing as to the custody of

the ballots since the election, there was also a strong presumption that the ballots were in the same condition in which they were when first taken from the box; that is, that the marks were made by the voter. Still, we cannot say that there was not a substantial conflict in the evidence. Two witnesses testified that they scrutinized the ballots closely as they were first counted, and would have seen the mark had it been there. They saw no such mark.

2. The plaintiff offered to prove an illegal vote which was not specified in the list of illegal votes served by him on the defendant, as required by section 1116 of the Code of Civil Procedure. The evidence was upon objection excluded. Although not on plaintiff's list, the voter's name was on a list served on the plaintiff by the defendant; and appellant now contends that defendant must therefore have known of the illegality of the vote, and the purpose of the statute requiring a notice has been accomplished. But the purpose of the statute had not been accomplished. It was intended that the opposite party should know what votes the contestant would attempt to show were illegal, in order that he might come prepared with evidence upon that subject. If he had learned that the voter named had voted for him or was a legal voter, and for either reason did not prepare proof upon the subject, such evidence would be as unfair as though the voter had never been named. He was not apprised that the contestant would rely upon the illegality of that vote.

3. One Stingley was called for plaintiff, and testified that he voted for the defendant. Although the court held that Stingley was not a legal voter, it refused to deduct the vote from the tally of defendant. The reason given was that Stingley, as a witness, was so thoroughly impeached that he could not be believed, and the court could not determine for whom he voted. The testimony consisted of proof by several witnesses that Stingley had stated to them that he did not vote for any one for supervisor, and for certain reasons would not vote for the defendant. As independent evidence, these statements were clearly incompetent, as was held in the recent case of Lauer v. Estes (Cal.) 53 Pac. 262. But it was here used for the purpose of impeachment, and may well have had the effect given it by the court. There was no evidence other than that of the impeached witness as to how he had voted.

4. One Crabtree, called as a witness, was asked for whom he had voted for supervisor. He declined to answer, and was then asked: "Without intimating whether or not you voted, did you have any preference for the office of supervisor of supervisor district No. 3 on or before the 3d day of November, 1896, and before the day the general election was held in this supervisor district?" An objection having been overruled, he answered: "On election day, if I had voted, I

suppose I would have voted for Mr. Thomas." He was then asked, if he had voted at all, would he have voted for supervisor, to which he replied: "I don't know but what I would." There was other evidence which tended to show that the witness had voted, and that he was not a legal voter. The court refused to deduct the vote from the tally of defendant, and perhaps in so doing was influenced to some extent by the testimony, improperly admitted, tending to show that the witness had said that he had voted for Smith. There was, however, no testimony as to how he voted except that above set out. I do not think it amounted to evidence. He thought when on the witness stand that he would have voted for Thomas if he had voted, and, if he had voted, he did not know but he would have voted for supervisor. The witness could not have been convicted of perjury for this testimony if it had been proven that he voted for Smith. He may have forgotten how he did in fact vote. At the general election there were many other offices to be filled. The requirement of secrecy is based upon the idea that voters may find it inconvenient to have it known for whom they voted,—may, in fact, be weak enough to desire to create the impression that they voted otherwise than as they did vote. They may not be willing to risk their political standing by openly voting independently. And I think results show that many do vote differently from their professions. Under such circumstances, I think very clear evidence should be furnished as to how one did vote before his vote can be deducted from the total of any candidate. The secret ballot brings many inconveniences, and we must take the bitter with the sweet.

5. We cannot disturb the finding as to the residence of George Phœbus. His evidence was to the effect that he was often absent from Visalia, performing different jobs of work, but that he always left with the intent of returning when his work was done. The evidence is somewhat equivocal, but I think the construction given it by the court was reasonable. The judgment is affirmed.

We concur: McFARLAND, J.; GAROUTTE, J.; HARRISON, J.; HENSHAW, J.; BEATTY, C. J.

(121 Cal. 574)

SHAEFFER v. LACY. (S. F. 1,052.)

(Supreme Court of California. Aug. 2, 1898.)

BAILMENTS—RIGHTS OF BAILOR AS TO THIRD PERSONS—TRIAL—FINDINGS—JUDGMENT—VACATION.

1. Civ. Code, § 2991, which provides that one who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it cannot set up his own title to defeat a bona fide pledgee, affords no protection to a pledgee of property received from one with whom it was left for safe-keeping.

2. The ownership of property left with another for safe-keeping is not changed by representations or acts of such bailee with reference

to the property, not brought to the owner's notice.

3. A finding of fact that property was left with another for safe-keeping is inconsistent with a conclusion of law that the bailee was thereby clothed with the apparent ownership of the same.

4. Where a conclusion of law is unsupported by the findings, a motion to vacate the judgment and enter a judgment to correspond with the findings is authorized, under Code Civ. Proc. § 663 (St. 1897, p. 58), which permits the court to amend and correct conclusions where a judgment is set aside because they are inconsistent with or unsupported by the findings.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Jessie Shaeffer against H. Lacy. From a judgment for defendant, and order denying a motion of plaintiff to set aside the judgment, and enter an unconditional judgment for plaintiff, on the ground that the conclusions of law were inconsistent with, and not supported by, the findings of fact, plaintiff appeals. Remanded, with directions to vacate judgment, correct conclusions of law, and enter judgment for plaintiff.

F. J. Castelhun, for appellant. W. T. Baggett, for respondent.

CHIPMAN, C. Action to recover the value of certain jewelry, to wit, a diamond stud, an opal stud set with diamonds, and a diamond ring. The pleadings are verified, and the answer is merely a specific denial of the allegations of the complaint. Judgment was given for the recovery of the possession of the property upon payment to defendant of \$349.74 and costs of action, \$21. Plaintiff moved to set aside the judgment, and to enter in lieu thereof an unconditional judgment in favor of plaintiff, on the ground that the conclusions of law were inconsistent with, and not supported by, the findings of fact. The motion was denied. The appeal is from the judgment, and from the order denying plaintiff's said motion, and comes here on bill of exceptions.

The court found that plaintiff was the owner of the jewelry, being of the kind worn by men, and of the value of \$400, and in 1890 "placed said property in the possession of one Dr. W. D. Johnson for safe-keeping." Said Johnson, while in possession of the property, in 1893, represented to defendant that he was the owner of the property, and borrowed from defendant \$200, giving his notes therefor, and as security for the loan, pledged with defendant the said property, without plaintiff's knowledge or consent. In the year 1894 plaintiff learned of this pledge; and in the year 1895 she demanded the return of the property from defendant, but he refused the return thereof, "and plaintiff took no further steps in the matter, except to request Dr. Johnson to return the jewelry, until after the death of said Johnson, in December, 1895. Defendant is in possession of the property, "holding the same as a pledge



to secure payment of said notes." "About March 1, 1894, defendant removed the opal from said opal stud set with diamonds, and sold the same for \$35, and applied the same on said notes." No part of the sum so borrowed has been repaid except said sum of thirty-five dollars, and the amount now due is \$349.74. On January 1, 1895, plaintiff demanded of defendant the said jewelry, which was refused.

As conclusions of law, the court found "that plaintiff, in delivering said property to said Johnson as aforesaid, clothed him with the apparent ownership of the same," and that "plaintiff is entitled to possession of the said jewelry upon the payment by her to said defendant" the amount due on said notes and costs of action. If the property belonged to plaintiff, and defendant refused on demand of plaintiff to surrender its possession to her, he thereby converted it, and this action in the form of trover was proper. Apparently, the court allowed defendant's claim against Johnson as a set-off to plaintiff's claim for the value of the property, and the judgment is for a return of the property upon payment of this set-off. In view of the pleadings and the fact that defendant converted the property, we cannot see upon what principle the court gave the judgment. We pass that question, however, to the more important one discussed in the briefs.

1. The finding is that the property belonged to plaintiff, and was delivered to Johnson for safe-keeping. The uncontradicted evidence of plaintiff was that she "delivered it to Dr. W. D. Johnson, and asked him to place it in his safe-deposit box." The defendant testified as follows: "I knew Dr. W. D. Johnson. On the 2d day of June, 1893, he called on me to borrow one hundred dollars. He offered as security the jewelry described in the complaint. He said it was his; that he had received it from Mrs. Shaefter, the plaintiff, for services rendered the Shaefter family. I lent him one hundred dollars on the jewelry, taking his note for the amount. The note bears interest at two per cent. a month. He had the ring on his finger and the stud in his shirt. The next day he called, and borrowed one hundred dollars additional, with the same security." Plaintiff testified in rebuttal that Dr. Johnson "had never rendered her family any services; that he might have rendered her husband's family services, but that she understood that he had been well paid for them." It is, I think, apparent from the findings of fact, that the court accepted the evidence of plaintiff; for the finding is unqualified that plaintiff placed the property in Johnson's hands for safe-keeping only. It must be held that the conclusion of law that "she clothed him with the apparent ownership of the same" is deduced from her evidence.

Section 2991, Civ. Code, provides as fol-

lows: "One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it cannot set up his own title to defeat a pledge of the property made by the other to a pledgee who received the property in good faith, in the ordinary course of business, and for value." The phrase "for the purpose of making any transfer of it," we think, must have been inserted as words of limitation upon the power to pledge by one having the "apparent ownership" of the property. The section would have a much broader meaning without than with these words. Formerly, a factor to whom goods were consigned for sale could not pledge them as against the consignor. *Wright v. Solomon*, 19 Cal. 64. Under this section, however, as it now reads, one who has allowed another to assume the apparent ownership of property for the purposes of sale or transfer cannot recover from the pledgee of such other person, if the pledgee receives the property in good faith, in the ordinary course of business, and for value. The rule of the Code permits the owner to show that the property was not intrusted to the bailee or person assuming ownership, for the purposes of sale, but for transportation or temporary custody and the like objects. And so we understand the note of the Code commissioners. Mr. Jones says: "Mere possession of a chattel is not title; and one taking a pledge of it is bound to satisfy himself that the pledgor is the owner; and, if he relies solely upon the pledgor's possession, he takes the risk of having to surrender the property to the true owner." The example of a chattel put in the hands of a mechanic for repairs is given, where by force of his possession, though lawful, he could not pledge the property. A case is cited by the author, which we have examined and find on all fours with the one at bar, holding that one who, having goods for safe-keeping, pledges them with intent to convert the proceeds to his own use, in effect commits larceny, and the pledgee acquires no title as against the owner, although he deals with the pledgor in good faith. *Jones, Pledges*, § 54, citing *Gottlieb v. Hartman*, 3 Colo. 53. In that case Mrs. Hartman deposited with one Morrison, the keeper of a restaurant, with whom she was staying, certain jewelry for safe-keeping. Morrison pledged the property with Gottlieb, a pawnbroker, to secure a loan of money. Mrs. Hartman sued Gottlieb in trover, and recovered judgment, and her action was sustained. Mr. Benjamin lays down the rule "that no man can sell goods and convey a valid title to them unless he be the owner, or lawfully represent the owner." *Benj. Sales*, § 6. And Mr. Edwards says: "As no one can convey the title to another's property without his consent, so it is quite clear that, as a rule, he cannot pledge it or incumber it without some authority." *Edw. Bailm.* § 192.

Respondent relies upon *McNeil v. Bank*, 46 N. Y. 325, approved in *Barstow v. Mining Co.*, 64 Cal. 388, 1 Pac. 349. In that case the plaintiff, being the owner of certain shares in a bank, had an account with certain stockbrokers relating to other stocks which they were carrying for him. To secure any balance which might be due on that account, plaintiff delivered the shares in dispute with a blank assignment and power of attorney to transfer them. These brokers pledged the shares without the knowledge of plaintiff, and without actual authority; and they came into the hands of defendants. The opinion is valuable for its review of the cases upon the point. It will suffice to quote briefly to show that the case in no sense supports respondent's contention, nor does it sustain the rule deduced from it by him. I quote: "Simply intrusting the possession of a chattel to another as depositary, pledgee, or bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property in case of an unauthorized disposition of it by the person so intrusted. *Ballard v. Burgett*, 40 N. Y. 314. 'The mere possession of chattels, by whatever means acquired, *if there be no other evidence of property or authority to sell from the true owner* [italics by the learned judge], will not enable the possessor to give a good title.' Per Denio, J., in *Covill v. Hill*, 4 Denio, 323. But if the owner intrusts to another, not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of unconditional power of disposition over it, the case is vastly different. There can be no occasion for the delivery of such documents, unless it is intended that they shall be used either at the pleasure of the depositary or under contingencies to arise."

The fact that Johnson represented that he owned the property cannot change the fact that he did not own it; and because he was seen wearing the jewelry by the pledgee at the time the latter took it cannot affect plaintiff's right to it any more than can the fact found that it was jewelry such as men wear. The broad fact stands out as found in this case that Johnson took the property for safe-keeping alone. There is no evidence that plaintiff knew he was representing it to be his own, or was wearing it, or exercising any ownership over it. Upon principle, we can see no difference between this case and that of the pledge or sale of stolen personal property; for, when Johnson pledged it, he converted it, and his pledge was the same as if he had stolen it, and then pledged it, in which case an innocent purchaser or pledgee would take no title. *Swim v. Wilson*, 90 Cal. 126, 27 Pac. 33. Nor can we see any distinction in principle between this case and that of *Robinson v. Haas*, 40 Cal. 474, which was the case of certain sheep intrusted to one Rood to be kept upon terms

agreed upon; or *Brewster v. Sime*, 42 Cal. 139, in which it was said: "The mere delivery of the possession of personal property does not, standing alone, constitute such an indicium of ownership as will bind the owner." See, also, *Lowe v. Woods*, 100 Cal. 408, 34 Pac. 959, and cases there referred to. We cannot discover upon what principle the trial court could reach the conclusion it did from the findings, nor can we find support for the judgment in the findings.

2. The plaintiff's motion to vacate the judgment and enter up a different judgment "upon findings of fact made by the court" is authorized by Code Civ. Proc. § 663 (act March 3, 1897; St. 1897, p. 58). The court may do this because of "(1) incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact; and in such case, when the judgment is set aside, the conclusions of law shall be amended and corrected." We think that plaintiff, on the findings of fact, was entitled to judgment. The conclusion of law that "plaintiff, in delivering said property to said Johnson, as aforesaid, clothed him with the apparent ownership of the same," we must construe to mean that, in the opinion of the trial court, this apparent ownership was given for the purpose of making a transfer of it, or at least with authority to transfer it. In that view the conclusion of the learned judge was erroneous, and plaintiff's motion should have been granted. We recommend that the cause be remanded, with directions to set aside and vacate the judgment entered in the action, to correct the conclusions of law in accordance with this opinion, and to enter judgment in favor of plaintiff for the sum of \$400, with legal interest from January 1, 1895, and costs of action.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, with directions to set aside and vacate the judgment entered in the action, to correct the conclusions of law in accordance with this opinion, and to enter judgment in favor of plaintiff for the sum of \$400, with legal interest from January 1, 1895, and costs of action.

121 Cal. 595

CLARKE et al. v. COBB (LANGENOUR et al., Interveners. Sac. 351).  
(Supreme Court of California. Aug. 2, 1898.)  
LANDLORD AND TENANT—CROPPING CONTRACT—  
RENT—MORTGAGES—FORECLOSURE—  
RIGHTS OF PURCHASER.

1. A contract whereby one agrees to farm land let to him for a term of years, and to give annually for the use thereof a certain portion of the products grown thereon, is a lease, and not a cropping contract; and the portion of the product to be delivered to the landlord when gathered is rent.



2. In the absence of appropriate words in a lease reserving part of the crop as rent, to indicate that the crops are to be held in co-tenancy, the products to be delivered to the landlord after harvest will be deemed the property of the tenant until that time.

3. Under Code Civ. Proc. § 707, providing that the purchaser in foreclosure proceedings may, from sale until redemption, receive from the terre-tenant the rents of the property, or the value of the use thereof, the purchaser can recover an amount of the landlord's share of the crops raised as rent, only in proportion as the time intervening between the purchase and the expiration of the year term bears to one year.

4. The purchaser at a foreclosure sale does not take the interest of the mortgagor as landlord in the crops raised on the premises under the sheriff's certificate.

Harrison, J., dissenting.

In bank. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by Catherine Clarke and J. E. Cain, executors of the will of W. J. Clarke, deceased, against G. M. Cobb, defendant, and E. C. Langenour and others, interveners. There was a judgment for interveners, and plaintiffs appeal. Reversed.

B. F. Howard, for appellants. N. A. Hawkins and H. C. Watkins, for respondents.

GAROUTTE, J. W. J. Clarke and plaintiffs and appellants, executors of the estate of W. J. Clarke, deceased, respectively entered into contracts with one Cobb, whereby said Cobb agreed to farm and cultivate certain lands to grapes and grain for a term of years. For present purposes, these contracts were the same; and it was provided therein that the lands were demised and let to said Cobb, he agreeing to give annually for the use thereof a certain portion of the crops of grain and other products grown thereon. At the time these contracts were entered into, certain mortgage liens rested upon the realty. Subsequently these liens were foreclosed, and under such foreclosure proceedings the mortgagees became the purchasers of the land, and certificates of sale were issued to them. The sales under foreclosure proceedings took place in January and April, respectively, of 1896; and, no redemption intervening, deeds passed to the purchasers six months thereafter. Crops of various kinds were cultivated upon these lands by Cobb under his contracts during the cropping season of 1895-96; and subsequent to the aforesaid sales of the land, and during the period of time allowed by law for redemption, these crops were gathered and harvested by Cobb. As provided in his contract, he set aside the portion thereof to be given for the use of the land; but, upon notice and warning from the purchasers at the sale, he refused to deliver the same to the plaintiffs, and this action was brought against him by them for a recovery of the possession thereof. Clarke died subsequent to the making of the contract with Cobb, and prior to the foreclosure proceedings. The mortgagee purchasers at the sale,

claiming the property by virtue of their purchase, intervened, and have become the real defendants in interest.

It is conceded by all parties that the merits of this litigation are dependent upon the construction to be given that portion of section 707 of the Code of Civil Procedure which provides: "The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof." At the threshold of this investigation, it becomes important to determine the legal status of the contracts entered into with Cobb by Clarke and his executors. That these contracts were leases, that the conventional relation of landlord and tenant existed between the parties, and that the grains and fruits to be delivered to the landlord when gathered and harvested were rent, we are entirely satisfied. Rent is a compensation paid for the use of land. It need not be money. Any chattels or products of the soil serve the purpose equally as well. These contracts are in no sense cropping contracts. The single difference differentiating them from ordinary conventional leases is that the rent is to be paid in products of the soil, after harvest, rather than in money. But such difference is wholly immaterial, as changing the character and aspect of the instruments. It is substantially conceded that the landlord and tenant are not co-tenants in the land, but it is claimed that they are co-tenants in the crops to be raised. The authorities of this state recognize that such conditions may exist. *Bernal v. Hovious*, 17 Cal. 544; *Walls v. Preston*, 25 Cal. 59. But we find no apt words here to disclose such a status. When it is established that a certain contract is a lease, and that the relation of landlord and tenant exists between the parties, there must be some appropriate words in the contract to indicate that the crops raised on the lands are to be held in co-tenancy, or such will not be the conclusion reached. If there is nothing in the language to indicate that intention, then the products to be delivered to the landlord after harvest, by the tenant, will be deemed the property of the tenant until that time, and treated as rent to be then paid. There is but little authority against the views we have here declared. The New York authorities almost stand alone as taking a contrary position. The decisions of the highest courts of at least a dozen states hold, upon facts similar to those at bar, in entire accord with the views we entertain. See *Freem. Coten.* § 100, note 1. This court held in *Bernal v. Hovious*, supra, that the contract under consideration in that case was a cropping contract; and of course, when such is the fact, the title to the products of the land necessarily vests in both parties, for the relation of co-tenancy is created. The facts of that case are broadly different from the facts here pre-

sented. Again, that decision is based solely upon the New York authorities. In *Walls v. Preston*, supra, *Bernal v. Hovious*, and the New York authorities upon which it is based, are reviewed and explained, and the doctrine of the *Bernal Case* limited. In *Walls v. Preston* the facts were entirely similar to those found in this record, and, after a careful consideration of the principles involved, the court said: "It clearly appears to us that the parties in this case intended to make a lease, and that the instrument executed by them was a lease; that its effect as such was not destroyed by their having contracted for the payment to the lessor of a portion of the specific crops to be produced; and that that covenant was an agreement to pay the rent of the premises out of the crops."

Having arrived at the conclusion that the crops involved in this litigation were rent due from the tenant Cobb to his landlord, do the provisions of section 707 of the Code of Civil Procedure heretofore quoted give them to the purchaser at the foreclosure sale? These products were the rents to be annually paid for the use of agricultural and vineyard lands. They were due and payable at a certain period of the year, and that period occurred after the purchase from the sheriff, and prior to the time when right of redemption was barred. These contracts stood exactly as though the land had been rented for a cash rental of \$1,200 per annum, payable at harvest time. Upon such a state of facts, it could not be claimed for a moment that the purchaser at the sheriff's sale would be entitled to the entire amount of rent due and payable for the use of the land for the entire year. If the foreclosure sale had occurred one day prior to the day when the rent was due and payable, upon such a line of reasoning the purchasers would be entitled to the entire \$1,200. If rent was payable semiannually, and no rent happened to fall due during the time intervening between the purchase under foreclosure and the expiration of redemption, it certainly could not be claimed that the purchaser was not entitled to any rent. In the eyes of the statute, the material question is not, when does rent become due and payable? but it is, what amount of rent has the property earned subsequent to the purchase, and prior to the redemption? By virtue of the statute, if the property is not rented, the purchaser may sue for the value of the use and occupation; and the value of the use and occupation would be such value for the time the purchaser held under his certificate of sale. And, likewise, a recovery for rent would necessarily be limited to the amount earned for that time.

In the case at bar, where the rent is an annual rent, the purchasers at the foreclosure sales are entitled to an amount of rent in proportion as the time intervening between their purchases and the expiration of the year term bears to one year; providing, of course, the six-months term of redemption

had not expired in the meantime. In *Reynolds v. Lathrop*, 7 Cal. 43, it is held that "the effect of the sale was equivalent to an assignment of the lease for the time." The contention that rent payable by the year is indivisible is unsound. Undoubtedly, the statute could provide for a division of it. It must be borne in mind that the whole matter of redemption is purely statutory, and the statute seems to contemplate a proportionate division of the rents. It was intended by this statute to give the purchaser at the sale the fruits of the land produced while he held the certificate of purchase; only this, and nothing more. To support a construction which would give the purchaser at the sale (perchance, a purchaser of a single day) the rents of property under a lease for years, for the sole reason that rents for the entire period happen to become due and payable upon that day, would seem to wander far from the intention of the legislature in enacting the statute. If such construction obtain, evidently the statute would at once become useless legislation; for upon the day of sale, by reason of previous mutual arrangements between the judgment debtor and the tenant, all questions of rent would have been compromised and settled. We cannot bring ourselves to hold that, if the mortgagor himself is in possession, he is liable only for the value of the use and occupation after the sale; while, if the tenant under the mortgagor is in possession, all rents owing by the tenant for an unlimited period in the past, and which happen to become due while the certificate of purchase is held by the purchaser at the sale, are his property. As to the general principle of law that a transfer of real estate carries with it rents earned, but not yet due, we are not concerned.

There is nothing in the contention of respondents that the purchasers at the sale, conceding that the landlord at the time had an interest in the crops, took such interest under the certificate of sale issued by the sheriff. If there had been no tenant, and the owner had cultivated the land and possessed the crop, such crop would not have passed by the certificate of sale. This court has repeatedly held that the owner has the right to retain and harvest the crops grown and ripened pending the time of redemption.

For the foregoing reasons, the judgment is reversed, with directions to the trial court to enter judgment in accordance with the views heretofore expressed.

We concur: VAN FLEET, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

HARRISON, J. I dissent. Section 707, Code Civ. Proc., declares: "The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the



use and occupation thereof." The term "rents," as here used, signifies the amount agreed to be paid by the tenant in possession, as distinguished from the value of the use and occupation, which is to be paid by the judgment debtor if he remains in possession. The purchaser is entitled to all of these "rents" which accrue after the sale of the property, subject to his obligation to refund the amount he may receive in case the judgment debtor shall redeem from the sale. Section 700, Id., declares: "Upon a sale of real property the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto." By virtue of this section the purchaser acquires the entire title of the judgment debtor to the property sold, and is entitled to the rents thereafter to accrue therefrom, as fully as if the sale was made by the judgment debtor himself. A sale by the sheriff is equivalent to a sale by the judgment debtor. *Blood v. Light*, 38 Cal. 649. "The execution of the deed gave to the purchaser at the sale no new title to the land purchased by him, but was merely evidence that his title had become absolute." *Robinson v. Thornton*, 102 Cal. 680, 34 Pac. 121. "The purchaser has already bought the land and paid for it. The sale is simply a conditional one which may be defeated by the payment of a certain sum by certain designated parties, within a certain designated time. If not paid within the time, the right to a conveyance becomes absolute without further sale, or other act to be performed by anybody. \* \* \* During the period which elapses between the sale and expiration of the time for redemption, the statute regards the purchaser as the owner in equity, and gives him the rents and profits, or the value of the use and occupation. In short, it gives him the entire beneficial interest in the property, except the actual possession." *Page v. Rogers*, 31 Cal. 293. See, also, *Duff v. Randall*, 116 Cal. 226, 48 Pac. 66. In *Reynolds v. Lathrop*, 7 Cal. 43, it was held that, before the expiration of the time for redemption, the purchaser could maintain an action against the tenant for rent, according to the terms of his lease. The court said: "But we think it clear that Lathrop was responsible to the plaintiff for the rents, in the way he would have been to the judgment debtor had no sale been made, and that, consequently, the plaintiff could sue for the rent as often as it fell due under the terms of the lease existing when he became purchaser. The effect of the sale was equivalent to an assignment of the lease for the time." If, instead of the sale by the sheriff, the judgment debtor had, at that time, assigned the lease for the time allowed for redemption, his assignee would have been entitled to all the rents which might accrue during the term for which the lease was assigned. A grant of the reversion of an estate passes the rights to rents that subsequently become due as incident to the reversion, but not the rents then in arrear. 4

*Kent, Comm. 354; Sampson v. Grimes*, 7 Blackf. 176; *Peck v. Northrop*, 17 Conn. 217. "The rent is incident to the reversion, and passes with it; and the grantee, by force of the conveyance, has a right to receive all rent accruing upon the estate. It is a part of the realty, and passes by the deed." *Burden v. Thayer*, 3 Metc. (Mass.) 76.

In the absence of an agreement or a statute for that purpose, there can be no apportionment of rent which, by the terms of the lease, is payable at stated intervals. "When rent is payable quarterly or yearly, the annual or quarterly payments are not to be apportioned if the reversion is transferred before the time at which the rent becomes due. The right to such quarter's or year's rent passes with the reversion. In the present case, had the year's rent become due five days after instead of five days before the mortgage, it would have passed by it to the plaintiff." *Burden v. Thayer*, supra. *Taylor*, in his *Landlord and Tenant* (section 389), says: "It is also well settled that in all cases of periodical payments accruing at intervals, and not *de die in diem*, there can be no apportionment, for rent will not be apportioned in respect to time, except by force of a statute, or of some special provision of the lease." *Kent* says (volume 3, p. 470): "The rule at common law was that neither law nor equity would apportion rent as to time, and therefore if the tenant for life gave a lease for years, rendering a yearly rent, and died in the course of the year, the rent could not be apportioned, and the tenant would go free of rent for the first part of the year. The principle was that an entire contract could not be apportioned." See, also, *Zule v. Zule*, 24 Wend. 76; *Marshall v. Moseley*, 21 N. Y. 280; *Woodf. Landl. & Ten. § 403*. By the statute of 11 Geo. II. c. 19, and subsequent statutes in England, and also in some of the states, the common-law rule has been superseded, and in certain cases an apportionment of rent is authorized in the case of the death of the lessor between two rent days. But, as no statute of this nature has ever been adopted in this state, the common-law rule must control. This question was very fully considered in *Bank v. Wise*, 3 Watts, 394, where the lessor's interest in a lot of land and house thereon was sold at sheriff's sale. The land was held at the time of the sale by a tenant, under a lease for five years, executed three years previously, at an annual rent payable half yearly, under which a half year's rent fell due on the 1st of February. The sale was made by the sheriff in January, and the court held that there could be no apportionment between the purchaser and the judgment debtor, but that the purchaser was entitled to the entire rent, saying: "The idea of apportioning the rent that becomes payable after the purchaser of a reversionary interest in fee at a sheriff's sale has paid the purchase money and received

his deed of conveyance for it, between him and the defendant in the execution as whose estate it was sold, is unknown to the law, and cannot be reconciled with any of its analogous and fixed principles." In *Klein v. Chase*, 17 Cal. 596, a redemption was made 21 days after the sale; but it was held that the purchaser was entitled to all the rents which accrued between the time of sale and redemption. At that time the law did not require the purchaser, in case of a redemption, to account for any of the rents which he might have received. In *Martin v. Martin*, 7 Md. 368, the tenant had leased a farm for two years, agreeing to pay as rent one-half of the wheat and corn raised thereon. After paying the rent for the first year, and before any rent was due for the second year, he accepted certain orders drawn upon him by his landlord, payable out of the rent. After these orders had been accepted, but before any rent was due, the farm was sold at sheriff's sale under a judgment against the landlord. It was held that, notwithstanding the acceptance of these orders, the tenant was liable to the purchaser for the whole rent of that year. There is no injustice in this rule. If the land is under lease, that fact is considered by the purchaser in making his bid, and the amount of rent which he will receive from the tenant is an element in determining the amount of his bid. If, by the terms of the lease, the rent day fell prior to the sale, it would belong to the judgment debtor, and the property would have less value than if it should fall after the sale. "By allowing the purchaser to take all the rent becoming due after the sale, it adds so much to the value of the lessor's interest in the land at the time of sale, and secures to him the benefit of the partial rent not due at that time in the way that it can be done consistently with established rules of law." *Martin v. Martin*, supra.

To hold that the purchaser is entitled to only the amount of rent "earned" by the land subsequent to the sale would in many cases render the provision of the statute nugatory; for, if that is the limit of his right, it must also be held that he is entitled to whatever the land has earned during that period. The tenant cannot be compelled to pay the rent otherwise than in accordance with the terms of his lease; and if, by these terms, he has paid the rent for a portion of the period for redemption, the fact that the land has earned some rent during a part of that period cannot impose upon him any liability to the purchaser for the rent so earned. If the tenant has paid the rent in advance before the sale, and his term expires during the period for redemption, he cannot be compelled to pay any further sum for his use and occupation of the land. So if, by the terms of his lease, there is no rent payable during this period, the purchaser can have no claim upon him for the

rent. He cannot be made liable beyond the terms of his lease, whether he has paid the rent before the sale, or is not required to pay it until after the time for redemption has expired. The judgment should be affirmed.

6 Cal. Unrep. 97

WEBB et al. v. KUNS et al. (L. A. 365.)  
(Supreme Court of California. July 25, 1898.)

WORK AND LABOR—PLEADINGS AND FINDINGS—MECHANICS' LIENS—FORECLOSURE—PLEADING.

1. A complaint alleged that plaintiff was to be paid a reasonable sum for extra work as to a certain contract, and also the performance of the work. The finding showed the performance of the work, its acceptance by defendants on a certain day, and that "defendants agreed to pay therefor the sum of ten dollars." Held, that the finding was not that the work was done for an agreed price; hence there was no variance.

2. In an action to foreclose a mechanic's lien, a mistake in the complaint in regard to the terms of the contract, as to time of payment, where the contract, the notice of lien, and the findings show the facts, is immaterial.

Department 2. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by W. E. Webb and others against N. Kuns and others. From a judgment in favor of plaintiffs and an order denying a new trial, defendants appealed. Affirmed.

C. K. Holloway, for appellants. Tanner & Taft, for respondents.

TEMPLE, J. This action was brought to foreclose a mechanic's lien for the sum of \$82.50. The appeal is from the judgment and from an order denying a new trial. The general point is that the evidence is insufficient to sustain the finding, and under this an attempt is made to show a variance between the findings and the allegations of the complaint in two respects. As I think no material variance is shown, I will not consider whether the point can be made under the specification.

1. The complaint avers, in accordance with the terms of the contract and the statement in the claim of lien recorded, that plaintiff was to be paid a reasonable sum for any extra work; also that extra work was done. It is found that these allegations are true, and in addition "that the plaintiff performed all the extra work mentioned in the complaint, and fully completed the same, and same was accepted by the defendants on the said 18th day of October, 1895, and the defendants agreed to pay therefor the sum of ten dollars." There is no variance,—not even an inconsistency. The finding is not that the work was done under a contract for an agreed price, but to the contrary, and that after it was done defendants accepted it, and agreed to pay therefor \$10. This was an admission that it was worth \$10.

2. The complaint states that three-fourths of the contract price was to be paid during the progress of the work, and the balance 35 days after completion. The contract, the



claim of lien, and the findings are to the effect that \$100 of the contract price was to be paid upon completion, and the balance 30 days after completion. The contract is correctly described in the notice of lien which was filed. A valid lien was therefore created. The mistake in the complaint was utterly immaterial, as defendants could not have been misled thereby. It is evident that the appeal is frivolous and vexatious. It is therefore ordered that the judgment and order be affirmed, with \$50 damages allowed respondents.

We concur: McFARLAND, J.; HENSHAW, J.

6 Cal. Unrep. 99

FAIRBANKS et al. v. ROLLINS.  
(L. A. 368.)

(Supreme Court of California. Aug. 4, 1898.)

WATER RIGHTS — CONTRACTS — TRIAL — FINDINGS.

1. Performance of a contract to convey "a good and sufficient water right" for the irrigation of a certain parcel of land was sufficiently tendered by an offer of water certificates issued by an irrigation corporation, guarantying the holder a flow of water of the quantity specified in the contract, together with a right of way through a pipe line reaching the lands to be irrigated for the conveyance of water "represented by said water certificates."

2. A finding of an ultimate fact cannot be impeached by an immaterial finding of a mere probative fact.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by C. W. Fairbanks and another against J. M. Rollins on a note. Judgment for plaintiffs, and defendant appeals. Affirmed.

C. C. Haskell, for appellant. Otis, Gregg & Hall, for respondents.

BRITT, C. By a contract in writing of date February 10, 1897, the plaintiffs agreed to sell and convey to defendant a "good and sufficient water right" for the irrigation of a parcel of land containing 4.22 acres, the same to be sufficient to furnish water to the amount of at least one-seventh of an inch, measured under four-inch pressure to each acre or fraction thereof in said parcel of land; in consideration whereof defendant agreed to execute to plaintiffs his promissory note for the sum of \$500, and to pay the same when plaintiffs should tender to him a conveyance of said water right. He made to plaintiffs his note accordingly, and this is an action to enforce payment thereof. In his answer, the defendant pleaded said contract, and averred that the only offer of plaintiffs to perform the same consisted in the tender to him of five so-called "Class A Water Certificates" issued by the Bear Valley Land & Water Company, a corporation, together with the tender of a right of way through a certain pipe line reaching his land, for the conveyance of the water "rep-

resented by said water certificates." The form of said certificates was set forth in the answer. Thereby the said corporation in terms guarantied to the holder thereof a flow of one-seventh of an inch of water for each acre of land to which the water was to be devoted, etc. It was further averred in the answer that said certificates constitute no water right; that they do not and cannot vest in or transfer to the holder thereof any water or water right whatever; and that they are of no value. There were other allegations in the answer to the effect that said certificates evidence a fictitious increase of the capital stock, and also of the indebtedness of said corporation, and that it had no lawful authority to issue the same. The court found that plaintiffs made a tender substantially as alleged in the answer of defendant. It also found that such tender was an offer to convey a water right in accordance with the terms of said contract of February 10, 1897; that said certificates entitled the holder to the water described on the face of the same, and were of the value of at least \$500; and that such certificates "convey and transfer the water and water rights represented on their face." There were also findings of evidential matters concerning the organization and powers of said corporation, and the origin and history of the said certificates issued by it. Judgment was for plaintiffs. Defendant relies for reversal on the contents of the findings alone.

The findings of ultimate facts above stated show that the consideration upon which said note was executed has not failed; and that, by the acceptance of the tender made to him, defendant would have received the transfer of the "water and water rights represented on the face" of said certificates, viz. a flow of one-seventh of an inch of water for each acre to be irrigated, which was the object of his contract with plaintiffs. Defendant claims that the objections urged by him to the validity of said water certificates are sustained by the said findings of evidence regarding the issuance thereof. We do not concede that; but, if we should, still those findings which respond to the substance of the issue, and show that plaintiffs offered to convey rights of water as required by their contract with defendant, would not be overthrown. The case is within the rule which forbids the impeachment of findings of ultimate facts by comparing them with other findings of mere probative facts which have no proper place in findings at all. *Rowe v. Blake*, 112 Cal. 637, 44 Pac. 1084; *Rankin v. Newman*, 107 Cal. 608, 40 Pac. 1024; *Perry v. Quackenbush*, 105 Cal. 299, 38 Pac. 740. The judgment should be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(121 Cal. 562)

**BAILEY v. JOHNSON (SACRAMENTO COUNTY, Intervener. Sac. 415).**

(Supreme Court of California. July 30, 1898.)

**SUBMISSION OF CONTROVERSY—PARTIES—COUNTIES—TAXATION.**

Under Code Civ. Proc. § 1138, which provides that parties to a question in difference which might be the subject of a civil action may agree on a case containing the facts on which the controversy depends, and present a submission of same to any court of competent jurisdiction, and obtain a determination of such question, a taxpayer and a tax collector may not submit an agreed case involving the validity of a tax, since the county, and not the tax collector, is a "party" to such question.

Department 1. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Agreed case of James Bailey against Frank T. Johnson, tax collector of Sacramento county, and the county of Sacramento, intervener. From a judgment for plaintiff, intervener appeals. Reversed.

C. H. Oatman, F. D. Ryan, and J. C. Jones, for appellant. J. H. McKune, for respondent.

**VAN FLEET, J.** The "agreed case" entered into between the plaintiff, Bailey, the owner of the assessed property, and defendant, Johnson, the tax collector of the county, whereby it was sought to submit to the court below, under the supposed sanction of section 1138 of the Code of Civil Procedure, the question of the validity of the tax in controversy, gave the court no jurisdiction of the subject-matter sought to have adjudicated. Section 1138 provides that "parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought," etc., and thereby have a determination of such question. But this provision has reference to interested parties, authorized and capable of litigating the question involved. The taxpayer and the county were the only parties to the "question in difference," involving the validity of the tax in controversy. Defendant, Johnson, the tax collector, was not such a party, and he was without authority to bind the county in the premises. He was but the agent of the county for the collection of the tax, with no interest other than that of an officer performing a duty enjoined by law, and with only such power and authority as the statute gave. He was not concerned in the question of the validity of the tax. If he failed to collect it because of its illegality, he was not responsible to the county; and if he collected it, and it subsequently proved to have been illegally assessed, he was not responsible to the aggrieved taxpayer. It is quite obvious, therefore, that he was not a

"party," within the statute, authorized to submit the controversy without action.

It does not follow that, because he would have been the proper party defendant in an action brought by Bailey to enjoin the collection of the tax, he is the proper party to this proceeding. Such an action runs against the officer or individual whose act is to be enjoined, whether he be a principal or an agent. And, while such an action would nominally be against the tax collector, the real defendant would be the county, with the right in the latter to conduct and have control of the defense. Here there is an attempt, without the intervention of an action, to submit to adjudication a controversy in which the rights of the county are directly involved, without any opportunity on its part to be heard. The objection to the jurisdiction interposed by the district attorney on behalf of the county should have been sustained. This renders it unnecessary to consider the other proposition discussed. The judgment is reversed, with directions to the court below to dismiss the proceeding.

We concur: **GAROUTTE, J.; HARRISON, J.**

(6 Cal. Unrep. 101)

**WARD v. YORBA. (L. A. 372.)<sup>1</sup>**

(Supreme Court of California. Aug. 2, 1898.)

**VENDOR AND PURCHASER—CONTRACT—CONSIDERATION—MISTAKE—WHAT CONSTITUTES—EVIDENCE.**

1. A contract to convey by good title was made between persons, both of whom claimed the premises by paramount title; but at the time of making the contract the vendee, acting on the advice of counsel, conceded the vendor's title to be the better one. The vendor testified that he agreed to convey only his interest, which was corroborated by another, and not denied by the vendee. *Held*, that a finding that the provision requiring a good title was inserted by mistake was justified.

2. The vendor and the vendee each claimed the premises by paramount title, and the vendee's counsel erroneously advised him that his title was inferior. The vendee knew all the facts on which this advice was based, and thereupon contracted to buy the vendor's interest. *Held*, that he was not entitled to be relieved from the contract on the ground of mistake, under Civ. Code, § 1577, defining a mistake as an unconscious ignorance or forgetfulness of a material fact, or a belief in the existence of a material thing which does not or did not exist.

3. The vendor and the vendee adversely claimed land in the former's possession worth \$9,000, the vendee claiming under an attachment for \$1,300. *Held*, that the vendee's agreement to purchase the vendor's interest for \$4,750 was supported by a valuable consideration, though it afterwards appeared that the vendee's title was the better one.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; Waldo M. Yorke, Judge.

Action by Shirley C. Ward against Vicente Yorba to reform a contract to sell lands, and for specific performance as reformed, and for damages. Judgment for plaintiff, from

<sup>1</sup> Reversed in banc. See 56 Pac. 53, 123 Cal. 447.



which, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Geo. H. Smith, for appellant. A. M. Stephens, for respondent.

CHIPMAN, C. Action to reform a contract of sale and purchase of a certain parcel of land situated in the city of Los Angeles, and to specifically enforce the same when reformed, and for damages. The pleadings are verified. Plaintiff had judgment, from which, and from the order denying a new trial, defendant appeals upon a statement of the case. The findings are quite lengthy, but the salient facts may be briefly summarized as follows: The premises in controversy originally belonged to one Francisca D. de Labracco, and both plaintiff and defendant claim title through this common source,—plaintiff by sale on execution to one Jarvis (who conveyed to plaintiff) at suit of one Bacon; and defendant by attachment proceedings at his own suit. Plaintiff's deed took effect as of date March 31, 1892, and defendant's March 5, 1892, by relation. The validity of defendant's attachment proceedings was in dispute at all the times mentioned in the findings. The property involved was worth \$9,000. A suit was pending against Labracco, in which one Javier Yorba and one Davilla were plaintiffs, wherein it was claimed that Labracco was trustee of the title for plaintiffs in that suit; but it was found that defendant had knowledge of this action, and claimed to be able to control it. There was also a judgment lien for \$312.75 on the property, of which defendant had full knowledge at the time he entered into the contract, the subject of the controversy. Plaintiff was in possession under his deed, and on February 10, 1893, the parties began negotiations looking to the sale by plaintiff and the purchase by defendant of plaintiff's interest in said property for the sum of \$6,000, at which time both plaintiff and defendant believed defendant's attachment lien to be subordinate to the judgment lien through which plaintiff claimed title. On February 24, 1893, a controversy arose between the parties as to their respective claims, the defendant claiming that his right was superior to plaintiff's; and on that day defendant offered to sell his interest to plaintiff for \$1,300 (the amount of his judgment in the attachment), or he would pay plaintiff \$4,750 for his interest in the property, which latter proposition plaintiff accepted, and a written agreement was accordingly on that day entered into; but by mistake the agreement was drawn so as to obligate plaintiff to convey a good and perfect title, whereas the agreement was that he should convey only his interest in the property. Defendant knew all the facts relating to the title at the time the agreement was entered into, and was acting upon the advice of counsel then present. Defendant agreed to pay \$100 cash in

hand, which was done, and \$4,650 in 30 days, which he failed to do. The consideration to defendant was plaintiff's compromise of his claim of superior title, dependent upon defendant's imperfect attachment proceeding mainly. The court, as conclusion of law, found that plaintiff was entitled to judgment (1) reforming the contract as prayed for, and (2) for the sum of \$4,650, with interest at 7 per cent. per annum from March 24, 1893, amounting in all to \$5,789.25, and for costs of suit; and judgment was accordingly entered. Appellant relies upon the written contract, which it is conceded respondent cannot perform. Respondent claims that he can perform the actual agreement, and stands ready to do so. We do not understand appellant to dispute that the findings support the judgment, but his contention is that the evidence does not support the findings. We assume that the points relied upon are those presented in the briefs of respective counsel.

1. Appellant insists that the evidence fails to show that the actual agreement was different from the written agreement, or that there was any mistake in the drafting of the latter, and that it devolved upon respondent to make out a good title, which it is found he failed to do. Appellant concedes that a "vendor may stipulate that the purchaser shall accept the title as it is," but he adds that "such conditions should be looked at with great jealousy, as they are often traps for the unwary, and the court should at least expect the fact to be broadly stated that the seller only sells such title as he has, without warranting the same"; citing 1 Sugd. Vend. pp. 29, 30 (24), and pages 455, 456 (390, 391); Haynes v. White, 55 Cal. 38; and other cases. If the evidence clearly showed that the actual agreement was as it was found to be by the court, the case is brought within the principle invoked. Upon this point the evidence is somewhat, but not seriously, conflicting. On the day the contract was entered into there met in the office of Mr. Meserve—respondent's attorney—Mr. Meserve and respondent; Mr. Munday, appellant's then attorney, and appellant; and Mr. Sanchez, who was brought in by and as interpreter for appellant, who could not himself "talk or understand English." Mr. Unger, who made the abstract, was present part of the time. As to what took place at this meeting, which resulted in the contract being signed then and there, Mr. Meserve, Mr. Munday, and Mr. Ward, respondent (and Mr. Unger to some extent) testified on behalf of respondent, and Mr. Sanchez and appellant on behalf of appellant. We have carefully read this testimony, and while there is a decided and sharp conflict as to one or two facts that will be noticed hereafter, as to the fact that respondent was offering to sell only whatever interest he had in the property the evidence is clear, and is not denied by appellant in his testimony; and on his cross-ex-

amination Sanchez testified: "Q. Did you hear Mr. Meserve tell Mr. Munday all we were selling was the right, title, and interest such as was acquired under the Jarvis deed? A. Yes, sir; I heard Mr. Yorba say he thought he could control the Davilla suit. He said, 'I can fix it with my brother and mother all right.' This was at the time of signing the contract." It was testified to by respondent's witnesses, two of whom understood some Spanish, that what was said by and to appellant's attorney and by and to respondent's attorney during the negotiations was communicated to appellant by the interpreter. We think there was sufficient evidence to support the findings, and that the parties understood perfectly that respondent was selling and appellant was buying only such interest or title as respondent then had, and that the written instrument did not express the true intent of the parties in this regard. The contract was drawn by respondent's attorney as soon as the parties had reached an agreement, and both signed it. How it happened to be drawn as it is was not explained by any witness. It was drawn by the attorney of respondent (who is himself an attorney), and it is urged that on this account the rule in such cases should apply with especial force. Section 1639, Civ. Code, provides that "when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title." Section 1640, *Id.*, reads, "When through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded and the erroneous parts of the writing disregarded." Here the ground relied upon is mistake, and it is urged that in actions of this kind the mistake must be "clearly made out by proofs entirely satisfactory"; citing 1 Story, Eq. Jur. 152 et seq.; *Leonis v. Lazzarovich*, 55 Cal. 52; *Hutchinson v. Ainsworth*, 73 Cal. 452, 15 Pac. 82. It was said in the latter case: "The conclusion from the sum of all the authorities on the subject is, not that relief must necessarily be denied because there is a conflict of testimony, for that would result in a denial of justice in some of the plainest cases calling for such relief, but that upon all the proofs, taking the facts as they appear to the court after eliminating testimony unworthy of credence, or based upon mistake or uncertainty, as in other cases, the mistake must be established in a clear and convincing manner, and to the entire satisfaction of the court." As was said in that case, so say we here, "Viewed in this light, and we cannot say the court was unauthorized by the testimony in the conclusion it reached." The draftsman did not attempt to explain how he came to make the mistake, and probably could have given no rational explanation had he been asked to do so. That it was a mistake clearly ap-

pears, we think, by great preponderance in the evidence; and, that being so, an explanation as to how it happened is unimportant and immaterial.

2. It is contended that appellant's consent to the contract was not free, but was induced by the mistaken belief that the title was in respondent, and that appellant was purchasing a valuable interest in the property, and that he was clearly entitled, upon discovery of the mistake, to rescind the contract, and that this he immediately offered to do. It appears from the testimony of appellant and the witness Sanchez that Mr. Munday advised appellant that respondent's title was superior to appellant's. Appellant testified: "I then told Mr. Sanchez to ask Mr. Munday what chance I had in that suit. Then he answered me that I had no right in the world in the matter, except to bring suit or to buy the property." At another point in his testimony he said: "Mr. Munday told me that I had no right to the property whatever; that the attachment that I had was second to the one that Mr. Ward had. I found out that I did have title to that property,—that Mr. Munday's advice was erroneous, when I went to you [speaking to his then counsel, Mr. Smith], which was about March 27, 1893." It appears from the evidence of both Meserve and Munday that up to the time the parties met in Meserve's office, February 24th, each of them believed that he had the better title through the sheriff's sales; and in order to convince Meserve, respondent's attorney, of his error, the negotiations on that day were suspended while they went to the clerk's office to consult the records, after which, and after consulting the notes of the abstract of title prepared for defendant, Meserve conceded Munday's position. There was, however, some question as to the regularity of the attachment proceedings by which appellant got his title, which the court found was at all times a subject of dispute between the parties. Mr. Munday, in rebuttal of appellant's testimony, testified that appellant was mistaken as to the time he was told he had no title; that it was some days before February 24th, and certainly prior to the making of the contract; and that he (Munday) did not know till that day that his client's title was superior to respondent's. There is much evidence tending to show that appellant knew all the facts as found by the court at the time he signed the contract, and that he was not then ignorant of the supposed strength of his own title. Mr. Munday testified: "The abstract was there before us, and I was buying what there was. I do not think 'perfect title' was mentioned, or any understanding of perfect title used. I understood it in this way: I stated to the parties the exact status of the title as I found it from the records—from this abstract or memorandum—there in your office. After that, and upon that, Mr. Yorba authorized me to make the offer of



four thousand five hundred dollars. The Court: Question. For what? A. For whatever appeared on this— As a matter of fact, he said he could control this, these outstanding liens,—these outstanding suits, rather; didn't care anything for them. \* \* \* Then—it was possibly my own suggestion—we split the difference between four thousand five hundred dollars and five thousand dollars, making four thousand seven hundred and fifty dollars. One hundred dollars was paid, and a receipt given for it, and the contract was written out by Mr. Meserve. I looked it over. Everybody seemed to be satisfied. I went out with Mr. Yorba. Tried in different places to borrow money for him." We are unable to see that appellant was misled in any way by any representations of respondent, and, if he acted through any mistaken belief of the strength of respondent's title or the weakness of his own, his action was in the face of full information then in his own control and that of his attorney. He acted not only upon means of knowledge available, but upon actual knowledge. There is no fraud or unfairness alleged or proved, and we are unable to see why appellant should not be held to the performance of the contract fairly and intelligently entered into by him. Section 1577 of the Civil Code, relied upon, has no application, because there was not "an unconscious ignorance \* \* \* of a fact material to the contract"; nor was there a "belief in the present existence of a thing material to the contract which did not exist."

3. It is claimed by appellant that there was no adequate consideration for the contract. It is not claimed by appellant that there was any fraud practiced upon him, or that there was anything unfair in the transaction. His claim rests wholly on the alleged mistake he made in supposing respondent's title superior to his own. But we have seen he was not mistaken, but acted with full knowledge of the record title of respondent. It appears, however, that respondent was then in possession of the premises. He disputed the regularity of appellant's attachment proceedings, while admitting that, if the lien was valid and legal, his deed took effect prior to respondent's deed; and it appears that an action is now pending in the lower court between appellant, as plaintiff, and respondent, as defendant, involving the regularity of said attachment proceedings, which action was determined in favor of this appellant, and was "tried \* \* \* and submitted at the same time as the trial and submission of this action," and it was this attachment which the court found was at all times a subject of dispute between the parties. It is in evidence, and was found by the court, that the property was worth \$9,000. Appellant's judgment under which he claimed was for \$1,300, and he claimed to be able to control the other pending action of Yorba and Davilla against Labracco; and

he knew of the judgment lien of \$312.75 in the action of Bacon against Labracco. There was therefore nothing unconscionable or unreasonable in his agreeing to pay \$4,750 for respondent's title or claim to property which had cost appellant \$1,300, and was worth \$9,000. We think there was sufficient consideration to support the contract. By it all of respondent's rights were extinguished, and possession to be surrendered, and all litigation avoided. There was some value to appellant in these considerations, and, however small, they were given in good faith, and free from fraud, and will support the contract. Appellant got all he bargained for, and should not be heard to complain of the inadequacy of the consideration. He was in position at the time he signed the contract to know all that he learned later on, and, if he chose to purchase rather than fight for peace, he must abide the consequences of his own deliberate act. We find no error, and therefore recommend that the judgment and order be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(121 Cal. 539)

SAN JOSE SAFE-DEPOSIT BANK OF  
SAVINGS v. BANK OF MADERA  
et al. (Sac. 433.)<sup>1</sup>

(Supreme Court of California. July 27, 1898)

MORTGAGES—WHAT ARE—RECORD—CONVEYANCE  
OF PREMISES—REDEMPTION—VALIDITY—  
RIGHT TO QUESTION.

1. Where one borrows money with which to redeem from a foreclosure sale, and, as security therefor, assigns to the lender all his right, as redemptioner or otherwise, by reason of the redemption, and authorizes him to obtain from the sheriff a deed of the property in his own name, the borrower does not convey the land absolutely, but only hypothecates his interest in it, inclusive of the right, under Code Civ. Proc. § 707, to receive the rents from the terretenant, and the lender holds the sheriff's deed as mortgage.

2. Where the execution debtor and a junior lienor, who has hypothecated her interest as redemptioner, join in conveying the legal title, the grantee holds the same subject to the equitable mortgage created by the assignment of the redemptioner.

3. Offer of payment is not a condition to the right to defend against a claim of ownership based on an assignment as security of the interest of a redemptioner from sale under foreclosure, and of his right as such to demand a deed from the sheriff.

4. Where the grantee of the interest of a junior lienor knew of her prior assignment, as security, of her interest as redemptioner, he cannot object that the mortgage, a copy of the record whereof was produced to the sheriff at the time of redemption, as required by Code Civ. Proc. § 705, was never legally recorded because of defects in the certificate of acknowledgment; nor that the redemption money was paid to the sheriff then in office, and not to the officer who made the sale; nor that the notice of redemption served on the sheriff then

in office described the sale as made by him, instead of by his predecessor.

5. The assignee of the purchaser at a foreclosure sale who has accepted the redemption money cannot deny that the redemption was effectual.

6. Where the period allowed a judgment debtor to redeem has expired without his redeeming, neither he nor his assignee can question the effectiveness of a redemption by a creditor.

7. One who has assigned her interest under a redemption as security for the money with which the redemption was made is estopped to impugn the manner of her own redemption.

8. One claiming to hold land absolutely under conveyances from the mortgagor and a senior lienor cannot, as holder of a docketed judgment against the legal owner, question the manner of redemption of the land by the senior lienor, who had assigned her interest as redemptioner before the conveyances.

Commissioners' decision. Department 1. Appeal from superior court, Madera county; W. M. Conley, Judge.

Action by the San José Safe-Deposit Bank of Savings against the Bank of Madera and others. There was a judgment for plaintiff, and from an order granting a new trial it appeals. Affirmed.

Jackson Hatch and Frs. E. Spencer, for appellant. R. L. Hargrove, W. T. Searles, and B. W. Child, for respondents.

BRITT, C. In this action, after trial, the court below rendered judgment whereby defendant Westfall, as sheriff of the county of Madera, was required to execute to plaintiff a deed of certain land which had been sold by his predecessor in office in the course of judicial proceedings to foreclose a mortgage thereon, and whereby also, among other directions in plaintiff's favor, the Bank of Madera and other defendants were enjoined from asserting any title or interest in said land. Afterwards the court granted a new trial, and the plaintiff took this appeal. Among the facts in evidence, or admitted by the pleadings, it appeared that on March 4, 1893, defendant Charles Dworack owned said land, and on that day mortgaged the same to one Roberts as security for a debt of \$3,000, and interest thereon, he owed to said Roberts. On January 10, 1894, said Charles Dworack made a second mortgage of the premises to his mother, the defendant Mary Dworack, purporting to secure payment to her of the sum of \$8,500, with interest, on or before January 10, 1896. August 4, 1894, said Charles made a deed in terms conveying said land to said Mary, and caused the same to be duly recorded. The court found that this deed was never delivered to the grantee or to other person for her. December 12, 1894, the land was sold by the then sheriff of the county, one Thurman, pursuant to a judgment obtained by Roberts in an action prosecuted by him against Charles and Mary Dworack to foreclose his said mortgage of March 4, 1893. Roberts himself became the purchaser. This is the sale which the judgment in the present action directed said Westfall to consummate by issuing his deed

to plaintiff. Previous to such sale, said Bank of Madera recovered a personal judgment against Charles Dworack for the sum of \$1,490, which was docketed and became a lien on the interest of said Charles in said land subordinate to the lien of Roberts' mortgage. On February 18, 1895, Mary Dworack, claiming to be a qualified redemptioner as holder of said mortgage of January 10, 1894, paid to Westfall, who had succeeded Thurman in the office of sheriff, the sum necessary to redeem the land from the sale to Roberts, and Roberts accepted the same as paid for that purpose. The money thus paid was borrowed from the plaintiff in this action. The court found that, "for the purpose of effecting a redemption from the foreclosure sale of December 12, 1894, the plaintiff herein loaned and advanced to the defendant Mary Dworack the sum of \$3,750, with the distinct understanding that said sum was to be used by her in effecting such redemption, and that, after such redemption should be effected, she would repay said sum to plaintiff, and interest," etc. It was also found, in effect, that, in order to secure plaintiff for the money so advanced, the said Mary Dworack, on said February 18, 1895, executed to plaintiff "an assignment and transfer of all her right as redemptioner, or otherwise, by reason of the redemption that day made by her of the real property above described." Such assignment in terms authorized plaintiff to obtain from the sheriff a deed of the property. On April 16, 1895, said Roberts quitclaimed to the Bank of Madera whatever interest he then had in the land. On June 29, 1895, Charles Dworack and Mary Dworack made their several deeds of grant, each purporting to convey the said land to said Bank of Madera, in consideration whereof that bank released its aforesaid judgment against said Charles. At the same time, and for the same consideration, Mary Dworack released the mortgage for \$8,500 made to her by Charles on January 10, 1894. The court found that the Bank of Madera took possession of the premises under said deeds from Charles and Mary Dworack, and also that it was not at the commencement of this action (July 29, 1895), nor ever at all, the owner or entitled to the possession thereof.

It is plain that when Mary Dworack assigned to plaintiff her rights as redemptioner,—whatever those may have been,—in order to secure the loan plaintiff made to her, she did no more than hypothecate her interest in the land, inclusive of the right, under the statute (Code Civ. Proc. § 707), to receive the rents from the terre-tenant; and, if plaintiff should procure the sheriff's deed, it will hold the same as mortgagee, and not as owner. Civ. Code, § 2924; Baber v. McLellan, 30 Cal. 135; Baker v. Insurance Co., 79 Cal. 34, 21 Pac. 357; Sears v. Dixon, 33 Cal. 326. The Bank of Madera acquired from Charles and Mary Dworack, by their deeds of June 29,



1895, the legal title to the land, and yet holds the same, subject to such rights of the plaintiff as may be found to inure to it as equitable mortgagee in virtue of its transactions with Mary Dworack. See *Page v. Rogers*, 31 Cal. 300-305; *Hill v. Eldred*, 49 Cal. 398. Therefore the finding declaring that the Bank of Madera is not, and never was, the owner of the land (on which the judgment enjoining it from asserting any claim thereto seems to have followed), was contrary to the evidence, and the court very properly granted a new trial. The contention of plaintiff, as we understand the argument, that none of the defendants can resist its claim to ownership of the land in the absence of an offer to repay the loan made by it to Mary Dworack, is not sustainable. We see no substantial distinction between this phase of the action and the case where a mortgagee sues the mortgagor in ejectment. Payment or offer of payment is not a condition of the right to defend. *Locke v. Moulton*, 96 Cal. 21, 30 Pac. 957.

What has been said suffices for the disposition of the appeal; but, in view of a new trial, it is proper to advert briefly to certain other matters appearing in the record. The court found, and there was evidence to sustain the finding, that, before the deed of Mary Dworack to the Bank of Madera, the latter had notice of the prior assignment to plaintiff of the rights accruing to said Mary in virtue of her redemption from Roberts. The court therefore rightly disregarded sundry objections of said bank, touching the procedure followed by Mary Dworack for the purpose of such redemption,—as that the mortgage of January 10, 1894, a note of the record whereof was produced to the sheriff (Code Civ. Proc. § 705), was never legally recorded because of defects in the certificate of acknowledgment thereto; that the redemption money was paid to the sheriff then in office, and not to the officer who made the sale; that the notice of redemption served on Sheriff Westfall described the sale as made by him, instead of by his predecessor, etc. The Bank of Madera is in no situation to raise such questions, even if said alleged irregularities would in any case invalidate a redemption otherwise good, as to which we intimate no opinion. Said bank cannot, as the assignee of Roberts, question the redemption. Roberts, having accepted the money paid as and for that purpose, could not deny that the redemption was effectual. *Bagley v. Ward*, 37 Cal. 121; *Freem. Ex'ns*, § 314a. As grantee of Charles and Mary Dworack, it is in no better position; for as to Charles, the judgment debtor, the full period of six months allowed him to redeem, under the statute then in force, having expired, and he having effected no redemption, his beneficial interest in the land was gone, and whether the sheriff should convey to the first purchaser or to a redeeming creditor was of no material concern to him. *Blair v. Chamblin*, 39 Ill. 522, 527.

And, of course, Mary Dworack was estopped, as to plaintiff, to impugn the manner of her own redemption. The original status of the Bank of Madera, as holder of a docketed judgment against Charles Dworack does not aid it in this particular (*Bagley v. Ward*, supra); for allowing that it could now, and in this action, enforce any right of redemption in its own favor by reason of such judgment, it does not seek to do so, but claims to own the land absolutely under said conveyances from the Dworacks.

The foregoing remarks have no relation to the question agitated in the case whether Mary Dworack was a qualified redemptioner, within the definition of the statute (Code Civ. Proc. § 701). If she was not, then we suppose that the payment she made to Roberts could not operate to invest her with statutory rights of a redemptioner, and her assignment conveyed none to plaintiff, though no doubt the effect of the sale to Roberts was thereby extinguished. *Phyfe v. Riley*, 15 Wend. 248. See *Edwards v. Burris*, 60 Cal. 157. But, as to this question, whether the mortgage of January 10, 1894, on which said Mary assumed the right to redeem, was a fraud upon the Bank of Madera and other creditors of Charles Dworack; and whether plaintiff had notice of its fraudulent character, or was otherwise affected thereby; also whether the deed of August 4, 1894, from Charles to Mary Dworack was delivered, or, if not formally delivered, was yet assented to and acted upon by the grantee, so as to become operative and destroy her character of mortgagee by merger in the fee,—are issues mainly of fact, on which we cannot anticipate the decision of the trial court. The order granting a new trial should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order granting a new trial is affirmed.

121 Cal. 543

SAN JOSE SAFE-DEPOSIT BANK OF  
SAVINGS v. BANK OF MADE-  
RA et al. (Sac. 444.)

(Supreme Court of California. July 27, 1898.)  
RECEIVERS—POWER TO APPOINT—APPEAL—DIS-  
MISSAL.

1. The court has no power to appoint a receiver of lands pendente lite in an action by one not entitled to their possession, and involving only legal rights.

2. Where a new trial is granted after an appeal from a judgment, the appeal will be dismissed.

Commissioners' decision. Department 1. Appeal from superior court, Madera county; W. M. Conley, Judge.

Action by the San José Safe-Deposit Bank of Savings against the Bank of Madera and others, to compel defendant Westfall, as sheriff, to execute a deed of certain lands, and

to restrain the other defendants from asserting title to such lands. There was a judgment for plaintiff, and a new trial was afterwards granted, and a receiver pendente lite appointed, and defendants appealed from the judgment and from the order appointing a receiver, the appeal from the judgment having been taken before the granting of the new trial. Appeal from the judgment dismissed, and order appointing a receiver reversed.

R. L. Hargrove, W. T. Searles, and B. W. Child, for appellants. Jackson Hatch and F. E. Spencer, for respondent.

BRITT, C. Appeals by defendants from a judgment and a subsequent order appointing a receiver. The main facts in the case are stated in the opinion rendered on the plaintiff's appeal from the order granting a new trial. The judgment included a provision that plaintiff recover from the defendant Bank of Madera the sum of \$1,745, rents of the land in dispute, collected by said defendant, from June 29, 1895, the date of the deeds made to it by Charles and Mary Dworack, to November 7, 1896, the date of the court's decision in the case. On February 15, 1897, the Bank of Madera and certain other defendants appealed from the judgment, and gave a bond in double the amount of the pecuniary recovery to stay execution thereof pending the appeal. June 1, 1897, the court made an order granting a new trial on the motion of said defendants, and the plaintiff appealed therefrom on July 2d following. August 10, 1897, on the application of plaintiff, the court appointed a receiver "to take and keep possession of the real property described in the judgment, \* \* \* and to receive and collect the rents, issues, and profits thereof, from date of said judgment until the further order of the court."

This order was erroneous. We have seen, in affirming the order granting a new trial, that the ultimate rights of the plaintiff are, if anything, those of a mortgagee. These do not include the right to possess the land (Civ. Code, § 2927), nor to have possession thereof delivered to a receiver (Guy v. Ide, 6 Cal. 99), except by statute now in an action to foreclose the mortgage (Code Civ. Proc. § 564, subd. 2). Plaintiff's action is not prosecuted for the purpose of foreclosure. The complaint contains no allegation even that the money loaned to Mary Dworack has not been repaid. The averments of the complaint, in so far as they furnish a basis for the recovery of the rents and profits of the land, are meager; but, if they may be regarded sufficient for that purpose, still the appointment of a receiver of the rents was not proper. It was not made in order to carry the judgment into effect, nor could it have been, since (aside from any consequence of the order granting a new trial) the judgment for money was stayed by a proper bond (Havemeyer v. Superior

Court, 84 Cal. 328, 24 Pac. 121), and was not proper with a view to preserving the future rents, etc., to abide the result of the action, because plaintiff's case has not the character of a suit in equity to subject the rents to payment of Mary Dworack's debt to plaintiff. On the contrary, it proceeds on the assumed ownership by plaintiff of the land and the profits thereof. Henry v. Everts, 30 Cal. 425. In such a case, involving merely legal, as distinguished from equitable, rights, the law does not authorize the appointment of a receiver. Bateman v. Superior Court, 54 Cal. 285; Scott v. Lumber Co., 67 Cal. 76, 7 Pac. 131. The case of Whitney v. Buckman, 26 Cal. 447, on which plaintiff seems to rely, was decided on a former statutory provision which was not re-enacted in section 564, Code Civ. Proc. The distinction is pointed out in Bateman v. Superior Court, supra. As the order granting a new trial on defendants' motion has been affirmed here, the judgment, of course, falls, and the appeal taken therefrom should be dismissed; the order appointing a receiver should be reversed; defendants to recover costs on both appeals.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal from the judgment is dismissed; the order appointing a receiver is reversed; defendants to recover costs on both appeals.

121 Cal. 593

THAXTER v. INGLIS et al. (L. A. 423.)  
(Supreme Court of California. Aug. 2, 1898.)  
BOUNDARIES—CONVENTIONAL LOCATION—EVIDENCE—DECLARATIONS

1. Uncertainty as to the location of a boundary is sufficient foundation for an agreement respecting it by the adjoining owners.

2. Declarations made by a party to a boundary agreement, subsequent thereto, that the location was subject to future correction, were not against his interest, and, not being shown to have been uttered in the presence of the other party or his successors in title, were properly excluded in an action concerning the boundary.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Annette Thaxter against Wheeler M. Inglis and others. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

E. E. Bacon, for appellant. James Burdett, for respondents.

BRITT, C. This action concerns the boundary between adjoining tracts of agricultural lands. The quantity of land in dispute seems to be less than the tenth part of an acre. Plaintiff derives title through one A. W. Thaxter, now deceased. Defendants' land was formerly the property of one John Willey. The court found, in substance, that in



the year 1881 said A. W. Thaxter and John Willey, in order to determine a dispute and uncertainty between them respecting the common boundary of said lands, fixed and agreed by parol upon certain lines as and for such boundary, and that they and their successors in interest thereafter claimed and occupied their respective tracts up to the lines as so established during a period of nearly 15 years, and until a time shortly before the commencement of this action, when the plaintiff repudiated the same. Defendants abide by such agreed boundary, and judgment was in their favor.

On appeal the plaintiff argues that the evidence did not justify said findings. The finding of a dispute between said former owners was perhaps scarcely sustained by the evidence, but it is immaterial. There was uncertainty as to the location of the boundary, and this was sufficient foundation for their agreement. *Helm v. Wilson*, 76 Cal. 485, 18 Pac. 604. Less conflict appears in the evidence regarding said agreement, and the subsequent occupancy conforming thereto, than is common in such cases, and the finding was in accord with the preponderance of the same. The judgment following thereon was right. *Cavanaugh v. Jackson*, 91 Cal. 580, 27 Pac. 931.

It is said that the court erred in excluding evidence of subsequent declarations of said A. W. Thaxter to the effect that the location of the boundary was provisional, and subject to future correction. These declarations were not against interest and were not shown to have been uttered in the presence of defendants or of their predecessor in title. They were properly excluded from consideration. See Code Civ. Proc. §§ 1849, 1853. The judgment and order denying a new trial should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

121 Cal. 582

SIMONSON et al. v. BURR, Sheriff, et al.  
(L. A. 425.)

(Supreme Court of California. Aug. 2, 1898.)

HOMESTEAD — VALIDITY — DECLARATION — SUFFICIENCY — ABANDONMENT.

1. Although under Civ. Code, §§ 1238-1262, the husband alone may select the homestead from community property, the fact that the wife joins with him in the declaration does not vitiate it.

2. Under Code Civ. Proc. § 17, providing that the singular number includes the plural, and the plural the singular, the statements in a declaration of homestead that "we do now, at the time of making this declaration, actually reside on the land" claimed, and that "we do hereby claim the same as a homestead," are the individual statements of each of the declarants.

3. Under Civ. Code, § 1243, providing that a homestead can be abandoned only by a dec-

laration of abandonment or a grant thereof; and section 1244, making such abandonment effectual only from the time it is filed in the office in which the declaration of homestead was recorded,—the leasing of homestead property, and the purchase of other property, and the fact of residence thereon, do not constitute an abandonment of the homestead.

4. Whether a declaration of homestead was made for the purpose of hindering, delaying, or defrauding a creditor is immaterial, where the creditor's claim was not merged in judgment prior to the declaration.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Waldo M. Yorke, Judge.

Suit by Espen Simonson and Bengita Simonson against John Burr, as sheriff of Los Angeles county, and George H. Emery, to restrain the sale, under an execution, of certain property, claimed as a homestead. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Mulford & Pollard, for appellants. Kendrick & Knott, for respondents.

BELCHER, C. The plaintiffs in this action, at all the times named in the pleadings therein, were husband and wife. On April 6, 1891, the real property involved in the action was conveyed by deed to the wife, Bengita Simonson. On December 3, 1892, the plaintiffs jointly executed, acknowledged, and filed for record a declaration of homestead upon the said property. The declaration stated that "we, Espen Simonson and Bengita Simonson, hereby certify and declare that we are husband and wife, and that we do now, at the time of making this declaration, actually reside on the land, and premises hereinafter described; that the land and premises on which we reside are situate in the county of Los Angeles, state of California, bounded and described as follows [then setting out the description]; that it is our intention to use and claim said land and premises, together with the dwelling house thereon, and we hereby do claim the same as a homestead; that the actual cash value of said property we estimate to be four thousand dollars. In witness whereof, we have hereunto set our hands, this 3d day of December, 1892." On June 30, 1893, the defendant George H. Emery recovered a judgment in the superior court of Los Angeles county against the plaintiff Bengita Simonson, for the sum of \$1,649, and \$45 costs, which judgment was duly docketed, and no part thereof has been paid. On February 6, 1897, a writ of execution upon the said judgment was issued and placed in the hands of the defendant John Burr, who was then the sheriff of Los Angeles county; and, under the supposed authority of said writ, he, as such sheriff, levied upon the said real property, and was threatening to advertise and sell the same to satisfy the said judgment. Thereupon the plaintiffs commenced this action to obtain an injunction restraining the sale of the said property, or any part there-

of, under or by virtue of said execution. The complaint sets out all the facts, and alleges, in effect, that the said real property was purchased and paid for with community funds, and at all the times mentioned in the complaint was the community property of the plaintiffs, and that plaintiffs' title thereto would be clouded by such sale, and great and irreparable injury would thereby be done to them. The answer denies, upon information and belief, that the said property at all the times mentioned in the complaint, or at any time, was community property, or was purchased with community funds; denies that plaintiffs' title to said real property would be clouded by a sale of the same, "other than such as defendants are of right and law entitled to place thereon," or that any injury would thereby be done to plaintiffs; and alleges, upon information and belief, that on or about the month of September, 1896, plaintiffs leased the said property to one Schandoney for the term of one year, and that, since said letting, they have not lived upon or occupied the same, or any part thereof, but have been and now are living and residing upon other property in Los Angeles county which they lately purchased, and upon which they have erected a home in which they are now residing. A general demurrer to the answer was interposed and sustained; and, defendants declining to amend, judgment was entered on May 7, 1897, awarding the plaintiffs the relief demanded in their complaint. From that judgment, defendants appeal.

1. In support of the appeal it is claimed that the declaration of homestead set out was nugatory and entirely ineffectual to create any homestead right in the property described, for the reason that it was executed jointly by the husband and wife. The Civil Code provides as to homesteads: Section 1238: "If the claimant be married, the homestead may be selected from the community property, or the separate property of the husband, or, with the consent of the wife, from her separate property." Section 1239: "The homestead cannot be selected from the separate property of the wife without her consent, shown by her making, or joining in making, the declaration of homestead." Section 1260: "Homesteads may be selected and claimed \* \* \* by any head of a family." Section 1261: The phrase "head of a family" includes "the husband, when the claimant is a married person." Section 1262: "In order to select a homestead, the husband or other head of a family, or, in case the husband has not made such selection, the wife, must execute and acknowledge \* \* \* a declaration of homestead and file the same for record." Section 1263: "The declaration of homestead must contain: (1) A statement showing that the person making it is the head of a family; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint account;

(2) a statement that the person making it is residing on the premises, and claims them as a homestead," etc.

"The statute in reference to homesteads is a remedial measure, and, as such, is to be liberally construed;" and where the several acts required "have been substantially performed, and where the declaration contains the essence of the statutory requirements, the construction should be so liberal as to advance the object of the constitution and statute." *Schuyler v. Broughton*, 76 Cal. 524, 18 Pac. 436; *Southwick v. Davis*, 78 Cal. 504, 21 Pac. 121; *Heathman v. Holmes*, 94 Cal. 291, 29 Pac. 404. We think the declaration involved in this case shows a substantial performance of all the acts required by the statute, and that it was sufficient to create and establish a valid homestead upon the premises described therein. The declarants were husband and wife, and the husband was therefore the "head of a family." If the premises were community property, the husband alone was authorized to select the same as a homestead, and to execute a valid declaration of homestead thereon; and it was not necessary that the wife should join him in doing so. But the fact that she did join him in making the declaration could not, and did not, in any way impair or affect its validity. If, on the other hand, the premises were the separate property of the wife, then the homestead could not be selected therefrom without her consent, shown by her making, or joining in making, the declaration of homestead. The fact, therefore, that the parties joined in making the declaration, shows a full compliance with the requirements of the statutes, whether the premises are regarded as the community property of the spouses or the separate property of the wife. The statements that "we do now, at the time of making this declaration, actually reside on the land and premises herein-after described," and that "we do hereby claim the same as a homestead," are statements that each of the declarants is actually residing on the premises, and claims the same as a homestead. "The singular number includes the plural, and the plural the singular." *Code Civ. Proc.* § 17.

2. The facts set up in the answer as to the leasing of their homestead property by the plaintiffs, and the purchase of other property upon which they had erected a home in which they were then residing, did not show, or tend to show, an abandonment of the homestead. A homestead once created under the provisions of the Civil Code is not abandoned by the claimant's ceasing to reside upon the premises; and it can only be abandoned in the way pointed out in sections 1243 and 1244 of that Code. *Porter v. Chapman*, 65 Cal. 365, 4 Pac. 237; *Tipton v. Martin*, 71 Cal. 325, 12 Pac. 244; *Lubbock v. McMann*, 82 Cal., 229, 22 Pac. 1145.

3. Appellants argue with apparent earnestness that the attempt by respondents to create a homestead was fraudulent. They say the



declaration of homestead was filed after Emery commenced the suit in which he obtained the judgment which he is now seeking to enforce, and claim that the purpose was to hinder and delay him in the collection of his debt. It does not appear from the record when Emery commenced his suit against Mrs. Simonson, and there are no allegations of fraud in the pleadings. But, if fraud had been pleaded, this ground of objection to plaintiffs' judgment could not be sustained. In *Fitzell v. Leaky*, 72 Cal. 477, 14 Pac. 198, it is said, on page 483, 72 Cal., and page 200, 14 Pac.: "The homestead is exempt from forced sale, except as provided in the Civil Code (section 1240). The very purpose of the homestead law is to give to one—except as against an indebtedness already merged in a judgment, and as against a judgment of peculiar character subsequently entered—the right to preserve and protect a homestead from forced sale. It has never been held that a homestead was invalid because the declarant was in debt, or declared the homestead to protect it from existing debts. It is not invalid because made during the progress of litigation, which subsequently results in an ordinary money judgment against the homesteader, or because made at any time before the entry and docketing of such judgment. The law authorizes a debtor to erect a barrier around the home, over which the sheriff, although armed with final process under such judgment, cannot pass. With the policy of the law, or the abstract morality of a particular transaction, we have nothing to do. The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead." And see *Beaton v. Reid*, 111 Cal. 484, 44 Pac. 167. We conclude that the court properly sustained the demurrer to the defendants' answer, and that there is no merit in the appeal. The judgment should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(121 Cal. 564)

**KERRY v. PACIFIC MARINE CO.**  
(S. F. 818.)<sup>1</sup>

(Supreme Court of California. Aug. 1, 1898.)

SHIPPING—CHARTERS—CONSTRUCTION—CARRIAGE OF GOODS—MANAGERS—OWNERS—DAMAGES—APPEAL—FINDINGS—HARMLESS ERROR.

1. The owner of a vessel entered into a charter party to carry goods in it to a certain place, agreeing to keep the vessel, during the voyage, tight, staunch, and well fitted, that all the vessel should be at the sole use of plaintiff, and that he would receive on board during the voyage the goods specified for a stipulated consideration. *Held*, that there was an implied obligation that loading and unloading should be so done by the vessel owner as not to cause unnecessary injury to the goods, under Civ. Code, § 2114, requiring ordinary care and diligence of a carrier for reward.

2. Civ. Code, § 2071, making it the duty of a ship's manager to provide for its seaworthiness, and to furnish a proper master, mate,

and crew, and supplies, does not fully define the duties and liabilities of a manager who is part owner; and a managing owner, who makes a charter party, as such, without disclosing the other part owners, is personally liable thereon.

3. In an action against the managing owner of a vessel on a charter party on which he is personally liable, a finding that he is a part owner of the vessel is immaterial.

4. 1 Supp. U. S. Rev. St. 1874-91, p. 443, § 18, limiting the individual liability of ship owners to the proportion of the ship owned by them, restricts the liability imposed on them by law as the result of such ownership, and does not limit their liability on contracts made by them.

5. The court will not, on appeal, pass on the relative weight of conflicting evidence.

6. Where the damages to certain lumber, for breach of contract, were specially alleged as being a certain sum per foot, it was error to award an amount exceeding that sum, though they were by the general *ad damnum* clause laid as amounting to a lump sum, which exceeded the sum awarded.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by A. S. Kerry against the Pacific Marine Company. From a judgment for plaintiff, and from an order granting a new trial, defendant appeals. Reversed.

Naphtaly, Freidenrich & Ackerman, for appellant. W. H. Fowler and D. H. Whittemore, for respondent.

PER CURIAM. Action on a charter party by which defendant undertook to carry for plaintiff, in the bark *Templar*, a cargo of piles from Seattle to San Francisco. Damages are claimed as resulting from the careless and negligent handling of the piles while being loaded and unloaded, whereby the bark on them became peeled off, thus diminishing their value. Plaintiff had judgment for \$2,390, from which, and from the order denying a new trial, defendant appeals.

The pleadings are verified. The complaint alleges that defendant is a corporation, and, "as managing owner of the bark *Templar*, of San Francisco, \* \* \* entered into a contract of charter party with plaintiff, \* \* \* whereby it was covenanted and agreed that the said bark *Templar* should be chartered, etc.; \* \* \* that defendant agreed to keep said vessel, during said voyage, tight, staunch, and well fitted; that she was to receive the said piles and short storage as aforesaid, carry the same, and deliver them at the port of San Francisco in good, marketable condition, and in as good order and condition as they received the same," etc. The charter party purports to be "between the Pacific Marine Supply Company of San Francisco, Cal., party of the first part, managing owner of the bark *Templar*, of San Francisco, \* \* \* and A. S. Kerry, of Seattle, Wash., of the second part." By the terms of the charter party the first party agreed "on the freighting and chartering of the said vessel unto the said party of the second part from a voyage from the

<sup>1</sup> For opinion on rehearing, see 54 Pac. 262.

port of Seattle, Washington, to San Francisco, California, on the terms" following: (1) That the vessel should be kept tight and staunch, etc., and well supplied with men and provisions; (2) that all the vessel, except certain portions for the use of the crew, should be at the sole use of plaintiff; and defendant agreed (3) "to take and receive on board the same vessel during the voyage [then follow the agreements entered into by plaintiff as to cargo to be furnished, the size of piles at the butt, rate of payment per lineal foot, regulations as to discharging cargo, etc.]" The contract is signed as follows: "Pacific Marine Supply Company, Alfred Greenebaum, Manager. D. M. Kennedy, Agent for A. S. Kerry."

1. It is contended by defendant that the action is based upon the breach of the written contract, which nowhere in terms provides that defendant agreed to deliver the piles in good order and condition as received, and unless there was such implied promise plaintiff cannot recover; that allegations and proofs must agree, and the proofs must disclose the cause of action which is alleged in the complaint (citing *Barrere v. Soms*, 113 Cal. 97, 45 Pac. 177); and it is claimed that there is a total failure of proofs upon this point. The contract does not provide in terms for the safe delivery of the cargo; but the court found that "defendant agreed that the said vessel should receive the said piles, and carry the same, and deliver them at the port of San Francisco, in good, marketable condition, and in as good condition as it received the same." The court also found that the piles, when received, were in good and marketable condition. These findings are challenged as not supported by the evidence. The court also found that the "defendant was the owner of nine-sixteenths of said vessel, and was the manager thereof; that as such owner, and as agent of the owners of the other seven-sixteenths, said defendant made said charter." It appears in evidence that a receipt for the cargo was signed by John Lee, master (who was also a part owner), which reads: "Seattle, Wash., August 29, 1893. Received from A. S. Kerry, on board the bark *Templar*, the following packages, contents unknown, to be delivered at San Francisco, Cal., \* \* \* and with privilege of reshipping on steamboats or barges." Then follows description of cargo. Defendant, by the contract itself, let not only the vessel in proper condition "and provided with every requisite" for the service, but it also agreed to furnish "men and provisions necessary for the voyage"; and defendant engaged "to take and receive on board the same vessel during the afore-said voyage," the entire vessel (except cabin, deck, and room for the crew and stowage for sails, cables, and provisions), "to be at the sole use and disposal of" plaintiff. The compensation was fixed by a rate to be charged per lineal foot of the piles and a

certain rate for other lumber. Lay days were provided for in loading and unloading, beyond which plaintiff was to pay \$40 per day for detention. Defendant agreed to receive cargo "delivered alongside the vessel, within reach of her tackles," and the charter was to commence "when the vessel is ready to receive cargo at her place of loading and notice thereof is given," and not at San Francisco, where she was when chartered. The receipt given shows that the cargo was received on board ship by the master, "to be delivered at San Francisco." The evidence showed that the loading and unloading was done by the crew of the vessel under the direction of the master, who had entire charge and command of the ship. It is evident, we think, that the entire control and management of the vessel, and the loading and unloading of the cargo, were in the hands of defendant. Plaintiff was to pay freight at fixed rates on the cargo when delivered. In such contract as this there is, we think, an implied obligation that, in loading and unloading cargo, it shall be so done as not to cause unnecessary injury to the merchandise; and for injury resulting from the negligence of the carrier there is an implied liability. Civ. Code, § 2114. It was not necessary, therefore, for plaintiff to prove an express stipulation in the written contract that the freight was to be delivered in good condition.

The question as to who is to be considered as owner for the voyage, in cases of charter party, so as to create a liability for repairs or breaches of duty, has been often litigated in England and America. The principles upon which the cases rest will be found discussed in *Abb. Shipp.* pt. 1, c. 1, § 8. In a question of construction it is not possible to lay down any rule of universal application, but Mr. Abbott says: "It seems to result, from the cases decided upon this subject, that when, by the terms of the charter party, the master and mariners are to continue subject to the orders of the ship owner, he retaining through them the possession, management, and control of the vessel, it is to be considered a contract to carry the freighter's goods; but where the merchant engages to pay a stipulated price to the ship owner for the use of his ship, for the voyage, by the month or year,—takes it and them into his service,—receiving the freight actually earned by it to his own use, the master and mariners becoming subject to his orders, and the general management and control of them and the vessel being given up to him, it is a demise of the vessel with her crew for the voyage, or the term specified. The charterer becomes owner *pro hac vice*, entitled to the rights and subject to the responsibilities which attach to the charter." In the case of *Marcadier v. Insurance Co.*, 8 Cranch, 39, it was said: "Where the general owner retains the possession, command, and navigation of the ship, and contracts to car-



ry a cargo on freight for the voyage, the charter party is considered a mere affreightment, sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership." It certainly would not be for one moment contended in the case at bar that the plaintiff would have been liable, under the charter party here, for damages resulting from collision through the negligence of the master or crew in navigating the chartered vessel. We are unable to see, in the contract entered into, as understood and acted upon by all the parties, any element of ownership *pro hac vice* in plaintiff; nor can we see in it such demise of the vessel and crew as would subject the plaintiff to the responsibilities which attach to the character of owner *pro tempore*.

But it is contended that the action is against defendant as managing owner of the vessel, and that there is an entire failure of proof that it was such owner. As we understand defendant's contention, it is that defendant was the manager of the vessel, and as such was the general agent for the owners, and incurred no other liability than to provide for the ship's seaworthiness, to take care of her in port, to see that she was provided with necessary papers, with proper master, mate, crew, and supplies of provisions, and that this relation and this limited liability were not changed by the fact that defendant was part owner or managing owner. Section 2071 of the Civil Code makes it "the duty of the manager of a ship, unless otherwise directed," to provide for the ship's seaworthiness, etc., as claimed by defendant; but this section does not attempt to define the full extent of the duties and liabilities of the manager, who is also part owner, and who, by section 2070, is called "the managing owner." Without attempting to define the meaning of this section of the Civil Code in respect of any difference between the powers and duties of a "manager" and a "managing owner," when they act as "general agent for the owners," it seems to us quite clear that, when either the manager or managing owner assumes to act as agent, he should disclose his agency in some unmistakable manner if he desires to escape liability as principal. The charter party was signed by defendant in its corporate capacity, describing itself in the body of the instrument as managing owner, and the evidence was that it owned nine-sixteenths of the vessel and the master two-sixteenths; but plaintiff did not know, when he signed the charter party, who were the owners. Defendant admitted in its answer that it made the contract as managing owner, but denied that it "had any other connection with said vessel than as managing owner thereof and agent for the owners." Neither in the body of the instrument nor in the signature of defendant does defendant appear or assume to act as agent; and defendant offered no evidence that it was agent or

acting as agent. The custom-house certificate of registration shows other part ownership, but that alone affords no sufficient evidence that defendant did not intend to be bound as principal; for, having possession and control of the vessel, and having employed her master, the plaintiff might well assume that defendant was contracting for itself in respect of the vessel. The most that can be claimed, under section 2070, *supra*, for defendant as managing owner, is that the contract indicated that defendant was negotiating for third parties, as well as for itself as part owner; but defendant did not disclose the identity of these other parties, nor their interest in the ship, nor did it attempt to bind any one but itself. It was stated by Mr. Story that "when, upon the face of the instrument, the agent signs his own name only, without referring to any principal, then he will be held personally bound, although he is known to be or avowedly acts as agent." Story, *Prom. Notes*, § 68. And it is only where the true object and intent to bind the principal, and not the agent, can be collected upon the whole instrument, that courts of justice will adopt that construction. *Id.* § 69. It was said in *Murphy v. Helmrich*, 66 Cal. 71, 4 Pac. 959: "Where an agent does not attempt, in an instrument, to bind his principal, and in terms imposes the obligation on himself, the rule is that he incurs by such act a personal liability, even though he described himself as an agent." See, also, *Hobson v. Hassett*, 76 Cal. 203, 18 Pac. 320.

2. The court found that defendant "was the owner of nine-sixteenths of said vessel, and was the manager thereof; that as such owner, and as agent of the owners of the other seven-sixteenths, said defendant made said charter." Appellant claims that this finding is outside the issues in the case, and that defendant cannot be made liable in this case as part owner. Defendant was sued as liable under the contract because it signed the contract in its individual and corporate capacity. It was, perhaps, unnecessary to inquire into the ownership of the vessel. But the finding that defendant was part owner was not prejudicial to defendant, for it is liable under this contract, when regarded as part owner and acting as agent for the other owners, even though the other part owners may also be liable. Mr. Story, in his work on Agency (section 278), says: "Nothing is more common than for a contract to be made by which the agent is personally bound, and which yet is, *ex consequenti*, binding on the principal also, although the latter is not a direct and immediate party to the instrument. \* \* \* The more correct and satisfactory doctrine would seem to be that where the agent is a direct party of the instrument, and the principal is not, so that the latter is not, *ex directo*, suable thereon, there the agent, although he describes himself as agent, is suable upon the covenants

and agreements contained therein as his own personal contract." And the doctrine is extended to the master contracting within the ordinary scope of his powers and duties, and the rule "is said to have been introduced in favor of commerce, so that merchants may not be compelled to seek after the owners to sue them, but that they may have a two-fold remedy against the owners and against the master." *Id.* § 294. Mr. Abbott says: "If an action is to be brought against the part owner upon a contract relating to the ship, although regularly such action should be brought against all jointly, yet, if all are not sued, the defendants can only avail themselves of the objection by a plea in abatement; and if they omit to plead such a plea the plaintiff will recover his whole demand, and the defendants must afterwards call upon the others for contribution." *Abb. Shipp.* pt. 1, p. \*116, c. 3, § 7; *Code Civ. Proc.* §§ 433, 434.

3. It is claimed that defendant's liability is limited by section 18 of the act of congress of June 26, 1884, to nine-sixteenths of plaintiff's damage. 1 *Supp. Rev. St.* 1874-91, p. 443. This section provides "that the individual liability of a ship-owner shall be limited to the proportion of any and all debts and liabilities that his individual share of the vessel bears to the whole." Respondent claims that this act does not apply, and that, if it does, defendant has not taken the required steps to limit its liability, and, furthermore, that defendant cannot have relief in this action and this forum, but must resort to a court of admiralty jurisdiction. There is nothing in the act of congress prohibiting part owners to so contract as to become liable for the entire damage, whatever it may be; and, as we think defendant made such contract in this case, the act of congress is not available to defendant to limit its liability, and need not be considered. In the *Amos D. Carver Case*, 35 *Fed.* 665, it was held that the act of 1884 "does not restrict the liability of the owners upon their own personal contracts, but only their liability 'on account of the vessel'; that is, the liability that is imposed on them by law in consequence of their ownership of the vessel, viz. for the contract or acts of the ship or her master without the owner's express intervention." *Gokey v. Fort*, 44 *Fed.* 364.

4. Appellant contends that the evidence is insufficient to show that the piles were barked through defendant's fault or carelessness in loading or unloading. There was much evidence tending to show that the damage to the piles was the direct result of their being handled in a careless and negligent manner. Other evidence tended to show that the piles were in bad condition when delivered to the vessel, and had been previously injured. The evidence was conflicting upon the point, and we cannot, under the settled rule, pass upon its relative weight.

5. The court found that plaintiff delivered to the vessel 47,800 lineal feet of piles, which were delivered in San Francisco, and were worth when received at the vessel 14 cents per lineal foot, but were worth only 9 cents per lineal foot as delivered at San Francisco, and plaintiff was compelled to sell at that price. The damage found was this difference in value. It is claimed that, because the complaint alleged that plaintiff was obliged to dispose of the piles at 9½ cents per lineal foot, the finding by the court is in excess of the amount of damage claimed by plaintiff in his pleadings. In his verified complaint plaintiff alleged "that, owing to the careless and negligent manner in which defendant handled the said cargo, the said plaintiff was obliged to dispose of the said piles at the rate of nine and one-half cents per lineal foot"; again, that the piles were worth 14 cents per lineal foot in San Francisco if they had been delivered as received, "but that nine and one-half cents was all that plaintiff could procure for them in San Francisco, and all that they were worth in the condition in which they were delivered," etc. There is a general averment of damages, to the effect that by reason of the careless and negligent manner in which the defendant handled the piles plaintiff was damaged in the sum of \$3,000. From these allegations it appears that plaintiff not only has alleged that his direct loss by reason of the injury to the piles was the difference between 14 cents per foot and 9½ cents, but, additionally, he has alleged the fact that he sold them for 9½ cents. This being so, his damages from this cause could not have exceeded 4½ cents per foot. He is allowed damages, however, at the rate of 5 cents per foot. It is said that the evidence supports this finding. However that may be, the finding is at variance with the allegation of the complaint. It is fundamental that in such an action a man may not recover in damages an amount greater than that which he pleads will compensate him for his injuries. The finding is not saved by the general ab *damnum* clause above referred to. That averment is not inconsistent with the idea that the direct damage was the difference between 9½ cents and 14 cents, and that other consequential damages for which defendants are responsible raised the amount to \$3,000. It is quite apparent that plaintiff has been allowed for the injury to the piles a sum for damages one-tenth greater than that for which he asks in his complaint. If it were permissible, this court might order that the judgment be lessened in this amount. Under the facts, however, this may not be done, as it would involve the making by this court, in the first instance, of a finding of fact.

For the reason indicated, the judgment and order must be reversed, and the cause remanded.



6 Cal. Unrep. 94

**BREEDLOVE v. NORWICH UNION FIRE INS. SOC. (L. A. 360.)**

(Supreme Court of California. July 23, 1898.)

**INSURANCE—INTEREST OF INSURED—MORTGAGES.**

The purchaser of mortgaged property did not record her deed until after suit brought to foreclose the mortgage. Before expiration of time for redemption, an insurance policy was issued to her, which stated her interest in the premises as being her building, and provided that, unless her interest was not truly stated therein, it should be void, and that it was to be void if such interest was not unconditional and sole ownership. *Held* that, in view of Civ. Code, § 2888, which provides that a lien on property transfers no title, the policy correctly stated insured's interest, her failure to record the conveyance only affecting her title as against a purchaser at the foreclosure sale, if there should be no redemption.

Department 1. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

Action by Mary Breedlove against the Norwich Union Fire Insurance Society. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

John G. North, for appellant. Collier & Evans, for respondent.

**PER CURIAM.** Action on an insurance policy. George L. Bush was the owner of the property on the 10th day of March, 1894, and on that day conveyed it to the plaintiff. At that time it was subject to a mortgage that had been made by him April 24, 1893, to one Cowgill. An action to foreclose this mortgage was commenced against the mortgagors October 3, 1894, and judgment therein was rendered December 22, 1894, and under this judgment the property was sold to Cowgill January 31, 1895. The plaintiff did not record her conveyance from Bush until October 13, 1894, and she was not made a party to the foreclosure suit. After the sale under the judgment, and before the time for the execution of the sheriff's deed, viz. July 13, 1895, the policy sued on was issued to the plaintiff, and the insured property was destroyed by fire July 23, 1895. There was no written application for the insurance. The policy contained the following clause: "This entire policy shall be void if the interest of the insured in the property be not truly stated herein. \* \* \* This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void \* \* \* if the interest of the insured be other than unconditional and sole ownership." The only statement in the policy relating to the character of the plaintiff's interest was as follows: "Mary Breedlove, \$2,500 on her two-story frame, metal-roof building." The court found that the defendant issued this policy to the plaintiff "by and through its duly and legally authorized agents, Jarvis & Bush (composed of B. B. Bush and John T. Jarvis),

of Riverside, Cal.," and that these agents had full knowledge, at the time the policy was issued and the premium paid, of the foreclosure proceedings and of the deed to plaintiff by Bush. It is admitted that Bush & Jarvis were the agents of defendant, and no question is made as to the loss, or of the value of the property, or of the service of due notice of the fire and making proofs of loss.

The point that the findings do not support the judgment presents the principal question involved. The finding is "that on the 13th day of July, 1895, plaintiff was the owner of the two-story frame, metal-roof building, situate, etc., \* \* \* and was such owner at the time of its insurance and destruction by fire, as hereinafter mentioned." Appellant contends that the facts as found show that the plaintiff was not the unconditional and sole owner, because she held title from the mortgagor, whose mortgage was foreclosed, and only an equity of redemption remained to her, and therefore she violated her warranty when she represented herself to be the unconditional and sole owner. There is no dispute as to the title or estate in the property held by the plaintiff. She was the purchaser from the mortgagor and former owner of the property before the right of redemption had expired. No evidence of fraud appears, and the rights of the mortgagee are in no wise involved. As a purchaser from the mortgagor, she stood in his shoes, and with the same right to take out an insurance policy. A mortgage in this state only creates a lien upon the mortgaged property, and transfers no title to the property. Civ. Code, § 2888; McGurran v. Garrity, 68 Cal. 566, 9 Pac. 839. Bush did not cease to be the sole and unconditional owner of the property after the execution of his mortgage to Cowgill, and by his transfer to the plaintiff she became its sole and unconditional owner. Her ownership is not subject to any condition, nor did any other person own an interest in the property. While her failure to record her conveyance until after the proceedings for the foreclosure of the mortgage had been commenced would prevent her from claiming title as against the purchaser at the foreclosure sale, if there should be no redemption, it did not impair her title. She was not a party to the foreclosure proceedings, and her title to the land would not be directly affected thereby, except that, by reason of her failure to file her conveyance, she would be estopped from claiming the premises, as against the purchaser, in case a deed should be executed to him. When she became the purchaser from Bush, she had a clear right to take out a policy of insurance, and when she represented in the policy that she was the "unconditional and sole owner" it was true, notwithstanding the proceedings in foreclosure.

In this view of the matter it is unnecessary to determine whether the agents of de-

fendant knew the facts relating to the mortgage and the foreclosure proceedings, and therefore waived any warranty of plaintiff, for there was no question of waiver necessarily involved. Her warranty was not violated. Nor is it necessary to discuss the point as to whether all the conditions of the policy were performed, for the contention that they were not is based solely upon the claim that the evidence shows her title to be conditional by reason of the mortgage. And so, also, it becomes immaterial whether the court did or did not find that she truly stated her interest in the property, as it fully appears what that interest was, and that it was the unconditional and sole ownership. The judgment and order are affirmed.

121 Cal. 580

**DODGE v. KIMPLE. (L. A. 492.)**

(Supreme Court of California. Aug. 2, 1898.)

APPEAL—UNDERTAKING—PRINCIPAL AND SURETY  
—CONTRIBUTION—PLEADING.

1. Where an undertaking on appeal refers only to an appeal from the judgment, it will not sustain an appeal from an order denying a new trial.

2. Where a complaint for contribution alleges a liability on the part of a co-surety to plaintiff for a certain sum, it is necessary to allege its nonpayment.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by S. C. Dodge against P. S. Kimple for contribution. From a judgment in favor of defendant, and an order denying a new trial, plaintiff appealed. Judgment affirmed, and appeal from order dismissed.

C. K. Holloway, for appellant. C. A. Miller, for respondent.

HAYNES, C. Appeal from the judgment, and from an order denying a new trial. Respondent moved in this court to dismiss the appeal from the order denying a new trial, and counsel stipulated that the case and the motion should be submitted upon the transcript, briefs, and other papers on file. There is no undertaking on the appeal from the order. The undertaking refers only to the appeal from the judgment, and therefore will not operate to sustain the appeal from the order. *Granger v. Robinson*, 114 Cal. 631, 46 Pac. 604, and cases there cited. The com-

plaint alleges that E. D. Brown contracted to erect a dwelling house for one F. T. Bicknell, and executed a bond to said Bicknell in the sum of \$2,500, conditioned for the full and proper completion and performance of the contract, upon which bond the plaintiff and defendant became sureties; that Brown commenced and partly performed his contract, but abandoned it before completion, and upon notice from the architect, requiring the sureties to do so, plaintiff completed it at a cost of \$1,220 over and above the balance of the contract price remaining in the hands of the owner, and brings this action to recover from the defendant one-half of said sum. The defendant demurred to the complaint for want of facts. The demurrer was overruled, and an answer filed. The cause was tried, and findings and judgment were for the defendant.

Respondent contends that the judgment must be affirmed for the reason that the complaint does not state a cause of action. The plaintiff alleges that he expended \$1,220 in completing the building, and that defendant became liable to him for one-half of said sum, but nowhere alleges in any manner that he has not been paid; and hence no breach of defendant's obligation to pay is alleged. In all cases it is necessary not only to allege the contract, agreement, or other facts out of which the obligation to pay money arose, but the breach of such obligation, which is that defendant has not paid, must also be alleged. It has been so held in numerous cases upon promissory notes, from *Frisch v. Caler*, 21 Cal. 71, down to *Ryan v. Holliday*, 110 Cal. 335, 42 Pac. 891; in action upon insurance policy (*Richards v. Insurance Co.*, 80 Cal. 506, 22 Pac. 939); upon bonds (*Curtiss v. Bachman*, 84 Cal. 216, 24 Pac. 379); and in other cases, not necessary to be cited, this well-established rule of pleading has been enforced.

As the complaint would not sustain any judgment in favor of the plaintiff, other questions raised by appellant need not be noticed. I advise that the appeal from the order denying a new trial be dismissed, and that the judgment be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal from the order denying a new trial is dismissed, and the judgment appealed from is affirmed.



121 Cal. 588

**MAYBERRY v. COOK et al. (L. A. 402.)**  
 (Supreme Court of California. Aug. 2, 1898.)  
 ACCOUNT STATED — EVIDENCE — INSOLVENCY —  
 PROOF OF CLAIMS—NECESSITY—DEBTS CRE-  
 ATED BY ONE IN FIDUCIARY CAPACITY.

1. Where consignor and consignee reside in different places, and one sends an account to the other, who makes no objection to it within a reasonable time, a stated account may be implied.

2. Under Insolvent Act 1880, § 52, providing that no debt created by one while acting in a fiduciary character shall be discharged because not filed under that act, such a debt is created where a factor fails to transmit the net proceeds of commission sales to his consignor.

3. The fact that an account has been stated does not change the character of the indebtedness, within Insolvent Act 1880, § 52, providing that no debt created by one in a fiduciary capacity shall be discharged because not filed under the act.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by E. L. Mayberry against J. E. Cook and T. E. Langley, co-partners as Cook & Langley. From a judgment in favor of plaintiff and an order denying a new trial, defendants appeal. Affirmed.

W. H. Davis, Hanna & Davis, A. B. McCutchen, and W. R. Bacon, for appellants. Anderson & Anderson, for respondent.

**HAYNES, C.** The defendants appeal from the judgment and from an order denying their motion for a new trial. The action was tried by the court without a jury. The complaint alleged that the defendants were co-partners doing business as factors and commission merchants at the city of Los Angeles; that plaintiff from time to time consigned to defendants oranges belonging to him, to be sold by defendants as factors and commission merchants, on account of the plaintiff, and that on September 7, 1893, an account was stated between plaintiff and defendants, upon which there was found to be due to the plaintiff from the defendants a balance of \$1,300.18 on account of said sales of plaintiff's oranges so consigned by plaintiff to defendants, and by them sold as plaintiff's factors and commission merchants; that defendants agreed to pay said balance, but have not paid the same or any part thereof. The defendants answered separately, and specifically denied each of the allegations of the complaint, and pleaded that the action was barred by each of the sections 339 and 344 of the Code of Civil Procedure. Defendant Langley also pleaded that defendants had been adjudged insolvent debtors after plaintiff's cause of action arose, and that his claim was provable in said proceedings, and was included in the schedule of their liabilities; and defendant Cook pleaded his final discharge in said insolvency proceedings, in which discharge were excepted such debts, if any, as are by

said insolvent laws excepted from the operation of a discharge in insolvency. The court found that all the allegations of the complaint are true; that his cause of action was not barred by either of said sections; that said defendants had been adjudged insolvent debtors in a proceeding commenced since plaintiff's cause of action accrued; that Cook had been duly discharged, and the proceedings therein were still pending as to Langley; that plaintiff's claim was included in the schedule of liabilities, and was provable against defendants in insolvency. As conclusions of law, the court found that the debt or liability set out in the complaint arose while defendants were acting in a fiduciary capacity, and was not affected by said proceedings in insolvency, nor barred by the discharge granted to Cook, and that plaintiff is entitled to judgment.

1. Appellants' first point is that "the account sued on is not a stated account." A copy of the account is set out in the statement, giving the items of debits and credits, the first item being May 11, 1893, and the last September 7, 1893, and showing a balance due plaintiff of \$1,300.18. No express acknowledgment of the correctness of the account was made by the plaintiff, nor did he make any objection to it at any time. It is contended by appellants that "a stated account is an agreement, and an account does not become stated until that agreement is had," and that "the evidence affirmatively shows that there was no agreement whatever"; and counsel quote from *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 372, as follows: "A stated account is an agreement between the parties thereto that all the items therein are true." No one questions that proposition; but counsel seem to understand that an actual, express agreement is necessary. The above quotation was evidently taken from the syllabus. If counsel had turned to the opinion of the court, they would have seen that those words constituted but part of a sentence, the remainder of which is as follows: "But this agreement may be implied from circumstances, as where merchants reside in different places, and one sends an account to the other, who makes no objection to it within a reasonable time." That this is the well-settled rule there can be no question. See *Terry v. Sickles*, 13 Cal. 427; *Hendy v. March*, 75 Cal. 566, 17 Pac. 702; 1 Story, Eq. Jur. § 526; 2 Greenl. Ev. § 126.

2. It is also contended that plaintiff's claim is barred by the statute of limitations. The last item in the account rendered by defendants is dated September 7, 1893, and this action was commenced September 3, 1895. The account could not have been stated earlier than September 7th, and therefore could not be barred. But, if it were treated as an open account, the evidence does not show that the last item charged against defendants became a charge before September 7th.

3. Appellants' third and last point is that "the debt sued on did not arise while defendants were acting in a fiduciary capacity," and that, therefore, the discharge in insolvency is a defense. Section 52 of the insolvent act of 1880 provides, among other things, that no debt created by a debtor while acting in a fiduciary character shall be discharged under that act, but the debt may be proved thereunder. It is not disputed that the transactions involved in said account were had and made by the defendants as factors and commission merchants for the plaintiff, but it is said that in these transactions the defendants were not acting in a fiduciary character, within the meaning of the insolvent act, as they received a commission on sales, but that, if it were otherwise, the action here is upon an account stated, which is a new agreement, based upon the balance assented to by the parties, and is not upon the original transaction; and cite *Coffee v. Williams*, 103 Cal. 550, 37 Pac. 506, where it is said: "When an account stated is assented to, either expressly or impliedly, it becomes a new contract, and an action upon it is not founded upon the original items, but upon the balance agreed to by the parties." In *Treadwell v. Holloway*, 46 Cal. 547, it was held that "one who receives goods consigned to him on commission to be sold, and the proceeds, less commission, to be transmitted to the consignor, if he sells the goods, and fails to transmit the money, creates a debt in a fiduciary capacity." This decision construed that clause of section 33 of the bankrupt act of 1867 (14 Stat. 517), which reads, "or while acting in a fiduciary capacity," and is therefore in point here. The same rule was expressed (obiter) in *Herrlich v. McDonald*, 80 Cal. 482, 22 Pac. 299, citing *Treadwell v. Holloway*, supra.

It only remains to consider whether the statement of the account changed the quality or character of the indebtedness so as to take it out of the exception declared in the insolvent act. That it changes the mode of pleading and proof is clear, but that does not prevent an inquiry into the origin and character of the indebtedness for the purpose of determining whether the liability is barred or affected by the provisions of the insolvent act. It was clearly the duty of the defendants to make out and deliver to plaintiff a just and correct account of all these fiduciary transactions, and it is clear that up to that time, at least, their character was not changed. If it was changed at any time it must have been by the implied agreement on the part of the plaintiff that all its items were

correct. Defendants still held in their hands \$1,300.18 of plaintiff's money which they had received from the sale of plaintiff's property, and how their admission that they had that amount of plaintiff's money in their hands, the account itself showing that it was the proceeds of the sale of plaintiff's property, could strip the transaction of its fiduciary character is beyond my comprehension. If defendants had made a mistake, or a willful error, in the account, so that the plaintiff could not accept it, and had brought his action for an accounting, or upon the open account, the fiduciary character of the transactions involved, it is conceded, would have remained; but, according to appellants' theory, that characteristic was eliminated by the simple process of rendering a true account, since, as they say, "when an action is brought on an original account, a plea of an account stated will bar a recovery thereon,"—citing *Driggs v. Garretson*, 25 N. J. Eq. 178. Counsel also cites *McClelland v. West*, 70 Pa. St. 183, to the proposition that "the balance due on an account stated becomes the principal debt. It cannot be re-examined or reopened, except for fraud or mistake, as set forth above, either to ascertain the items themselves or to inquire into their character." There was in that case, however, no question made as to the character of the transactions between the parties, or of any of the items in the account, so that remark can have no weight as authority upon the question before us. A direct authority against appellants' contention is *Dunbar v. Johnson*, 108 Mass. 519, cited by respondent. That action was upon an account stated. Upon the trial the court, against plaintiff's objection, admitted evidence to show upon what transaction the account arose, and found that the plaintiff sold intoxicating liquors to the defendant in violation of law, and that the account stated was upon such sales, and was the balance due therefor. The plaintiff contended that said illegality did not affect the action upon an account stated, which stood upon a new consideration, to wit, the accounting together. The defendant had judgment, and upon appeal it was affirmed, *Gray, J.*, writing the opinion, and citing several English cases. The judgment and order appealed from should be affirmed.

We concur: CHIPMAN, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.



121 Cal. 608

ANGUS et al. v. PLUM et al. (S. F. 1,135.)  
(Supreme Court of California. Aug. 3, 1898.)

## COURTS—DECISION—STARE DECISIS.

A decision construing a clause of the constitution will not be overruled in an action between parties who have acted on the same.

Temple, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by one Angus and others against one Plum and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Aylett R. Cotton, W. C. Burnett, and L. G. Burnett, for appellants. Pierson & Mitchell and Garrett W. McEnerney, for respondents.

PER CURIAM. The judgment in this case must be affirmed on the authority of San Gabriel Valley Land & Water Co. v. Witmer Bros. Co., 96 Cal. 623, 29 Pac. 500, and 31 Pac. 588. The clause of the constitution upon which the rights of the parties depend was construed in that case, and the court was very evenly divided. We are now asked to overrule the decision then made, but, whether that decision was right or wrong, it has been since acted upon, and was acted upon by the parties to this controversy, and we consider that it is protected by the rule of stare decisis. Judgment affirmed.

I dissent: TEMPLE, J.

121 Cal. 609

In re MORE'S ESTATE. (S. F. 1,020.)  
(Supreme Court of California. Aug. 6, 1898.)

ANIMALS—LEASE—EXECUTORS—ACCOUNTING—EXPENSES—EVIDENCE—EXPERTS—HEARSAY—RELEVANCY—TRIAL—WITHDRAWAL OF EVIDENCE.

1. Under a lease giving lessee the increase of a flock of animals, requiring the flock, however, to be grown to a certain number, which lessee was to turn over to lessor at the end of the term, a delivery of the specified number was required, and not merely a delivery of such number as he was able to raise by the exercise of reasonable care and prudent husbandry.

2. The question whether an administrator is entitled to employ a bookkeeper depends on the circumstances of the estate, and should be left to the discretion of the court.

3. On an issue of the correctness of a count made with a machine, it was not error to permit a duplicate of the machine used, which had been received in evidence, to be withdrawn, where the offer was to prove the original unreliable, and no request was made for a test of the duplicate, and where the correctness of the count was proved by other testimony.

4. One who had been in the sheep business for 26 years, and was familiar with sheep husbandry, was competent to testify as to the probable average annual increase in a certain flock of sheep.

5. On an issue whether an administrator was

entitled to credit for the expenses of a bookkeeper employed by him, testimony that the bookkeeper employed had filed an exorbitant claim against the estate, and on its disallowance had commenced suit thereon, is irrelevant.

6. Where witness sent another person on an errand, statements by such person to witness as to the result of such errand are hearsay and inadmissible.

7. An executor was chargeable in his annual account with property which he, as lessee under a lease with intestate, had agreed to deliver to him at a certain time, where he failed to make such delivery to himself as administrator.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceedings for the settlement of the annual account of John F. More, an administrator of the estate of Alexander P. More, deceased. From a decree sustaining exceptions filed by certain heirs, said More, as administrator and individually as an heir at law, appeals. Reversed in part.

Rodgers & Paterson, for appellant. John B. Mhoon, for respondents.

BELCHER, C. This is an appeal by John F. More, as administrator of the estate of Alexander P. More, deceased, and individually as an heir at law of said deceased, from a decree settling the second annual account of said John F. More, as administrator of said estate. Alexander P. More died October 21, 1893, and John F. More was appointed administrator of his estate, February 12, 1894. The second annual account of the administrator was filed March 5, 1896, and accompanying it was a lengthy report as to the property of the estate and what had been done with portions thereof. To the account so filed certain heirs of the decedent filed exceptions in writing and contested numerous items thereof. When the matter came on for hearing it was stipulated by all parties in interest that all testimony introduced by any one contestant should be considered as introduced on behalf of all the contestants, and that all testimony introduced by the administrator should also be considered as introduced on behalf of John F. More individually. After the hearing the court filed its "Findings of Fact and Conclusions of Law," and made an order thereon, in which some of the objections made by the contestants were sustained, some overruled, and others reserved for future considerations, with directions that the items reserved be included in the next account.

The bill of exceptions contains numerous specifications of the particulars in which it is claimed the evidence was insufficient to justify the findings of fact, and also numerous exceptions to the conclusions of law drawn from the facts; but, as only a few points are discussed by the learned counsel for appellant, we shall not consider those not noticed in their brief.

1. It appears from the record that on October 1, 1891, the decedent leased to John F.

More the property known as "Santa Rosa Island," "together with the cattle, horses, flocks, and herds of live stock of all kinds on said island," for the term of three years, to wit, from October 1, 1891, to October 1, 1894, for the annual rent of \$10,000, payable on the 1st day of June of each year. The lease provided that the lessee "shall and will, at his own proper costs and charges, bear, pay, and discharge all such taxes, duties, and assessments whatsoever as shall or may, during the said term, be charged, levied, or imposed upon the said premises or property," and also that the said lessee shall have "all the increase of the stock, flocks, and herds on said island, and the proceeds thereof, during the term of this lease, upon the express understanding and condition, however, and it is hereby expressly agreed by the parties hereto, that the cattle on said island shall be increased and kept up to fifteen hundred (1,500) head, and that flock of sheep shall be grown up to forty thousand (40,000) head of sheep, and that the said lessees shall, at the end of said term, turn over and deliver to said lessor, or his assigns, that number, to wit, forty thousand head of sheep in good quality and condition, and that the said lessor shall have the fall clip of wool of the year 1894." As the lessor was dead, and the lessee was the administrator of his estate, when the lease expired, it became the duty of the lessee to turn over to himself, as administrator, the said cattle and sheep. In the report accompanying his account the administrator states that he has on hand on the island 1,500 head of cattle, of the appraised value of \$18,000, and 40,000 head of sheep, of the appraised value of \$60,000, and "the increase of the flocks and herds of said estate on said island." The court found that under the said lease John F. More "covenanted and agreed on his part to deliver to said A. P. More, his administrators or assigns, on the 1st of October, 1894, forty thousand head of sheep, on Santa Rosa Island; that said John F. More, as said lessee, did not and has not at any time delivered to himself, as said administrator, or to any one for said estate, a greater number of sheep than twenty-five thousand seven hundred and eighty-nine, and there was on the 1st of October, 1894, due from said John F. More to said estate, and there is still due from said John F. More to said estate, fourteen thousand two hundred and eleven (14,211) head of sheep; that said sheep on said 1st day of October, 1894, were of the value of \$1.50 per head." The court further found "that during the months of October, November, and December, 1895, said administrator, John F. More, sold to the Western Meat Company, in San Francisco, four hundred and eighty head of cattle, for the sum of \$14,270.94; that four hundred and thirty-two head of said cattle were the property of, and belonged to, the estate of A. P. More, deceased, and forty-eight head of said cattle were the

individual property of the said John F. More; that the expense of marketing said cattle cannot be determined from the evidence now before the court; that of said \$14,270.94, the gross proceeds of said sale, the estate of A. P. More was entitled to the sum of \$12,843.85, and John F. More was entitled individually to the sum of \$1,427.09." And, as conclusions of law from the foregoing facts, the court found "that the administrator should charge himself with the sum of \$21,316.50, the appraised value of fourteen thousand two hundred and eleven sheep, and interest thereon from the 1st day of October, 1894, at the rate of seven per cent. per annum." "Also that he should charge himself with the sum of \$12,843.85, being the gross proceeds of the sale of four hundred and thirty-two head of cattle made as aforesaid by him in October, November, and December, 1895, and interest on the same from the 17th day of December, 1895, at the rate of seven per cent. per annum, and that said administrator be allowed the expense of marketing said cattle in his next account."

These findings are assailed by the appellant as not justified by the evidence. As to the sheep it is claimed (1) that the lease, when properly construed, in effect provided only that the lessee should increase the flock of sheep to the number of 40,000 head, if he could do so by the exercise of reasonable care and proper husbandry, and in that event he should turn over that number at the expiration of the lease, but if, by the exercise of such care and husbandry, he should be unable to increase the flock to 40,000 head, then he should turn over only such number as he might have, and that the burden was upon respondents to show that he had not exercised such care and husbandry, which they wholly failed to do, and hence that appellant was properly chargeable only with such number of sheep as he had at the time the lease expired and actually turned over; (2) that he did, in fact, turn over to himself, as administrator, the full number of 40,000 head; and (3) that the value of the sheep was only 50 cents per head, and not \$1.50, as found by the court. And as to the cattle it is claimed that appellant had on the island 1,500 head which belonged to the estate, and that the 480 head which he sold were increase which belonged to him, and which he had a right to sell on his own account.

As we read the lease, it is not subject to the construction claimed for it. On the contrary, it provides, in plain and unambiguous language, that the lessee shall, at the end of the term, turn over and deliver to the lessor, or his assigns, 40,000 head of sheep, in good quality and condition. And that this expressed the meaning and intention of the parties to the instrument is shown by the evidence given by appellant himself. He testified that the lease gave him the surplus of the sheep over 40,000 head, and



that in September, 1894, he sold and shipped from the island 4,957 head of them, the last shipment of 1,040 head being made on the 30th day of that month, the last day of his lease. He further said: "It is my understanding that under the lease I was to account for 40,000 head of sheep at the expiration of the lease. I have always held myself out as accountable for that number as of that date."

The question, then, is, did appellant, as lessee, turn over and deliver to himself, as administrator, 40,000 head of sheep on the 1st day of October, 1894? The testimony in the case is quite voluminous, covering, in a partly-condensed form, a little more than 200 pages of the printed transcript. We have carefully read all testimony found in the record, and, while there is some conflict, we are of the opinion that it is quite sufficient to show that no greater number than that found by the court was ever turned over or delivered by appellant to himself, as administrator, or to any one for said estate. The sheep were appraised as of the value of \$1.50 per head, and the court found that to be their value on October 1, 1894. There was evidence that they were of the value of \$2 per head, and we find nothing in the record tending to support the claim that their actual value was only 50 cents per head, or that it was less than that found by the court. As to the cattle, there is no dispute that at the time the lease expired the estate owned and was entitled to the proceeds of 1,500 head of cattle that were then being herded and fed on the island. Nor is there any dispute that during the last three months of 1895 appellant sold and shipped away 480 head of the cattle on the island. But the claim is that on October 1, 1894, there were on the island at least 1,980 head of cattle, and that the estate was therefore not deprived of any of its property by the sale subsequently made. The court found, in effect, that there were only 1,548 head of cattle on the island on October 1, 1894, and that of the animals sold 432 head were the property of the estate, and must be accounted for by appellant. The question is, was this finding justified by the evidence? We think it clearly was. It is true that there was some apparent conflict, but, when fairly considered, a clear preponderance of the evidence tended strongly to show that the whole number on the island was not greater than the number found by the court. It follows, therefore, that the findings as to both the sheep and cattle cannot be disturbed for want of evidence to justify and support them.

2. The court found "that the said administrator, during the whole period since his qualification as such administrator, has grazed and used for his own personal benefit and gain the island of Mescalitan, or Little Island, and the tide lands adjacent

thereto, being part and parcel of the property belonging to said estate held by him as said administrator; that the reasonable value of such use, and the rents, issues, and profits of said island, during the period so used by him, is the sum of seven hundred and fifty dollars, and there is due from said John F. More to said estate, for the use of said island, said sum of seven hundred and fifty dollars;" and, as a conclusion of law, "that he should further charge himself with the sum of seven hundred and fifty dollars, being the rent for the island of Mescalitan during the period of his administration to date." This finding is complained of as not justified by the evidence, "in that the evidence shows that the rental value of said Mescalitan during said period was less than seven hundred and fifty dollars, and not to exceed one hundred and fifty dollars." There were about 60 acres in the island of Mescalitan, and about 300 acres of tide lands surrounding it which were valuable for pasturage. And it was proved, without contradiction, that the rental value of the island proper per annum, during all the times named, was at least \$4 per acre, and that in 1894 the use of the tide lands surrounding the island was very valuable, worth perhaps \$300 or \$400 and in any year worth \$50. Obviously this evidence was quite sufficient to justify the finding.

3. The account presented for settlement contained three items for sums of money, aggregating \$3,000, claimed to have been paid by the administrator to P. W. Watson, as monthly wages, at the rate of \$125 per month, for his services as bookkeeper for the estate. The court rejected each of the items, and held that Watson had rendered no services for which the estate was liable, and that "the administrator should not be allowed anything on account thereof." It is claimed for appellant that this decision was not justified by the evidence; that, on the contrary, it appears from the evidence that the estate was one of great value, and many important transactions required the services of an expert accountant and bookkeeper; and hence "that the court erred in not allowing a reasonable amount to the administrator for the services of Mr. Watson." It is true it cannot be said that in no case should an administrator be allowed to employ a bookkeeper. But whether an administrator should be allowed for payments made for the services of a bookkeeper depends upon the circumstances of the estate, and is a matter properly left to the discretion of the probate judge. "If the services were such as, under the circumstances, the administrator ought to have performed, and for which his commissions are intended to compensate him, such charge should be disallowed." *In re Moore's Estate*, 72 Cal. 335, 13 Pac. 880.

4. Appellant calls attention to four rulings

of the court, and claims that each one of them was erroneous. They were as follows:

First, Mr. C. E. Sherman was appointed by the court to count and report the number of sheep on the island. He undertook the work, and in making the count used a registering machine to check off the numbers. He testified that the machine worked correctly, and that he had used it for three or four years, and never found any mistake in it; that he had not then the machine which he used in counting the sheep,—having made a present of it to a gentleman at Bakersfield,—but had one just like it, which he exhibited, and pointed out the way it worked. Counsel for appellant then stated, "We would like this machine," and that they expected to show, and were advised they could show, "that these machines are entirely unreliable. The Court: This is not the machine that he used. Mr. Mhoon: We will strike out the subject of the machine. \* \* \* I will withdraw it. The Court: It is withdrawn. Whatever way you made it, you made a count, and the count was correct? Witness: Yes, sir; I made a correct one. Mr. Whitworth: We note an exception to the withdrawing of that testimony at this stage of the case."

Second. The same witness, Sherman, was asked: "What is the average percentage of the increase of lambs of a flock of forty thousand, in the spring, for instance?" The question was objected to upon the ground that the witness was not shown to be an expert on the question, and the objection was overruled. The witness had testified that he had been dealing with sheep about 26 years, and that he was familiar with the sheep husbandry.

Third. It appeared that during the time Watson was employed by appellant as bookkeeper for the estate, and was receiving \$125 per month for his services, he made out a claim against the estate for \$30,000 for services claimed to have been rendered by him to decedent in his lifetime. One of the items of this claim was as follows: "July 5 to Sept. 8, 1893. Advising him not to purchase two millions pounds of wool, in which matter he was very anxious to speculate, and hold the same for a rise in the market, in which there would have been a heavy loss; also not to purchase five thousand tons of wheat, in which he was also anxious to speculate,—eighteen thousand dollars." It was admitted that the said claim was presented for allowance, and rejected, and that suit upon it was thereafter brought by Watson, and was then pending in court and being defended by the administrator. Appellant was examined as a witness quite fully as to the relations that existed between Watson and A. P. More in his lifetime, and also in regard to the services of Watson as bookkeeper for the estate; and in connection

therewith the said claim for \$30,000 was offered in evidence by the contestants, and, over the objection of appellant that it was entirely immaterial and irrelevant, it was admitted.

Fourth. While Mr. Sherman was making the count of the sheep, in the fall of 1894, he left the island, and was taken over in a schooner to Santa Barbara, with the understanding that he was to be sent for and brought back in a few days. Appellant testified that the schooner was sent over to the mainland about a week after Sherman left. "I told the captain to see Mr. Sherman, and see if he wanted to come over. Some remark of that kind I said to Captain Thompson. Q. Did the captain bring back any word from him at that time? A. Yes; he did. The captain said he reported at Mr. Sherman's shop or business, I disremember which, in Santa Barbara. They told him there he was out of town at Lompoc,—that was the word he brought back,—and would be gone several days." On motion of counsel for contestants this answer was stricken out, upon the ground that it was simply hearsay.

We see no prejudicial error in the ruling complained of as to the registering machine. Counsel say: "The court erred in allowing the contestants to withdraw the register used by the witness Sherman in making the count, and in refusing to compel him to produce it. \* \* \* The administrator desired to inspect the machine that the witness had used in making the count, and to exhibit it to others, for the purpose of showing that it was entirely unreliable." But the witness did not have the registering machine that he used in making the count, and could not produce it, as was clearly shown. And no point seems to be made on the refusal of the court to require the duplicate machine which the witness then had to be handed over for inspection. Besides, there was evidence, aside from that given by Sherman, sufficient to justify a finding that the whole number was not greater than the number found by the court. And, if the count was in fact correct, then the case should not be reversed because the duplicate machine which was there was allowed to be withdrawn and not handed over for inspection, even if it ought to have been.

The question whether Sherman was an expert, and as such competent to testify as to what would probably be the average increase of lambs in a flock of 40,000 sheep in the spring of the year, was for the court to decide, in view of the evidence; and the uncontradicted evidence that he had been in the sheep business for 26 years, and was familiar with sheep husbandry, would seem sufficient to justify the court in deciding the question as it did.

The time during which appellant claimed to have paid Watson for his services as bookkeep-



er for the estate covered the whole period between his appointment as administrator and the making out of his second annual account, and the \$30,000 claim of Watson against the estate was evidently offered in evidence for the purpose of showing that one who would make out and present such a claim could not have been honestly and properly employed by appellant in the interest of the estate. But, conceding that the claim was obnoxious to all the objections urged against it by respondents, still we fail to see how it was relevant to the question whether all the services rendered by Watson as bookkeeper were such as under the circumstances the administrator ought to have performed, and for which his commissions were intended to compensate him. We think, therefore, that the court erred in admitting the said claim in evidence. The answer of appellant as to the report brought back by the captain was not responsive to the question propounded to him, and was clearly hearsay, and on that ground properly stricken out.

5. Finally it is said: "Whatever may be the evidence as to the number of sheep at the time of the expiration of the lease, the court erred in charging the administrator with the value of the deficiency in number. If, upon a final accounting, it should be found that the administrator is unable to turn over to these entitled to the same the number of sheep which ought to be turned over, it will be time enough then to charge him with the value thereof. The court cannot during the course of the administration, and before the time when he should turn over the specific property to those entitled to the same, charge the administrator with the value of any property supposed to have been lost or destroyed through the fault of the administrator." No authority is cited in support of this proposition, and we know of no rule of law or public policy which can be said to sustain it. Appellant was obligated, as lessee of the island, to turn over to himself, as administrator, on the 1st day of October, 1894, 40,000 head of sheep. This, it appears, he failed to do, but about a year and a half later falsely reported to the court that, as administrator, he had that number of sheep on hand and the increase thereof. From the date of the expiration of the lease the estate was entitled to the full number of sheep named, and all the increase thereof, and all the wool clipped from the whole band; and if it be true that appellant cannot be charged with the value of the deficiency in the number turned over until all litigation in regard to the estate has been ended, and he has presented his final account for settlement and is ready to turn over all the property to the heirs, then it is apparent that the matter may possibly be delayed for many years, and until important witnesses in the case are dead, and that the heirs might thereby be deprived of valuable property to which they were entitled. We conclude, therefore, that the court was authorized to hear and determine the matter, as it did, on the settlement of the second annual account.

We advise that the judgment or order appealed from be reversed, in so far as it relates to the three items embraced in the account for moneys claimed to have been paid to Watson for his services as bookkeeper, and that the administrator be permitted to include the said items in his next annual account for further consideration by the court below, and that in all other respects the said judgment or order be affirmed.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment or order appealed from is reversed, in so far as it relates to the three items embraced in the account for moneys claimed to have been paid to Watson for his services as bookkeeper, and that the administrator be permitted to include the said items in his next annual account for further consideration by the court below, and that in all other respects the said judgment or order is affirmed.

121 Cal. 641

PEERLESS GLASS CO. v. PACIFIC  
CROCKERY & TINWARE  
CO. (L. A. 422.)

(Supreme Court of California. Aug. 10, 1898.)

SALES — CONTRACT — MEETING OF MINDS — CONDITIONS.

1. A seller, in giving terms, stated that the "freight allowance" was 74 cents, believing he was answering an inquiry simply as to the freight rate. The buyer understood the term to mean an allowance of 74 cents per hundred pounds from the invoice price, such allowance being known as a discount among merchants. The goods were sold by the gross, and there was no evidence as to how the discount was to be computed. *Held*, that the buyer was not entitled to any deduction, there having been no contract, because of the failure of the minds of the parties to meet.

2. An agreement to sell goods at a future time, if the seller should then have them on hand for sale, is conditional, and the buyer cannot recover for its breach without showing that the seller had them to sell.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the Peerless Glass Company against the Pacific Crockery & Tinware Company to recover for goods sold and delivered. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

McKinley & Graff, for appellant. Welles Whitmore, E. M. Gibson, and F. M. Porter, for respondent.

TEMPLE, J. Both parties to this case are corporations. Plaintiff alleges a sale of merchandise to defendant of the agreed value of \$4,862.62, and admits a payment of \$1,972.81, leaving a balance of \$2,889.81, for which the suit was brought. Defendant de-

nies that it purchased goods of the value charged in the complaint, but avers that it purchased, or contracted to purchase, from plaintiff, 1,500 gross of Mason jars, and 76 gross of extra caps, of the total value of \$7,640.12, and that as part of the contract of sale plaintiff agreed to a rebate of 74 cents per hundred pounds, as an allowance upon the freight charges to be paid thereon. Defendant admits that plaintiff delivered 946 gross of jars and 76 gross of caps, worth \$4,862.62, and alleges that upon these goods defendant paid \$1,525.14 freight, which plaintiff agreed to pay; also that 167 gross of jars delivered were defective, and were worth \$1 per gross less than the agreed price; also that plaintiff failed to deliver 554 gross of jars, which failure obliged defendant to purchase in the market 164 gross at an increased price, to its damage in the sum of \$600.49. Defendant demands judgment against plaintiff in the sum of \$1,425.57.

The parties agree as to the issues submitted to the trial court. They were: (1) Was defendant entitled to a rebate as freight allowance, and, if so, how much? (2) Is defendant entitled to damages for the failure of plaintiff to deliver all the goods it had contracted to deliver, and, if so, the amount of the damage? And (3) was defendant entitled to recover damage for 167 defective jars?

There is no controversy as to the invoice price, nor as to the quantity of goods delivered. The main controversy relates to the rebate and to the number of jars plaintiff was bound to deliver. The negotiations were by letter, as follows: December 26, 1894, plaintiff, a manufacturer of glassware at Converse, Ind., addressed a letter to defendant, a dealer in crockery and tinware, at Los Angeles, soliciting orders for Mason fruit jars. January 11, 1895, defendant replied, asking a description of ware and terms, closing its letter thus: "State terms, freight allowance, etc., and oblige." On the 18th plaintiff replied, describing goods and packages, and then as follows: "Freight allowance to Los Angeles from Converse is seventy-four cents. We would be pleased to sell you five to ten car loads as follows: Pints, complete, \$4.00; quarts, \$4.25; half gallons, \$6.00,—f. o. b. factory, Converse. Packed in regular packing, regular terms; if packed one dozen in a box, twenty-five cents per gross extra. Extra caps, \$1.75. Or we would sell bodies only, pints, \$2.25; quarts, \$2.50; half gallons, \$4.25,—in regular packing; special packing, twenty-five cents per gross extra. This for early acceptance and shipment not later than June 1st. Our terms are sixty days from date of shipment, or two per cent. off for cash in ten days. We hope these prices and terms will be sufficiently attractive to secure your order. We would be very much pleased to make consignment of jars to your place. Very truly," etc.

On the 28th of that month defendant sent

its order for jars and caps, with some directions as to shipment, and the following inquiry: "Please state, also, by return of mail, if you will give us the refusal of an additional five car loads at present prices and terms, provided we place our definite order for the same before May 1, 1895. We are not in position at this writing to safely judge as to our fuller wants for the coming season, which ordinarily run from twelve to twenty car loads, but will be able to do so intelligently by May first, and probably sooner. Respectfully," etc.

February 5th plaintiff replied, accepting order, and to the special inquiry as follows: "We have, so far, declined to give any option or refusal as to future sale, as we look for better prices. We have decided in your case to sell you another five hundred gross upon same terms and prices if notified on or before May first, conditional if we have the ware to sell at that time. Yours, very truly, The Peerless Glass Co. J. A. Gauntt, President."

February 28th the first car load was shipped to defendant, with the following invoice:

"Converse, Ind., Feb. 18, 1895. Pacific Crockery & Tinware Co., Los Angeles, Cal., Bought of the Peerless Stamping and Glass Co., Incorporated. Fruit Jars and All Kinds of Glass Vessels. Plant, Converse, Ind.; office, Marion, Ind. Terms: Sixty days; two per cent. off, ten days. Terms: Cash.

Feb. 18th.		
To 9 gross pint Mason's, 1 doz.		
in a box.....	\$4 25	\$ 38 25
To 10 gross pint Mason's, 6 doz.		
in a box.....	4 00	40 00
To 30 gross quart Mason's, 1 doz. in a box.....	4 50	135 00
To 16 gross quart Mason's, 8 doz. in a box.....	4 25	68 00
To 20 gross ½ gal. Mason's, 1 doz. in a box.....	6 25	125 00
To 10 gross ½ gal. Mason's, 6 doz. in a box.....	6 00	60 00
To 10 gross caps and rubbers..	1 75	17 50

\$483 75

"F. o. b. Converse, Indiana."

Other shipments were made as follows: March 5th, March 20th, April 29th, and May 2d. With each an invoice was sent similar to that above set out. All were f. o. b. Converse, which means delivered on the cars at Converse without expense to the buyer. In none was there any mention of freight allowance, or any discount, except the statement, "two per cent. off ten days," which was part of the heading of each invoice. Heimann testified that he conducted the correspondence for the defendant; that the invoices were all received by defendant about 10 days after their date; that the defendant rendered no statement to plaintiff, and did not mention or refer to the subject of freight allowance, until its letter of May 29, 1895. Defendant never paid the amount of any bill, but made remittances on account, without explanation.

May 9, 1895, plaintiff drew upon defendant



for the full balance due on goods, according to invoice price, making no rebate. Helmann testified that the order was presented, "but the company did not pay the same, but allowed the draft to go to protest. The Pacific Crockery Company never wrote to the Peerless Glass Company in regard to said protested draft, and in no way ever mentioned it to plaintiff, or made any explanation why it was not paid, or why it was allowed to go to protest." This draft must have made it clear to defendant—if before it had been doubtful—that plaintiff did not understand that there was any discount on the goods. Still it continued to insist upon the shipment of more goods. Plaintiff had notified defendant that it could not furnish the additional 500 gross, claiming that its acceptance was conditional upon its having the goods, and it did not have them. Even after this positive knowledge that plaintiff did not expect to make a discount, defendant strenuously insisted upon its right to the "option," as it terms this part of the contract, and finally, on the 27th of May, sent the following dispatch to plaintiff: "Los Angeles, May 27, 1895. To the Peerless Glass Co., Converse, Indiana: To end controversy about option, will you ship quick one more car as specified, April 22d, at former terms, and fifty-four gross due on original contract, the latter in cases?" The next day defendant received a telegram accepting the offer, and then on the following day wrote a letter to plaintiff, for the first time explaining its construction of the contract. The letter of the 29th clearly shows that defendant supposed all the goods would be shipped before the letter would arrive, but apparently they were not, and plaintiff then refused to ship more until those already sent were paid for. Hence the proposed compromise fell through, and plaintiff failed to deliver 54 gross of the jars included in the first order.

Defendant proved by many witnesses that the term "freight allowance" was a term well understood by merchants who buy goods in the East, and when goods are delivered f. o. b. the purchaser pays the freight, and deducts the amount of the allowance from the invoice price. The allowance has nothing to do with the freight actually paid. It may be greater or less. In other words, it is a discount sometimes made by merchants to induce dealers at a distance to trade with them. Plaintiff claims to have understood that defendant was inquiring for the freight rates from Converse. If so, the inquiry naturally is, why its agents did not give the freight rates, instead of using the phrase "freight allowance,"—a phrase never used to convey such meaning. If this were all, the case would be easily resolved against plaintiff, so far as concerns

goods delivered before the order and letter of May 9th are concerned. At that time defendant well knew how plaintiff understood the contract, and further receipts of merchandise would be without freight allowance. From that time the managers of the defendant were not acting in good faith, but were lying in wait for plaintiff, intending to spring the point they thought they had when they got all the goods they could. And such was the course they pursued.

But what is the natural meaning of the sentence, "The freight allowance to Los Angeles from Converse is seventy-four cents." The form of the expression is inapt as applied to a rebate, and quite appropriate as applied to a charge for freight. It is true, on the other hand, that the word "allowance" by itself does suggest an idea the opposite of a charge. But if an allowance or a rebate was meant, what is the amount of the rebate? Defendant's managers say the allowance is 74 cents per hundred pounds. The only reason for this conclusion that I can see is that it is very near the freight rate. Plaintiff contends that this fact shows that freight rate is what was meant, especially as in the same letter defendant was told upon what terms it could have a discount. Taken literally, it means a rebate of 74 cents upon the whole purchase; as merchants would probably understand the phrase, it would mean 74 per cent. upon the invoice. Neither interpretation is admissible, for each is unreasonable. But we are not at liberty to interpolate in the letter the words "per cental" or their equivalents. That is certainly an unusual mode of determining a discount. It may as well have meant per car load, per shipment, or per gross. The contract of purchase was not by weight, but per gross. If the phrase had no ascertainable meaning, and it was in fact differently understood by the parties, it must be a case in which there was no agreement, which in this case means that no rebate was allowed. If there was no meeting of the minds of the parties, since defendant has received and sold the goods it would be liable on quantum valebat, which the evidence shows would be the contract price. Defendant was allowed the damage for inferior goods. The sale of the additional 500 gross was conditional, and the defendant did not show that the condition upon which plaintiff agreed to deliver them existed. The contrary was shown without conflict. The fact that the terms of the sale were never really agreed upon would be a sufficient answer to this claim on the part of the defendant. The judgment and order are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.





(121 Cal. 620)

**WILSON v. CALIFORNIA BANK.**  
(L. A. 449.)

(Supreme Court of California. Aug. 9, 1898.)

**MORTGAGES — PRIORITY OVER STREET ASSESSMENTS — FORECLOSURE — LIS PENDENS.**

1. Code Civ. Proc. § 726, providing that no person having an unrecorded lien on mortgaged property need be made a party to proceedings to foreclose the mortgage, and that the judgment rendered therein is conclusive against him, refers only to those holding from the mortgagor, and not to a purchaser at a sale under a street assessment.

2. The title acquired under the sale following a judgment based on a street assessment is not subject to a mortgage on the property, and cannot be litigated in an action to foreclose it.

Department 2. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Action by Henry P. Wilson against the California Bank. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Jones & Weller, for appellant. Finlayson & Finlayson, for respondent.

McFARLAND, J. This is an action to quiet title to a certain lot of land. Judgment went in the court below for plaintiff, and defendant appeals from the judgment and from an order denying a motion for a new trial.

The plaintiff claims title to the lot through a sale made pursuant to a judgment enforcing a lien for an assessment for street improvements upon the lot. On November 22, 1887, one Burlingame was the owner of the lot in question, and on that day executed a deed conveying the lot to the present defendant, the California Bank, which deed was on said day duly recorded. Afterwards, and while the record title thus stood in the defendant, there was an assessment duly made upon the lot for street improvements, and one Brearly brought suit to foreclose the same, making the defendant the California Bank a party defendant thereto. Such proceedings were had that a judgment enforcing the lien was entered, and the lot was sold by the sheriff to said Brearly to satisfy the assessment. A certificate of sale was issued to him, which, on November 3, 1890, was duly recorded; and thereafter, on February 14, 1891, he assigned the certificate to one M. C. Marsh. This assignment Marsh did not cause to be recorded. No redemption having been made, and the time for redemption having expired on May 1, 1891, the sheriff, on February 20, 1892, executed a deed conveying the lot to the said Marsh, which was recorded March 26, 1892, at 2:47 p. m. Marsh afterwards conveyed the property to the plaintiff. No objection is made by appellant to the regularity and validity of the assessment, or to the judgment and sale made under it; and plaintiff has full title to the lot under said proceed-

ings, unless the title was cut off by the matters hereinafter mentioned. The deed of conveyance hereinbefore mentioned by Burlingame to the defendant, the California Bank, while apparently conveying the legal title, was in fact intended as a mortgage; and on May 8, 1891, after the expiration of the time for redemption under the sale on the assessment judgment, the defendant brought suit to foreclose the said intended mortgage. Said Brearly was made a party defendant, and filed an answer disclaiming all interest. Marsh was not made a party defendant. The suit proceeded to a decree of foreclosure, which was entered on January 22, 1892. On March 26, 1892, at 12 o'clock m., the lot was sold by the sheriff, under said decree, to the defendant; and on September 29, 1892, a sheriff's deed issued to the defendant therefor. The defendant claims title under the last-mentioned deed; and the contention of defendant is that the title of the plaintiff acquired under the said assessment judgment was cut off and defeated by the decree in the foreclosure of the mortgage, upon the ground that, as Marsh's assignment of the certificate of sale had not been recorded at the time the mortgage foreclosure suit was commenced, therefore all his interest was foreclosed under the provisions of section 726 of the Code of Civil Procedure. That section provides that "no person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered and the proceedings therein had are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action." The section refers, however, only to those holding from or under the mortgagor, and a purchaser at a sale for street assessment or tax is not within that class. At the time of the commencement of the action to enforce the assessment the California Bank held the apparent record title, and was properly made defendant under the street law (Stat. 1885, p. 159); and if plaintiff could be considered as holding under either Burlingame or the bank it would be more proper to say that he holds under the latter than the former. But he does not hold under either. The title acquired under the sale following the assessment judgment was not subject to the asserted mortgage, but was superior and hostile thereto, and could not have been litigated in the action to foreclose the mortgage. *Odell v. Wilson*, 63 Cal. 159, and cases there cited. And the rights of the parties are not affected by the fact that at the commencement of the action to foreclose the mortgage the bank filed a lis pendens. The lis pendens merely gave notice to certain persons that the action was pending; but

the plaintiff herein was not a proper party to that action, and his title could not have been litigated or foreclosed thereby. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

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laws of the state wherein they are domiciled, and immediately after the marriage return and continue to reside in such state, the laws of their domicile apply to the marriage.

4. When a party relies on a foreign law, or law of another state, he must prove the law, by its production.

5. Civ. Code, § 55, provides that consent of the parties to a marriage must be followed by a solemnization authorized by the Code, to constitute marriage. Section 70 provides that "marriage may be solemnized either by a justice of the supreme court, judge of the superior court, justice of the peace, priest or minister of the gospel of any denomination." Section 79½ provides that the provisions as to solemnization of marriage do not apply to members of religious denominations having any peculiar mode of entering into the marriage relation, and that as to them a written declaration of marriage should be filed. *Held*, that where the solemnization was performed by the master of a vessel on the high seas, and there was no such marriage as is contemplated by section 79½, the marriage was invalid.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; M. T. Allen, Judge.

Action by Homer Norman against Janette Thomson Norman. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Walter Haas and A. M. Stephens, for appellant. Davis & Rush, for respondent.

**CHIPMAN, C.** Action to have a certain marriage between plaintiff and defendant declared valid and binding upon the parties. A second amended complaint alleged: That on August 2, 1897, defendant was a minor of the age of 15 years and 10 months, and that her father, one A. C. Thomson, was her natural and only guardian. Plaintiff was of the age of 21 years and 10 months, and both plaintiff and defendant were citizens and residents of Los Angeles county, Cal. On said day plaintiff and defendant, at Long Beach, on the coast of California, boarded a certain fishing and pleasure schooner, of 17 tons burden, called the "J. Willey," duly licensed under the laws of the United States, of which W. L. Pierson was captain, and was enrolled as master thereof, and had full charge of said vessel. Said vessel proceeded to a point on the high seas about nine miles from the nearest point from the boundary of the state and of the United States. The parties then and there agreed, in the presence of said Pierson, to become husband and wife, and the said Pierson performed the ceremony of marriage; and, among other things, they promised in his presence to take each other for husband and wife, and he pronounced them husband and wife. Neither party had the consent of the father or mother or guardian of defendant to said marriage. On the same day, and immediately after said ceremony, the parties returned to the county of Los Angeles, and have ever since resided there, and they then and there immediately began to live and cohabit together as such husband and wife, and continued so to do until the 10th day of August, 1897. Said marriage has never been dissolved. Defendant denies the validity of

121 Cal. 620

**NORMAN v. NORMAN. (L. A. 469.)**

(Supreme Court of California. Aug. 9, 1898.)

**MARRIAGE—VALIDITY—EVASION OF STATE LAWS—SOLEMNIZATION—CONFLICT OF LAWS.**

1. Rev. St. U. S. § 722, providing that the United States courts, in the vindication of the civil rights of all persons in the United States, where the laws of the United States do not apply or are deficient, shall be guided by the common law, as modified in the state wherein the court is held, and section 4290, providing that the master of a vessel shall enter in his log book every marriage taking place on board, do not declare the common law, as to marriage, to be in force on the high seas on board American vessels.

2. Under Civ. Code, § 63, providing that marriages without the state, valid under the laws of the place where contracted, are valid within the state, the fact that parties to a marriage go on the high seas to be married solely to evade the laws of the state wherein they are domiciled does not invalidate the marriage, if otherwise valid.

3. Where parties go on the high seas, where no law exists, to be married, so as to evade the

said marriage, and refuses to join in a declaration thereof. Defendant, by her guardian ad litem, admits the allegations of the complaint, and alleges that, in having the ceremony performed as alleged, plaintiff and defendant did so with the intent and for the purpose of evading the statutes of the state prescribing the manner in which marriages shall be contracted and solemnized. She prays that the said pretended marriage be declared illegal and void, and that plaintiff be precluded and estopped from ever setting up or asserting or claiming to be the husband of defendant. The court found all the allegations of the complaint and answer to be true, and, as conclusion of law, found that plaintiff was not entitled to the relief claimed, but that the said pretended marriage was illegal and void, and judgment was entered accordingly. The appeal is from the judgment. The action is brought under section 78, Civ. Code. It must be conceded that the question presented by this appeal is one of much importance, whether viewed in its relation to society, or to the parties only.

Appellant contends (1) that the marriage is valid because performed upon the high seas; and (2) that it would have been valid if performed within this state, because there is no law expressly declaring it to be void. Respondent presents the case upon two propositions, claiming (1) that no valid marriage can be contracted in this state, except in compliance with the prescribed forms of the laws of this state; and (2) that citizens and domiciled residents cannot go upon the high seas for the avowed purpose of evading the law of this state, and contract a valid marriage.

Sections 4082, 4290, 722, Rev. St. U. S., are cited by appellant as recognizing marriages at sea and before foreign consuls, and that section 722 declares the common law as to marriage to be in force on the high seas on board American vessels. We have carefully examined the statutes referred to, and do not find that they give the slightest support to appellant's claim. The law of the sea, as it may relate to the marriage of citizens of the United States domiciled in California, cannot be referred to the common law of England, any more than it can to the law of France or Spain, or any other foreign country. We can find no law of congress, and none has been pointed out by appellant, in which the general government has undertaken or assumed to legislate generally upon the subject of marriage on the sea. Nor, indeed, can we find in the grant of powers to the general government by the several states, as expressed in the national constitution, any provision by which congress is empowered to declare what shall constitute a valid marriage between citizens of the several states upon the sea, either within or without the conventional three-mile limit of the shore of any state; and clearly does no such power rest in congress to regulate marriages on land, except in the District of Columbia and the territories of the United States, or where it pos-

sesses the power of exclusive jurisdiction. We must look elsewhere than to the acts of congress for the law governing the case in hand. Section 63 of the Civil Code provides as follows: "All marriages without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state." The parties in the present case were residents of, and domiciled in, this state, and went upon the high seas to be married, with the avowed purpose of evading our laws relating to marriage. It seems to be well settled that the motive in the minds of the parties will not change the operation of the rule. Chief Justice Gray, in *Com. v. Lane*, 113 Mass. 458, said: "A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the state shall have no validity here." This has been repeatedly affirmed by well-considered decisions. The authorities are found fully reviewed in that case, as they also will be found in support of the general rule in *Milliken v. Pratt*, 125 Mass. 374, by the same learned jurist. See, also, as to marriages in evasion of the law of the domicile of the parties, *Bish. Mar. & Div. § 880 et seq.* If the marriage in question can find support by the laws of any country having jurisdiction of the parties at the place where the marriage ceremony was performed, we should feel constrained by our code rule and well-considered decisions to declare it valid here, even though the parties were here domiciled at the time, and went to the place where they attempted to be married for the purpose of evading our laws, which they believed forbade the banns. But the parties did not go to any other state or country to be married. They went upon the high seas, where no written law, of which we have any knowledge, existed by which marriage could be solemnized. The rule, therefore, that the law of the place must govern, does not operate, because there was no law of the place, unless we may hold that the law of the domicile applies. The question presented is *res integra*, so far as we have been able to discover; and no case in England or the United States or elsewhere has been found by counsel (and their briefs disclose much research and industry) holding that the code rule *supra* applies to such a marriage as this. In the case of *Holmes v. Holmes*, 1 Abb. (U. S.) 525, Fed. Cas. No. 6,638, the question was whether a marriage had been contracted under the laws of California or Oregon. It seems that the parties, who were domiciled in Oregon, met in San Francisco, and there took passage on the steamer for Portland. It was at the trial suggested that the marriage might have taken place on board this vessel when on the high seas. There was no evidence that the parties ever met elsewhere, except in Cal-



fornia and Oregon. In the opinion by Deady, J., it was said, after showing that there was no valid marriage under the laws of either of these states: "Nor do I think that citizens of this state [Oregon], as the complainant and deceased were, can purposely go beyond its jurisdiction, and not within the jurisdiction of another state,—as at sea,—and there contract marriage contrary to its laws. Such an attempt to be joined in marriage is a fraudulent evasion of the laws to which the citizen of the state is subject and owes obedience, and ought not to be held valid by them." It is said by appellant that this expression of opinion is but dictum, inasmuch as the question did not necessarily arise. This may be true, but it commends itself to our judgment as wise and sound upon reason and principle. We find no case holding that parties domiciled in a state may, for the avowed purpose of evading its laws, go where no law exists, and there consummate marriage in violation of the laws of their domicile, and immediately return and claim a valid marriage. In all the cases where the statutes have been thus circumvented, it was accomplished by a marriage valid in the place where celebrated. The Gretna Green marriages of Scotland between citizens of England are notable examples, and they were upheld by the ecclesiastical courts. But these marriages were solemnized in accordance with the laws of Scotland, and therefore had legal sanction; and so, also, marriages in this country of citizens of one state going into another to avoid some disqualification prescribed in the law of their domicile.

It has been properly held that as marriage is a natural right, of which no government will allow its subjects, wherever abiding, to be deprived, if the parties happen to be sojourning in a foreign country, and under the local law there is no way by which they can enter into valid marriage, they may marry in their own forms, and it will be recognized at home as good. Bish. Mar. & Div. § 890 et seq. But this author says: "In reason,—for we have probably no adjudications of the question,—a marriage void by the law of the place of its celebration, in a case where such law provides no valid method, would not be made good by the rule we are considering, if the parties went there simply to avoid compliance with the law of their domicile. There was no necessity; for their own law was open to them at home, and it would not assist them in eluding its inhibitions." And he refers to the case of *Holmes v. Holmes*, supra, remarking, "It would perhaps be the same, also, where the resort was, for the like purpose, to an uninhabited region or the high seas." In the case before us the parties not only went where there was no law authorizing the marriage, but they went with the intention of immediately returning to their domicile, where they supposed the law would not admit of their marriage, to enjoy the fruits of their contract. There was no necessity upon the parties to do this, suddenly arising, or arising from unex-

pected surrounding circumstances; but the circumstances were of their own creation, and for a purpose to evade the law of their home. There is, we conceive, no ground of expediency, sound policy, or good morals upon which the transaction can be given legal sanction. In summing up the doctrine, Mr. Bishop says (Id. § 920): "Therefore the rule necessarily is that whenever a marriage is entered into, so that the laws of one country take cognizance of it, it will be accepted as a marriage in every other country, also. On the other hand, no forms matrimonial which come short of constituting valid marriage in the one country will so bring it within the cognizance of international law as to make it valid elsewhere." We think it results from considerations of reason and principle that, unless it appears that this marriage was consummated under some recognized law, the courts of this state should not declare it valid; and we think the burden is upon appellant to show such a law, failing in which his suit must fail. The authorities are many to the point that the party who relies upon the foreign law, or law of another state, must prove the law by its production. Cases cited at section 119, Stew. Mar. & Div.

Respondent cites the case of *Crapo v. Kelly*, 16 Wall. 610, where it was held that, in the case of an assignment in insolvency in the state of Massachusetts, it carried with it a vessel then in the Pacific Ocean; and, in an elaborate opinion, it was shown that, except for the purposes and to the extent that certain attributes have been transferred to the United States by the several states of the Union, each possesses all the rights and powers of a sovereign state, and that the vessel in question was a part of the territory of the state of Massachusetts, although at the time in the Pacific Ocean, and that the laws of Massachusetts would govern the assignment. It is hence argued by respondent that the law of the domicile in the present case should govern. There is much force in this position, but we do not deem it necessary to place our decision on that ground. We think the law of the domicile of the parties must be the law by which to judge the validity or invalidity of this marriage, upon the grounds already stated.

We are thus brought to the only remaining question: Was the marriage valid tested by the laws of California? If this marriage can be upheld, it must be upon the sole ground that there was mutual consent, solemnization by a sea captain, and subsequent cohabitation as husband and wife for the space of eight days. What constituted marriage in this state, prior to the amendments of the Code in 1895 and 1897, was pretty well settled, and need not be restated here. In the light of the history of past litigation, it ought not to be difficult to determine what is a valid marriage under existing law. Section 55, Civ. Code, as amended in 1895, provided as follows: "Marriage is a personal relation arising out of a civil contract, to

which the consent of the parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization authorized by this Code." No particular form of solemnization is required, "but the parties must declare, in the presence of the person solemnizing the marriage, that they take each other as husband and wife." Id. § 71. Section 70, Id., provides as follows: "Marriage may be solemnized by either a justice of the supreme court, judge of the superior court, justice of the peace, priest, or minister of the gospel of any denomination." Prior to the amendment of 1895 the consent to marriage was required to be followed either by "a solemnization, or by a mutual assumption of marital rights, duties or obligations." Section 55. The amendment added the words "authorized by this Code" after the word "solemnization," and struck out the words above in italics. It seems to me that the intention of the legislature is plainly declared, that consent must be followed by such solemnization as is authorized by the Code, or there can be no valid marriage, and that this solemnization can only be performed by the persons mentioned in section 70, supra, for no other persons are so authorized. Prior to 1895, section 75, Id., provided for marriages by declaration, without the solemnization required by section 70; but the act of March 26, 1895, swept away that easy process of marriage. Section 68, Id., was also amended in 1895 in an important particular. It now reads: "Marriage must be licensed, solemnized, authenticated, and recorded as provided in this article; but non-compliance with its provisions *by other than the parties to a marriage* does not invalidate that marriage." The words in italics were added to the section as it formerly stood, and would seem to imply that, while there may be non-compliance with the law by parties other than those seeking marriage, there cannot be by the latter. Section 76, Id., now, as heretofore, makes provision for supplying the evidence of marriage where no record of the solemnization is known to exist, and a form of written declaration is prescribed. A new section (79½) was added to the Civil Code in 1897, which provides that "the provisions of this chapter, so far as they relate to procuring licenses and the solemnizing of marriage, are not applicable to members of any particular religious denomination having, as such, any peculiar mode of entering the marriage relation; but such marriages shall be declared as provided in section seventy-six of the Civil Code of this state, and shall be acknowledged and recorded as provided in section seventy-seven of said Civil Code." Section 69, Id., provides that "all persons about to be joined in marriage must first obtain a license therefor from the county clerk of the county in which the marriage is to be celebrated, showing: [Then follow certain facts which must appear, such as

names, identity, and ages of the parties, etc.]" When a marriage may not be invalidated, although there has been noncompliance with the provisions of article 2, §§ 68-79½, "by other than the parties to the marriage," need not now be determined. In this case there was no license; there was no solemnization by any person authorized by law to perform the ceremony; there was no marriage, under section 79½. To recognize such a marriage, we think, would grossly violate the spirit and letter of our statute, and be a blot upon the civilization we profess. To give the law any just interpretation, we must hold that, subject to the exception mentioned in section 79½, section 55 requires, not only the consent of parties capable of making a contract of marriage, but that that consent must be followed by a solemnization authorized by the Code; and this solemnization can only be performed by the persons named in section 70. We do not think it necessary to decide whether it is mandatory to obtain a license; nor whether the minority of the defendant, and want of consent of her parents or guardian, would invalidate the marriage. Our conclusion rests upon the want of any authorized solemnization, and would be the same if the parties were both of full age. We recommend that the judgment be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

121 Cal. 668

#### PEOPLE v. SILVA. (Cr. 370.)

(Supreme Court of California. Aug. 17, 1898.)

IMPEACHING WITNESS—HARMLESS ERROR—INSTRUCTIONS—ACCOMPLICE TESTIMONY.

1. Error in limiting a question as to reputation of witness "for truth, honesty, and integrity" to his reputation for truth and veracity is harmless, witness having given evidence of his dishonesty by testifying that with defendant he committed the larceny in question.

2. Evidence that witness was confined in a jail is not admissible to impeach him, Code Civ. Proc. § 2051, not allowing for such purpose evidence of particular wrongful acts, except that conviction of a felony may be shown.

3. The rule of court that instructions requested must be presented before argument does not apply to the instruction that "the testimony of an accomplice is to be viewed with distrust," which Code Civ. Proc. § 2061, declares is to be given on all proper occasions.

Department 1. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Adolph Silva was convicted of grand larceny, and appeals. Reversed.

J. E. McElrath, for appellant. Atty. Gen. Fitzgerald, for respondent.

PER CURIAM. Appellant was convicted of the crime of grand larceny,—cattle stealing,—and appeals from the judgment, and from an order denying a new trial.



1. The prosecution called as a witness one Firmain Vallenzuela, against whom an information had been filed, and was still pending, charging him with the larceny of the same cattle, and he testified that he and this appellant had committed the larceny for which appellant was being tried. For the purpose of impeaching Vallenzuela, appellant called a witness, and asked him the following question: "Are you acquainted with the general reputation of Firmain Vallenzuela for truth, honesty, and integrity in the community in which he lives?" Upon objection being made to the question, the court ruled that it could only be answered as to "his general reputation for truth and veracity." In *Heath v. Scott*, 65 Cal. 548, 4 Pac. 557, it was held that, for the purpose of impeaching a witness, the inquiry is not confined to his reputation for truth and veracity, but may extend to his general reputation for truth, honesty, and integrity. See, also, *Code Civ. Proc.* §§ 1847, 2051, and *People v. Hickman*, 113 Cal. 86, 87, 45 Pac. 175. The error of the court in limiting this question to the reputation of the witness for truth and veracity did not, under the circumstances, prejudice the defendant, as the witness had given the jury direct evidence of his dishonesty by testifying that he and the defendant had stolen the cattle.

2. The question put by defendant to Marcos Vallenzuela upon cross-examination, for the purpose "of laying before the jury the character of the witness," viz. "Were you not confined in the county jail in Oakland for a period of about eight months, continuously, charged with cattle stealing?" was properly disallowed. Evidence of particular wrongful acts cannot be shown for the purpose of impeachment, "except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony." *Code Civ. Proc.* § 2051.

3. During the argument before the jury, counsel for the defendant orally requested the court, when it came to charge the jury, to instruct them that "the evidence of an accomplice is to be viewed with distrust"; and again, before the court had finished its instructions to the jury, counsel repeated the request. The court refused to give said instruction, on the ground that counsel had not handed up to the court, before the argument, the charge in writing, as required by the rules of the court. Section 2061, *Code Civ. Proc.*, provides: "The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect and value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions: \* \* \* (4) That the testimony of an accomplice ought to be viewed with distrust." The rule of court that instructions requested by a party must be given to the court, in writing, before the argument begins, is eminently proper. Its pur-

pose is to give to the court an opportunity to determine the correctness and propriety of the instructions, and thus prevent errors and promote justice; but when the strict observance of the rule would operate to defeat or impede justice, it is always within the power of the court to suspend the rule, and it is its duty to do so. The request here made did not come within the reason or the spirit of the rule, and should have been granted. It was in the language of the Code, and the occasion was proper. See *Pickett v. Wallace*, 54 Cal. 148, and *People v. Demasters*, 105 Cal. 669, 39 Pac. 35. The judgment and order are reversed, and cause remanded for a new trial.

121 Cal. 633

## PEOPLE v. CLARK. (Cr. 447.)

(Supreme Court of California. Aug. 10, 1898.)

## CRIMINAL LAW—APPEAL—RECORD.

Refusal of instructions as to insanity as a defense, unobjectionable in form, will be presumed proper, the record not showing that such a defense was made, or that there was any such question in the case.

In bank. Appeal from superior court, Napa county; E. D. Ham, Judge.

George W. Clark was convicted of murder, and appeals. Affirmed.

C. J. Beerstecher, Henry Hogan, and E. L. Webb for appellant. Atty. Gen. Fitzgerald, for the People.

VAN FLEET, J. This appeal is by the defendant from a judgment convicting him of murder in the first degree, and adjudging him to suffer death. Apparently, the appeal has been practically abandoned, since appellant's counsel have filed no brief in its support, nor did they appear on the day the cause was set for argument, to make an oral presentation, or offer any reason or suggestion against the affirmance of the judgment. By reason of this fact, the cause was, on motion of the attorney general, ordered submitted on the transcript, and that alone is presented for our consideration. It is not an agreeable task for the court, in undertaking to review a case involving the gravity of capital punishment, to be compelled to resort to the naked record, wholly unaided by counsel, in the effort to determine whether a defendant has been accorded in all respects that fair and impartial hearing, and protection in all his rights, guaranteed him by the constitution and the law. Nevertheless, we have never been willing, as in cases of lesser felonies, to affirm a judgment of death without looking into the record, by reason of the absence of such aid. We may safely assume, however, that the failure of counsel to appear in this case arises solely from their conviction that the appeal involves no question of merit which they could conscientiously urge upon the court; and this view is in

accord with the results of our own investigation of the record.

The appeal, being from the judgment alone, without a bill of exceptions, brings up simply the judgment roll, and presents for review only the sufficiency of the information, any errors disclosed in the minutes, and the propriety of the instructions given and refused. The information is a model of simplicity, and wholly free from objection; and the minutes disclose nothing violative of the defendant's rights. The only matter in the record calculated to arrest attention is the refusal of the trial court to give certain instructions requested by the defendant. Several of these bear upon the subject of insanity as a defense, and would appear, as abstract statements of the law, to be unobjectionable in form. As such, the defendant in a proper case would be entitled to have them submitted to the jury; but, unfortunately for the defendant, we cannot say upon the record before us that there was error in their refusal. The evidence is not in the record, and there is therefore nothing to show that such a defense was made, or that there was any such question in the case. In the absence of such showing, we must and will presume that these instructions were rejected by the trial court as not pertinent to any question of fact before the jury. The same is true of one or two requests upon other subjects. It cannot be determined from the record that their refusal was improper, or in any way prejudicial to the defendant's rights. It results that the record discloses no error justifying a disturbance of the judgment, and the judgment must therefore be affirmed. It is so ordered.

We concur: BEATTY, C. J.; GAROUTTE, J.; HARRISON, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

6 Cal. Unrep. 108

WALSH v. HYLAND, Judge. (S. F. 1,396.) (Supreme Court of California. Aug. 16, 1898.)

#### JUDGMENT OF REVERSAL—CONSTRUCTION.

A judgment of the supreme court reversing a judgment in a mortgage foreclosure for \$1,200 and costs and attorney's fees, and directing a judgment for the principal and interest stipulated in a note, less interest paid,—defendant to have costs of appeal,—does not deny plaintiff the counsel fees and costs of the trial court; no question of such counsel fees or costs being considered on the appeal.

In bank. Appeal from superior court, Santa Clara county; M. H. Hyland, Judge.

Petition by Margaret E. Walsh for a writ of mandamus to M. H. Hyland, judge of the superior court of the county of Santa Clara. Granted.

John H. Yoell, for petitioner. Wm. P. Veuve, for respondent.

HENSHAW, J. This is a petition for an original writ of mandate. It arises upon the

following facts: Upon appeal to this court in the case of Walsh v. Hunt (S. F. 710) 52 Pac. 115, the judgment of the trial court was reversed, with directions to that court to enter a different judgment upon the findings, all of which will be found set forth in the opinion rendered in that case. Upon the going down of the remittitur, plaintiff in that action, who is petitioner herein, made application to the trial court to enter its judgment in her favor for the sum of \$500, for \$100 counsel fees, and for \$60.15 costs in the trial court, with interest upon these sums, together with her costs upon the appeal to this court. The item of counsel fees was stipulated in the mortgage, and the amount had been awarded in the former judgment. The costs which were prayed for were the costs which were incidental to the former trial, and were also embraced within the judgment appealed from. The trial judge refused to grant the application. By his interpretation of the decision of this court, the only judgment permissible to be entered in plaintiff's favor was a judgment for \$500, principal of the mortgage debt, with interest and costs upon the appeal to this court; thus holding that by the judgment of this court respondent upon that appeal was denied counsel fees and costs in the trial court. This construction of our judgment is erroneous. No question upon counsel fees or costs was considered upon the appeal. The sole modification of the judgment was that elaborately considered. The judgment by this court entered was, in substance and effect, a direction to reduce the principal sum of the mortgage debt from \$1,200, the amount found due by the trial court, to \$500, the amount which this court decreed was chargeable against the defendant. In all other respects the original judgment was to stand unmodified. For this reason the mandate applied for should be issued, and it is ordered accordingly.

We concur: BEATTY, C. J.; TEMPLE, J.; McFARLAND, J.; HARRISON, J.; VAN FLEET, J.

121 Cal. 635

In re MORE'S ESTATE. (S. F. 891.) (Supreme Court of California. Aug. 10, 1898.)

#### ADMINISTRATORS—SETTLEMENT OF ACCOUNT—EVIDENCE—JUDGMENT.

1. On hearing of proceedings to settle account of administrator, judgment obtained by him on personal claim against the estate, in an action pursuant to Code Civ. Proc. § 1510, is admissible as prima facie evidence of the correctness of the claim, subject to be contested by a person interested in the estate, as other allowed claims might be; section 1504 providing that a judgment against an administrator on a claim against the estate only establishes the claim as if it had been allowed by him and the judge, and the judgment must be that he pay, in due course of administration, the amount ascertained to be due; and section 1510 providing, if the administrator is a creditor of decedent, his claim shall be presented to a judge, and its allowance by him is sufficient evidence



of its correctness, and must be paid as other claims in due course of administration; but, if the judge reject it, action thereon may be had against the estate, summons being served on the judge, who may appoint an attorney to defend.

2. It is ground for reversing the settlement of an administrator's account that relevant and material evidence, no valid objection to which appears, was rejected on objection that it was irrelevant and immaterial.

3. Though, under Code Civ. Proc. §§ 1633, 1635, 1636, a person wishing to contest an administrator's account must file exceptions thereto, the court should, though no exceptions are filed, examine and be satisfied of the correctness of the account before settling it.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Proceeding to settle account of John F. More, administrator of Alexander P. More, deceased. From part of the order settling the same, Eliza M. Miller and another appeal. Reversed.

J. B. Mhoon and C. A. Storke, for appellants. Rodgers & Paterson, for respondent.

**PER CURIAM.** This is an appeal from so much of an order of the superior court of the city and county of San Francisco, dated June 1, 1896, as settled and allowed as correct an item of the administrator's second annual account, setting forth the payment by the administrator, John F. More, to himself as an individual, of the sum of \$28,414.72. That item, represented by voucher No. 13, was the amount, with interest and costs, of a judgment of the superior court of the city and county of San Francisco, rendered in an action entitled "John F. More, Plaintiff, vs. Estate of Alexander P. More, Defendant." The judgment roll in that case is set out in the transcript here. By that judgment it was decided and adjudged that the said plaintiff have and recover of and from the said defendant estate the sum of \$26,026.33, with interest thereon from the 6th day of March, 1894, together with his costs and disbursements, taxed at \$520.50, to be paid in due course of administration. From the said judgment roll it appears that John F. More, being the general administrator of the estate of Alexander P. More, and claiming to be a creditor of the estate, presented his claim for allowance to the judge of the court in which the estate was being administered, as required by section 1510, Code Civ. Proc. The judge rejected the claim, and thereupon the claimant brought his action against the said estate to establish his claim. The summons and complaint were served on the judge, who appointed Oliver P. Evans, an attorney of the court, at the expense of the estate, to defend the action. Evans answered the complaint, denying all of its principal averments, and the case was thereafter tried before the court without a jury, and findings of fact and conclusions of law were filed, upon which judgment was entered as above stated. The amount of this judgment, with interest, hav-

ing been paid by the administrator to himself as an individual, and having been included in his second annual account, the appellants here filed exceptions and amended exceptions thereto. In the original exceptions they contest the item, "on the ground that said judgment was procured by collusion between the said J. F. More, administrator, and one P. W. Watson, and that the said J. F. More did not defend said suit in good faith, but exerted himself to obtain said judgment against these contestants and the other heirs, contrary to his duty as administrator." And in the amendment to the exceptions they repeat the same objection, making the charges of fraud and conspiracy more specific. At the hearing of the proceeding for the settlement of the said account, the administrator introduced in evidence voucher No. 13, showing the payment to himself of the amount in question, and the judgment roll in said case of John F. More against the estate of Alexander P. More, deceased. The foregoing was all the evidence offered by the administrator to support the said item represented by voucher No. 13; and to the admission of the said judgment roll the appellants objected, upon the ground that the same was incompetent, because appellants were not parties or privies thereto, and was irrelevant and immaterial and not binding on appellants here. The objection was overruled, and an exception reserved. The appellants then, to support their exceptions to the said item, offered in evidence (1) the deposition of John F. More, taken in the case of Watson against the estate of A. P. More; (2) the testimony of John F. More given in his suit against the estate of A. P. More, as reported in the transcript in that case; (3) the testimony of P. W. Watson, given upon the hearing of the petition by John F. More for letters of administration upon the estate of A. P. More, as shown by the transcript in that proceeding; and (4) the testimony of P. W. Watson, given in the said case of More against the estate of More, as shown in the transcript of that case. To each of these offers counsel for the administrator objected, upon the ground that the offered evidence was irrelevant and immaterial, as it had no bearing upon the item of the account in question, and the objections were sustained and exceptions reserved. The evidence objected to and excluded is set out in the transcript in full.

1. There was clearly no error in admitting in evidence the said judgment roll. Section 1504 of the Code of Civil Procedure provides: "A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due." And section 1510 of the same Code provides: "If

the executor or administrator is a creditor of the decedent, his claim duly authenticated by affidavit must be presented for allowance or rejection to a judge of the superior court, and its allowance by the judge is sufficient evidence of its correctness, and must be paid as other claims in due course of administration. If, however, the judge reject the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who may appoint an attorney, at the expense of the estate, to defend the action." The action of More against the estate of More was brought, and the judgment recovered, under the last-named section; but we do not consider that the judgment had any greater force or effect than would a judgment recovered under the section first named. It did, however, establish the claim in the same manner as if it had been allowed by the judge, and was prima facie evidence of its correctness. The judgment was, however, subject to be afterwards contested by any person interested in the estate, in the same manner and to the same extent as other allowed claims might be contested. But in all such cases the burden is upon the party contesting to show that the claim was not properly allowed. *In re Loshe's Estate*, 62 Cal. 413; *In re Swain's Estate*, 67 Cal. 637, 8 Pac. 94.

2. The Code of Civil Procedure contains also the following provisions:

"Sec. 1633. When any account is rendered for settlement the court, or a judge thereof, must appoint a day for the settlement thereof," etc.

"Sec. 1635. On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same."

"Sec. 1636. All matters, including allowed claims not passed upon on the settlement of any former account, \* \* \* may be contested by the heirs for cause shown."

Under these provisions, if a person interested in an estate wishes to contest an account presented for settlement by the executor or administrator, he must file his exceptions in writing to the account, setting out specifically the grounds of his objections; and at the hearing he should be held limited to the exceptions so presented. But, whether exceptions are filed or not, the court should carefully examine every account presented for settlement, and be satisfied that it is in every respect practically correct before entering an order settling it. "The probate court is the guardian of the estates of deceased persons, and has control of the person appointed by it to administer the estate, subject to review as provided by law." *Hirschfield v. Cross*, 67 Cal. 661, 8 Pac. 507. And "it is the duty of the court carefully to scrutinize the account, and to reject all claims of the executor illegal in themselves or un-

just in fact." *In re Sanderson's Estate*, 74 Cal. 190, 15 Pac. 753.

It is suggested by counsel for appellants that the court must have rejected the offered evidence upon the erroneous theory that the judgment in *More* against the estate of *More* was an estoppel against these contesting heirs. By respondent it is answered that there is nothing in the record to show upon what ground or for what reason the evidence was rejected. The only light thrown upon this point is derived from the grounds of objection, urged when the evidence was offered, that it was "irrelevant and immaterial, and had no bearing on any item in the account of the administrator." These grounds of objection were untenable. The evidence offered was certainly material, and directly relevant to the questions put in issue by the contestants. Whether it was of sufficient weight, if considered by the trial court, to have led to the making of an order other than that here presented, it is not within our province to say; but certainly the contestants were entitled to demand that the judge should consider all proper evidence bearing upon the question of the disputed claim before giving his determination against them. The claim, in amount over \$26,000, was made up of various small items. As to one of these items the rejected evidence tended to show that it was paid by the administrator without the presentation and allowance of any claim. Upon another proposition it was urged that the rejected evidence would disclose that, by the testimony of the administrator himself, his claim should have been reduced over \$16,000. As we have said, it is not within our province to consider how much weight the court should give to the rejected evidence; but it is plain that that evidence should have been before the court and under its consideration when it made the order complained of. For this reason the order is reversed.

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(6 Cal. Unrep. 111)

KENNEY v. PARKS et al. (L. A. 405.)

(Supreme Court of California. Sept. 6, 1898.)

DEED—REFORMATION—PARTIES—COMPLAINT—  
TESTAMENTARY INSTRUMENT.

1. The attorney who is alleged to have committed the fraud of making a deed conveying only a life estate, instead of a fee, is not a necessary party to an action to reform it.

2. The executors in possession of the property of deceased, as well as the legatees and devisees claiming it under his will, are properly parties to an action to reform his deed to make it convey a fee, instead of a life estate.

3. There is no ambiguity prejudicial to defendants in a complaint to reform a deed so as to convey a fee, instead of a life estate, in that in one place a mutual mistake is alleged, as though both parties were misled by the reading of the deed by the attorney, while in another place it is charged that the attorney and grantor, knowing that the grantee believed the deed to convey a fee, did not disclose the fact that it did not.

4. Deeds executed by husband and wife, conveying each to the other their separate properties, and delivered to a third person, with direction to record that of the person dying first, are not testamentary or revocable.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Sarah J. Kenney against W. S. Parks and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Boyce, Taggart & Kellogg, for appellants.  
B. F. Thomas, for respondents'

HAYNES, C. Action to reform a deed, to quiet title, and for other relief. The plaintiff had judgment, and the defendants appeal upon the judgment roll. The defendants W. S. Parks and J. C. Kenney are the executors of the will of Joseph A. Kenney, deceased, and the other defendants are heirs at law of said decedent, and devisees under said will. A jury was called, to whom certain

special issues were submitted, and the findings of the jury thereon were adopted by the court, who added other findings covering all the issues, and ordered judgment thereon for the plaintiff, which was duly entered. Joseph A. Kenney, deceased, and the plaintiff, were husband and wife, and resided in the county of Santa Barbara, where each owned a considerable quantity of both real and personal property. The complaint alleges that in May, 1892, the plaintiff being then of the age of 48 years, and said Joseph A. then of the age of 73 years, and there being no living children of their said marriage, mutually agreed to execute deeds each to the other conveying absolutely in fee simple all of their respective estates, both real and personal, situate in said county, and agreed that said deeds should be placed as escrows in the hands of the cashier of the First National Bank in Santa Barbara, with directions to said cashier that, if the plaintiff should die during the lifetime of said Joseph A. Kenney, he, the said cashier, should, on request of said Joseph A., or his agent, file the deed of the plaintiff to said Joseph A. for record in the county recorder's office of said county, and, if said Joseph A. should die during the lifetime of the plaintiff, said cashier should, at the request of plaintiff or her agent, file said deed of Joseph A. to her in said recorder's office; that, pursuant to said agreement, said Joseph A. employed one S. W. Bouton, an attorney, to prepare said deeds. They were prepared, and were each duly executed and acknowledged on June 1, 1892. Both deeds are set out in full in the complaint. The deed executed by Joseph A. to the plaintiff is as follows:

"For and in consideration of my love and affection for my wife, Sarah J. Kenney, I, Joseph A. Kenney, of the county of Santa Barbara, in the state of California, do hereby grant, bargain, and sell unto my said wife, Sarah J. Kenney, to have and to hold the same during the term of her natural life, with remainder in fee to my lawful heirs according to the laws of the state of California, all that real property situated in the county of Santa Barbara, state of California, bounded and described as follows, viz.: All my real property, and all interests therein belonging to me, situated in the said county of Santa Barbara; also all my personal property, of whatsoever kind and description, moneys, notes, bonds, and all other evidences of debt belonging to me; and this deed shall be an assignment to said grantee of all mortgages and other securities owned by me. This deed is intended to convey all my estate situate in said Santa Barbara county in the event of my decease during the lifetime of my said wife, and is to be deposited in escrow with the cashier of the First National Bank of Santa Barbara to be filed for record by him in case of my decease as aforesaid; and I do hereby declare, as part of this

conveyance and my act and deed, that the filing this deed for record by said cashier shall constitute and be a good and sufficient delivery of this deed to the grantee therein named. Witness my hand and seal, this first day of June, A. D. 1892. Joseph A. Kenney. [Seal.]

"Signed, sealed, and delivered in presence of S. W. Bouton."

The deed executed by the plaintiff to her husband was in all respects the same, except that it purported to convey a fee simple absolute, instead of a life estate. These deeds were each inclosed in a separate sealed envelope; and upon that inclosing the deed of the husband was the following indorsement:

"The inclosed deed, dated the first day of June, 1892, is herewith deposited in escrow with the cashier of the First National Bank of Santa Barbara, and the said cashier who may be such cashier at my decease, if I should die during the lifetime of my wife, is hereby instructed and commanded at my decease, on request of my said wife, or her agent, to open this envelope at once, and to file the inclosed deed for record with the recorder of Santa Barbara county. Santa Barbara, Cal., June first, 1892. Joseph A. Kenney.

"In the presence of S. W. Bouton."

The envelope inclosing the deed executed by the plaintiff bore the like indorsement.

Joseph A. Kenney died, testate, July 5, 1894; and on July 13, 1894, plaintiff demanded of said cashier that he deliver the said deed executed by Joseph A. to her, or place the same on record at her expense; but he declined to do either, but delivered to her the deed she had executed. The amended complaint was demurred to upon several grounds.

1. It is claimed that there is a defect of parties defendant, in that S. W. Bouton, who is alleged to be the party who committed the fraud, is not made a defendant. He is not interested in the subject of the action, and no judgment could have been rendered for or against him, and therefore could not have been a proper party.

2. There was no misjoinder of parties defendant. The executors of the will, who were in possession of the property, were properly joined with the heirs and the legatees and devisees under the will who claimed to be entitled to the property.

3. Another ground of demurrer is that the complaint is ambiguous and uncertain in its attempted statement of a cause of action to reform said deed. This ground of demurrer refers to the allegations concerning the insertion of a clause in the deed of the husband limiting the estate conveyed to the plaintiff to an estate for life, instead of an estate in fee, as they had agreed, and plaintiff did not discover that said deed contained said clause until April, 1895, which was nearly a year after her husband's death. It is alleged that



the deeds were read to plaintiff and her husband by Bouton, and that in the reading of the deed executed by her husband said clause was omitted; that, at the time of preparing said deeds, she had the utmost confidence both in her husband and Bouton, and this was known to her husband, who also knew that she was unable to read said deeds, and believed that her husband's deed conformed to their agreement, and conveyed to her an absolute title in fee simple, and that otherwise she would not have executed her said deed. This is, in substance, the allegation of the complaint upon which the reformation of the deed was prayed for, and was all that was essential to be alleged. It is true, the complaint alleged a mutual mistake in the execution of said deed, as it would be if both parties were misled by the reading of the deeds, and Bouton is thereby, in effect, charged with a fraud upon both, though in another paragraph it is charged, in substance, that Bouton and Joseph A. Kenney, knowing that plaintiff believed the said deeds were alike, did not disclose the fact that they were not. Whether the fraud was perpetrated solely by Bouton, by which both parties to the deed were misled and deceived, or whether Bouton and the husband both participated in it, could make no difference as to the relief to which the plaintiff is entitled, for in either case she was misled, deceived, and defrauded. I see no ambiguity or uncertainty which could mislead or prejudice defendants.

The general demurrer is not specially presented in appellants' brief. It was doubtless based upon the conclusion of counsel that the facts stated showed the instrument in question to be of a testamentary character, and which could not for that reason operate as a deed of conveyance,—a question here raised upon the findings, which, it is claimed, do not support the judgment. That it was not intended that the grantee should enter upon the enjoyment of the property described in the deed until the death of the grantor is clear; but, if a future interest was presently and irrevocably given, then it is equally clear that it was valid as a conveyance; and whether it was or not must be determined from the deeds, the instructions to the depositary, and the acts and intentions of the parties. The complaint alleges and the court found that these deeds were made and deposited with the cashier in pursuance of the agreement made between the plaintiff and her husband in reference to the property of each. The consideration for the promise of each to make and deposit the deed was the promise of the other, and, when the deeds were made and deposited in compliance with the terms of that agreement, the agreement itself was executed, and could not be annulled except by mutual consent. The deeds, as well as the indorsements made upon the envelopes, call the deposit of the deeds with the cashier of the bank an escrow. Under many authorities, the cashier became a trustee, and not a

simple depositary of an escrow, though in either case the deposit was not revocable. It was so held, as to an escrow, in *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499. The distinction is that, where the instrument is deposited to await the performance of some condition by the grantee, it is an escrow; while, if it is simply to await the lapse of time or the happening of some contingency, it will be deemed the grantor's deed presently. *Foster v. Mansfield*, 3 Metc. (Mass.) 415. So, in *Wheelwright v. Wheelwright*, 2 Mass. 452 (margin): "If a grantor deliver any writing as his deed to a third party, to be delivered over by him to the grantee on some future event, it is the grantor's deed presently, and the third person is a trustee of it for the grantee; and, if the grantee obtain the writing from the trustee before the event happen, it is the deed of the grantor, and he cannot avoid it by a plea of non est factum, whether generally or specially pleaded." But, without multiplying cases from other jurisdictions, I think the case of *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, is conclusive of this case. In that case, Hinkson, being ill, sent for his attorney, to advise as to the disposition of his property, and, acting upon the advice of his attorney, signed and acknowledged a deed purporting to convey his real estate to his two daughters, and gave the deed to his attorney, with instructions not to record it, but to deliver it to the grantees upon his death. He recovered from his illness, and demanded possession of his deed from his attorney, who refused to surrender it. At a later date he made a will devising all his real estate to one of said daughters, and afterwards died, and the attorney delivered the deed to the other daughter, the plaintiff in that action. Upon appeal, Mr. Justice Garoutte, speaking for the court, after quoting from many authorities, said (page 451, 98 Cal., and page 340, 33 Pac.): "Section 767 of the Civil Code provides that a freehold may commence in futuro, and for that reason we are inclined to recognize the views of Dixon, C. J., in *Pruitsman v. Baker*, 30 Wis. 650, as the true rule applicable to this class of cases in this state. We know of nothing in the Codes forbidding the doctrine announced in that case, to wit, that the grantor, upon the irrevocable delivery of the deed to the depositary, thereupon constitutes such depositary the trustee of the grantee, and creates in himself a tenancy for life." The case of *Bury v. Young*, supra, is cited and followed in *Wittenbrock v. Cass*, 110 Cal. 1, 6, 42 Pac. 300, and in *Ruiz v. Dow*, 113 Cal. 496, 45 Pac. 867. That the delivery of these deeds to the cashier was an irrevocable transaction follows not only from the fact that it was done in pursuance of a mutual agreement between the plaintiff and her husband, but from the declarations in the body of the instruments and the express and unqualified direction to the cashier indorsed upon the envelopes; and this irrevocability constitutes the distinguish-

ing characteristic between a grant and a testamentary disposition, which is always revocable and passes no present interest; or, as stated in *Habergham v. Vincent*, 2 Ves. Jr. 231, the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property to accrue and take effect only upon his death, and passing no present interest. The making of a will long after he had executed and delivered the deed to the plaintiff could have no effect upon it.

Appellant attempts to distinguish this case from *Ruiz v. Dow*, 113 Cal. 494, 495, 45 Pac. 867, because the deed in that case declared that the filing for record after the death of the grantor should be a good delivery of the deed, "as of the date of the execution thereof." But the legal effect of the delivery of that deed to the bank, under the circumstances, would have been the same if the words above quoted had been omitted; and therefore those words served only as the expression of an intention which would have been inferred without them. The question here involved having been expressly adjudicated in this court, a review of the many cases cited by appellant is unnecessary, many of which expressly support our conclusions, while none that we have examined conflict therewith. We advise that the judgment appealed from be affirmed.

We concur: **CHIPMAN, C.; BELCHER, C.**

**PER CURIAM.** For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(121 Cal. 647)

**WEINREICH v. HENSLEY et al.**<sup>1</sup>  
(Sac. 277, 334, 335, 336.)

(Supreme Court of California. Aug. 12, 1898.)

**HOMESTEAD—DURATION—SEPARATE PROPERTY OF SPOUSE—DRAINAGE ASSESSMENTS—VALIDITY—ENFORCEMENT—JUDGMENTS—PARTIES—MORTGAGES—PROTECTION OF LIEN—ATTACHMENT—LIEN.**

1. Code Civ. Proc. § 1474, provides that if a homestead is selected from the separate property of a spouse, without his assent, it shall vest in his heirs on his death, "subject to the power of the superior court to assign it for a limited period to the family of the decedent." Section 1465 provides that when a homestead has been selected by one spouse out of the separate property of the other, since deceased, who did not join therein, the court must select and set apart "a" homestead for the use of the family of decedent out of the common property, or, if there be none, then out of the separate property of decedent. Section 1468 declares what shall be the ownership when property is set aside under the previous sections, and provides that, when the homestead is selected from the separate property of decedent, the court can set it apart only for a limited period, and that the title vests in the heirs "subject to such order." *Held*, that separate property of a husband, on which the wife had filed a declaration of homestead, without his joining therein, ceased to be a homestead on his death.

2. Under Civ. Code, § 2876, declaring that when the holder of a special lien is compelled to satisfy a prior lien for his protection, he may enforce payment as part of his claim, an assessment by a reclamation district creates a lien which a mortgagee had a right to remove for his protection, notwithstanding the assessment was invalid, where the mortgagor, who was an executrix, requested the mortgagee to pay the assessment.

3. The mortgagee might assume that such request was made by the executrix in her representative capacity, although she was a residuary legatee.

4. A residuary legatee is estopped from objecting to an allowance for money advanced by a mortgagee of property belonging to the estate, at her request, in payment of an assessment against mortgaged property, although the assessment was invalid.

5. One who made no issue on a cross complaint is precluded from questioning a judgment thereon.

6. One who was not made a party to a cross complaint cannot be bound by a judgment thereon.

7. Under Pol. Code, § 3461, requiring reclamation assessment lists to contain "the names of the owners of each tract, if known, and, if unknown, that fact," and section 3466, authorizing suits for the collection of such assessments to be commenced "against the person to whom the same is assessed, and, if assessed to unknown owners, then against the real owners," where the assessment was made against only one of two owners, the judgment for enforcement thereof was not binding on the other owner.

8. Pol. Code, § 3628, relating to tax assessments in general, and providing that no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid, has no application to an assessment by a reclamation district.

9. The fact that a judgment in an action aided by attachment was not docketed does not invalidate the lien of the attachment, inasmuch as an attachment lien is not merged in the judgment until the judgment becomes a lien.

In bank. Appeal from superior court, Sacramento county.

Action by H. Weinreich against Mary A. Hensley, individually and as executrix of the will of Calvin P. Hensley, deceased, and others. From a judgment for plaintiff and one of the defendants, who asserted a lien, defendants Mary A. Hensley, individually and as executrix, Marion Turner, and Mebius and Drescher appeal on separate records. Modified.

W. A. Gett, Jr., L. T. Hatfield, Driver & Sims, and Stearns & Elliott, for appellants. A. M. Johnson, H. W. Johnson, and A. P. Catlin, for respondent.

**HARRISON, J.** The plaintiff seeks by this action the foreclosure of a mortgage upon 229 acres of land belonging to the estate of Calvin P. Hensley, deceased, executed to him by the defendant Mary A. Hensley, as executrix of the last will and testament of said decedent, under an order of the superior court therefor, made by virtue of the provisions of sections 1577, 1578, Code Civ. Proc. The tract of land was the separate property of the deceased, and he and the said Mary A. Hensley were husband and wife, and resided thereon with their family up to the time of his death, and since

<sup>1</sup> Rehearing denied September 10, 1898.



his death the family has continued to reside upon the land. In the year 1881, and again in 1884, Mrs. Hensley filed and caused to be recorded a valid declaration of homestead upon the premises, but her husband did not join in either declaration, and never made any declaration of homestead. June 2, 1888, Mr. and Mrs. Hensley made their promissory note to the plaintiff herein for the sum of \$6,000, and executed to him a mortgage upon said tract of land as security for its payment; and on August 22, 1888, they made to him another note for \$2,000, which they secured by another mortgage upon the same land. Mr. Hensley died July 26, 1889, leaving a last will and testament, which was admitted to probate, and letters testamentary thereon issued to his widow, whom he had named as executrix. By his will he gave certain pecuniary legacies, and made other dispositions of property, and devised the residue of his estate to his wife, and son, Calvin P. Hensley, Jr. After letters testamentary had been issued upon his will, the executrix gave due notice to the creditors of the deceased for presentation and allowance of their claims, and the time for such presentation expired July 31, 1890. In September, 1889, she also filed an inventory of the property belonging to the estate, in which the land described in the mortgage herein was included, and was appraised at the sum of \$38,930. The plaintiff made no presentation to the executrix of his claim against the estate of the deceased upon the aforesaid promissory notes and mortgages, but the executrix continued to pay the interest thereon until April 26, 1893. On that day she filed a petition in the superior court for an order authorizing her to execute a mortgage upon the above land for the purpose of meeting the notes and mortgages held by the plaintiff, and, after setting forth the fact of their execution, and that they had not been paid, stated "that it is necessary to mortgage the foregoing described real estate in order to raise funds to pay off the foregoing named mortgages, because, if they are not paid, the said Weinreich will foreclose the same at a great cost and expense and damage of and to said estate," and asked for an order authorizing her, as executrix, to execute her promissory note "to the said Weinreich, or to some other person, for the sum of \$8,000, together with a mortgage on said real estate to secure the payment of the said promissory note for the period of two years, or more or less, as to the court may seem proper." Upon filing this petition the court fixed a day for its hearing, and on the day fixed, after proof that notice thereof had been given, made an order authorizing the executrix to execute her promissory note for \$8,000, payable in two years, and to secure its payment by a mortgage upon the aforesaid land. The order makes no reference to the mortgages then held by the plaintiff herein, but recites that it duly appeared to the court that it would be for the best advantage and interest of the said estate, and of all persons interested therein,

that the executrix should execute her note for the sum of \$8,000, and borrow said sum of money thereon, and mortgage the real estate described in the petition to secure its payment. Thereupon the executrix executed to the plaintiff herein the mortgage upon which the present action was brought, and he surrendered and satisfied the mortgages then held by him. June 2, 1892, Mrs. Hensley mortgaged the tract of land to Mebius and Drescher, defendants herein, to secure her promissory note to them for the sum of \$919. This mortgage is set up by them in a cross complaint herein, in which they seek its foreclosure, and the court finds that there was unpaid the sum of \$832.92. August 20, 1894, the defendant John Elliott commenced an action against Mrs. Hensley upon a money demand, in which action he caused her interest in the land to be attached, and on October 8, 1894, judgment was entered therein against her for the sum of \$782.30. This judgment Elliott prayed might be paid to him out of the proceeds coming to Mrs. Hensley from the sale of the premises, after satisfying the claim of the plaintiff. The superior court rendered its judgment directing a sale of the mortgaged premises, and that, after paying the claim of the reclamation district No. 556, hereinafter considered, the proceeds of the sale be applied to the payment of the plaintiff's claim upon the promissory note set forth in the complaint, and for certain moneys paid by him to the reclamation district upon an assessment levied upon the land; and that, after making such payments, any surplus proceeds of the sale be paid to the executrix of the will of Calvin P. Hensley, to be held by her subject to administration; and that, after the payment and discharge of all incidents of administration, the distributive share of Mary A. Hensley in such surplus proceeds shall be subject to the payment, first, of the claim of Mebius and Drescher, and then to the claim of John Elliott. From this judgment appeals have been taken by Mary A. Hensley individually, and also as executrix, Marion A. Turner, a legatee under the will of Calvin P. Hensley, and Mebius and Drescher. The appeals are presented in four separate records, but, as they involve the same questions, they have been considered together.

1. The validity of the mortgage sued upon is contested upon the ground that the land secured by the mortgages of 1888 was a homestead, and that, under the provisions of section 1475, Code Civ. Proc., by reason of the failure of the plaintiff to present a claim against the estate upon the notes which they were given to secure, he lost the right to enforce either the notes or the mortgages, and that, therefore, there was no consideration for the note and mortgage executed under the order of the court; citing *Camp v. Grider*, 62 Cal. 20. One of the controlling questions in the case, therefore, is the effect of the death of Hensley upon the homestead which his wife had selected out of his separate estate without his assent. What was

the status of the property after his death? Did the homestead cease with his death, or was the land still impressed with the characteristics of a homestead? The devolution of the title to the homestead premises in case of the death of one of the spouses is provided for in section 1265, Civ. Code, and also in section 1474, Code Civ. Proc. The latter section was amended 10 days later than the section of the Civil Code, and is to be regarded as the latest expression of the legislative will. By this section the legislature has declared: "If the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the superior court to assign it for a limited period to the family of the decedent." The power thus to limit the estate of the heirs is not given by this section, but is merely referred to as the source of the limitation which may be placed upon their estate. This section purports to deal merely with the descent of the property from which the homestead was selected, but the power of the court to assign the homestead, and upon whose exercise a limitation upon the estate of the heirs is created, is given in section 1465, Code Civ. Proc., and the provisions of this section are to be read in connection with the provisions of section 1474. The court is there directed to set aside the homestead that was selected in the lifetime of the decedent, provided such homestead was selected from the common property, or from the separate property of the person selecting or joining in the selection of the same, and the section then declares: "If none has been selected, designated and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate and set apart and cause to be recorded a homestead for the use of the surviving husband or wife and the minor children; or, if there be no surviving husband or wife, then for the use of the minor children, in the manner provided in article two of this chapter, out of the common property, or, if there be no common property, then out of the real estate belonging to the decedent." The power thus given to the court to set apart a homestead that has been selected from the separate estate of the decedent is the same as is its power to set apart a homestead when none has been selected in the lifetime of the decedent, and must be exercised in the same manner and under the same limitations and conditions. The provision in section 1474 making the estate of the heirs subject to the exercise by the court of its power to assign the homestead to the family for a limited period, does not confer upon the court the power to assign the homestead taken from the separate property of the decedent, unless

by the conditions of section 1465 the separate estate may be so set apart. That section does not direct the court to set apart the homestead which had been selected by the survivor out of the separate property of the deceased spouse, but declares that in such case the court must "select," designate, and set apart "a" homestead, and limits the property out of which it is to be selected to the common property, if there be any. It is only in the case where there is no common property that it may select, designate, and set apart a homestead out of the separate estate of the decedent. *Lord v. Lord*, 65 Cal. 81, 3 Pac. 96. It is very evident that, if there be any common property, the homestead which may have been selected by the survivor from the separate property of the decedent, without his assent, would cease to be such upon his death; but the effect of his death upon the homestead selected from his separate estate, without his assent, is the same whether there be common property or not. The provision in section 1468, Code Civ. Proc., declaring what shall be the ownership "when property is set apart to the use of the family in accordance with the provisions of this chapter," implies that until it is so set apart the property belongs to the estate of the decedent; and the subsequent provision in the same section, "if the property set apart be a homestead selected from the separate property of the deceased, the court can only set it apart for a limited period to be designated in the order, and the title vests in the heirs of the deceased, subject to such order," clearly indicates that the court must make an order designating the limited period for which the homestead is set apart, and that until such order is made there is no homestead, and that the property selected as a homestead out of the separate estate of the deceased in his lifetime, without his assent, ceases upon his death to be a homestead, and vests in his heirs, free from any such limitation, unless it is afterwards selected and set apart as a homestead by an order of the court. The court has a discretion to exercise in determining whether it will set aside a homestead from the separate property of the decedent, as well as the particular property which it will set aside, and also in determining the time during which it shall be held as a homestead. It is not required to set aside the property which was selected by the survivor, and is limited to selecting and designating property which is of no greater value than \$5,000. "The court is not bound by the wishes of the applicant, but should exercise its own discretion and good judgment." In *re Schmidt's Estate*, 94 Cal. 334, 29 Pac. 714. "The right to have it assigned for a limited period is not absolute, but rests in the sound discretion of the court, to be exercised in view of all the facts appearing before it." In *re Lamb's Estate*, 95 Cal. 399, 30 Pac. 568. In the present case the land selected by the



wife was appraised at \$38,930, and was alleged by her, at the time the application was made for leave to execute the present mortgage, to be of the value of \$31,000. As a homestead of only \$5,000 in value could be set apart, and as there was no particular portion of the tract subject to the claim until it had been set apart, it was not impressed with the characteristics of a homestead. It must, therefore, be held that upon the death of Calvin P. Hensley the property ceased to have the incidents of a homestead, and that the property described in the complaint was subject to foreclosure, under the provisions of section 1500, Code Civ. Proc., without the presentation of a claim to the executrix. There was, therefore, at the date of the order authorizing the executrix to execute the note and mortgage sued on, and also at the date of their execution, a valid claim of lien in behalf of the plaintiff upon the property included in the mortgage; and the surrender and cancellation by him of the notes and mortgages of 1888, which was the basis of this claim, was a sufficient consideration for the execution to him of this note and mortgage.

2. The lands included in the mortgage are within the limits of reclamation district No. 556, and in May, 1894, the district levied an assessment upon all the lands within its boundaries. The amount of the assessment imposed upon these lands was \$7,296.54, and was assessed to "Mrs. M. A. Hensley." After the assessment was levied, the district made a written demand upon her for its payment, and at her request the plaintiff paid portions thereof as they became due and payable, amounting to \$3,283.46. These amounts and their payment are set forth in the complaint, and claimed by the plaintiff to be secured by the mortgage, and this claim was sustained by the court. The remainder of the assessment—\$4,013.15—was not paid. Section 2876, Civ. Code, declares: "Where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him as a part of the claim for which his own lien exists." An assessment by a reclamation district, like any other tax levied under the sovereign authority of the state, creates a lien upon the land assessed paramount to the lien of the mortgage. Taxes upon the mortgaged premises are a charge upon the estate, and, if paid by the mortgagee for the purpose of preserving his security, may be added to the mortgage. *Robinson v. Ryan*, 25 N. Y. 323; *Jones, Mortg.* § 358. It is urged by the appellants, however, that the statute under which the assessment was levied required it to be made to the "owner" of the tract (Pol. Code, § 3461), and that, as Mrs. Hensley and Calvin P. Hensley, Jr., were the residuary devisees of the estate, she was not its "owner," and the assessment to her was such a failure to comply with this requirement of the statute as to render it il-

legal, and the plaintiff was therefore not required to pay it for the protection of his security. Whether the form of the assessment was such as would have defeated an action for its collection, or would have conferred no title upon the purchaser at a sale under a judgment for its foreclosure, is not the test of the plaintiff's right to recover the amount paid for its discharge. The assessment created at least an apparent cloud upon the title to the mortgaged premises, and to the extent of such cloud impaired the sufficiency of the security. Mrs. Hensley was not only one of the residuary legatees, but she was also the executrix of the testator's will, and was charged with the care and preservation of the estate during its administration. If, when the district made its demand upon her for the payment of the assessment, she had paid it out of the funds of the estate, the court would have been justified in allowing such payment in the settlement of her accounts. She was not required to contest its validity at the risk of having the payment disallowed, and its allowance by the court upon the settlement of her accounts would have been binding upon the heirs and devisees of the testator. In *Windett v. Insurance Co.*, 144 U. S. 581, 12 Sup. Ct. 751, it was held that a mortgagee should be allowed for the moneys paid in purchasing some tax titles which were claimed by the defendant to be void, the court saying: "The mortgagee was not bound to take the risk of contesting the tax titles, and the sums paid to extinguish those titles were reasonable expenses, chargeable to the mortgagor by the terms of the mortgage." The mortgage to the plaintiff was made by Mrs. Hensley in her representative capacity alone, and when she requested him to pay this assessment he was justified in assuming that it was a request from her in this representative capacity in behalf of the estate, and for its preservation, rather than from her as the residuary legatee of a portion of the estate. His payment at her request must be considered with the same effect as if it had been made by her in her representative capacity. As one of the residuary legatees, Mrs. Hensley is estopped from disputing the plaintiff's right to make the payment under this request, and it may be noted, too, that the other residuary legatee makes no resistance to the plaintiff's right to be reimbursed therefor.

3. The reclamation district was made a defendant herein, and in its answer set forth its claim of lien by virtue of the said assessment, alleging that it is paramount to that of the plaintiff, and also filed a cross complaint, alleging its corporate existence and boundaries; that it had levied an assessment upon the lands within these boundaries, \$7,296.64 having been assessed against the lands described in the complaint, of which amount \$4,015.69 remained unpaid; that the defendant Mary A. Hensley is, and was at the date of the assessment, the owner

of said lands; and asked judgment that said amount is a valid lien upon the lands, paramount to that of the plaintiff, and that it be paid out of the proceeds of any sale thereof. The plaintiff demurred to this cross complaint as constituting no defense to his cause of action, but no disposition was made of the demurrer, nor did the plaintiff answer the cross complaint. Mary A. Hensley, in her individual capacity, answered the cross complaint, and to this answer the reclamation district interposed a demurrer, which was sustained, and no further pleading was made on her behalf. The cross complaint did not name any particular defendants thereto, and was not served upon any of the defendants in the action other than Mrs. Hensley. The court rendered judgment in its favor for the amount of this claim, directing it to be paid from the proceeds of the sale as a first charge upon the land. As Mrs. Hensley made no issue at the trial herein upon the allegations in the cross complaint, she is precluded from questioning the judgment sustaining the validity of the assessment. It appears, also, from the bill of exceptions, that the district had brought an action (St. 1893, p. 208) in the superior court for the purpose of determining the validity of this assessment, wherein Mrs. Hensley was a defendant, and that the court rendered its judgment therein that the assessment was legal and valid. Mrs. Hensley was not, however, the sole owner of the land, and, while she is estopped by these judgments from questioning the right of the district to enforce the lien of the assessment against her interest in the land, or her personal liability for the assessment, if any exists, they are not available against the interests of any other person in the land assessed. Calvin P. Hensley, Jr., as one of the residuary legatees, has the same interest as herself in the land, and, while the estate is in the course of administration, the personal representative of the testator is entitled to be heard in any manner affecting the rights or interest of the estate in the land. Unless such personal representative is made a party to the proceeding, neither the estate nor any person claiming as legatee or devisee of the decedent, who is not himself a party, can be bound by the judgment therein. The court, therefore, was not authorized to determine as against these defendants that the assessment was a valid lien upon their interest in the land.

Section 3461 of the Political Code requires the assessment list to contain "the names of the owners of each tract, if known; and, if unknown, that fact." Under a long line of decisions in this state a failure to comply with this requirement renders the assessment invalid. *Kelsey v. Abbott*, 13 Cal. 609; *People v. Sneath*, 28 Cal. 612; *Smith v. Davis*, 30 Cal. 536; *Taylor v. Donner*, 31 Cal. 480; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Lake Co. v. Sulphur Bank Quicksilver Mining Co.*, 66 Cal. 17, 4 Pac. 876. In the case last cited

the court said: "Tax proceedings are in invitum, and, to be valid, must be in strict accordance with the statute. Without an assessment, all subsequent proceedings are nullities; and in making the assessment the provisions of the statute under which it is to be made must be observed with particularity." Section 3466 of the Political Code authorizes the board of trustees to commence an action for the collection of the assessment and the enforcement of the lien on the land assessed "against the person to whom the same is assessed, and, if assessed to 'unknown' owners, then against the real owners." As the assessment in the present case was made to Mrs. M. A. Hensley, the latter clause in the above portion of the section is inapplicable, and an action for its enforcement must be brought against her alone, and the court cannot render judgment therefor against any other person. The statute does not authorize the assessment to be enforced against the real owners unless they are named in the assessment, or the assessment is made to "unknown" owners, and in an action for its enforcement against them they may question its validity, notwithstanding the admission of its validity by the person against whom the assessment is made. In *Blatner v. Davis*, 32 Cal. 328, the assessment was made to Schaffer, and in a suit for its enforcement brought against Davis and Schaffer under the allegation that both were owners of the lot assessed judgment was rendered against Davis alone, and the amount of the assessment decreed to be a lien against the entire lot. In reversing this judgment the court said: "If the property was properly assessed as belonging to Schaffer, there is no apparent reason for charging the appellant with the amount assessed. If the property belonged to the appellant and Schaffer as tenants in common, it should have been assessed to them jointly as owners. \* \* \* The name of the appellant does not appear in the assessment as the owner, or one of the owners, of the lot assessed, nor does it appear that he was unknown to the superintendent of streets, and that his interest in the property was duly assessed, as required in such cases. The complaint states that the lot in question was assessed to Schaffer, which means that it was assessed to him as the owner. This statement, which is found to be true by the court, shows that the assessment did not affect the appellant, and, consequently, that the proceedings had, and upon which the plaintiff relies for compensation under his contract with the superintendent, were of no binding force upon the appellant, and created no legal obligation on his part to pay the sum for which judgment passed against him." The reason for this requirement is obvious. The assessment is a charge against the entire property, and under section 3466 the lien is to be enforced "against each tract for the amount assessed against the same." If the person assessed



is not the entire owner, his interest in the land would be made to pay the entire assessment, while, if the entire land is made liable for the assessment, those who are not named in the assessment list would be deprived of their interest in the property without an opportunity of being heard in its defense. It follows that, as the assessment in the present case was made to "Mrs. M. A. Hensley," the district was not authorized to institute an action for its enforcement against any other person interested in the land, either as owner or otherwise; and that, although she is estopped by the judgment against her from questioning its validity, its illegality is available to the other defendants as a defense herein. The provision in section 3628 of the Political Code that "no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid" refers to the assessment provided for in that section, and has no application to an assessment by a reclamation district. See *Lake Co. v. Sulphur Bank Quicksilver Mining Co.*, 66 Cal. 17, 4 Pac. 876; *Gwynn v. Dierssen*, 101 Cal. 563, 36 Pac. 103.

4. It is objected by Mrs. Hensley that the judgment in favor of Elliott did not constitute a lien upon the premises, for the reason that it does not appear that it was ever docketed. The lien of the attachment would not, however, be merged in the judgment until the latter became a lien, and, if the judgment has not been docketed so as to become a lien, the lien of the attachment still remains upon the land. *Bagley v. Ward*, 37 Cal. 121; *Riley v. Nance*, 97 Cal. 203, 31 Pac. 1126, and 32 Pac. 315. As we have seen that upon the death of Mr. Hensley the land ceased to be a homestead, the interest of Mrs. Hensley therein became subject to an attachment by her creditors. Each of these liens upon the interest of Mrs. Hensley in the lands was created before the judgment was rendered against her affirming the validity of the assessment, and, as the holders of these liens were neither of them a party to that proceeding, their liens are superior to that of the judgment, and are entitled to priority of satisfaction.

From the foregoing considerations it follows that out of the proceeds of the sale of the land described in the complaint the plaintiff is entitled to be paid as a first charge thereon the amount of his claim, as found by the court, including the amount due upon the promissory note, the amount paid by him for the assessment levied by the reclamation district, and his attorney's fees and costs; and that any surplus proceeds there may be after making these payments should be paid to the executrix of the last will of C. P. Hensley, deceased, to be held by her subject to the administration of said estate, and that at the close of said administration Mebius and Drescher, John Elliott, and reclamation district No. 556 should receive out of

the distributive share coming to Mary A. Hensley the respective amounts found by the court in their favor, and in this order of priority. The cause is therefore remanded to the superior court, with directions to modify its judgment for the disposition of the proceeds of the sale after paying the claim of the plaintiff in accordance with the foregoing opinion. The costs of the appeals of Mary A. Hensley, as executrix, and Marion A. Turner, to be taxed against reclamation district No. 556; the costs of the appeals by Mary A. Hensley and Mebius and Drescher to be borne by them respectively.

We concur: McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.

126 Cal. 112

In re STANFORD'S ESTATE. (S. F. 571.)  
(Supreme Court of California. Aug. 26, 1898.)

STATUTES — OPERATION — PARTIAL INVALIDITY —  
SPECIAL LAWS — CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — COLLATERAL INHERITANCE TAX.

1. Pending an appeal from an order requiring an executrix to pay a collateral inheritance tax as provided by Act March 23, 1893, the legislature (St. 1897, p. 77) amended the act by exempting certain classes, including appellants, from its operation, and provided that the exemptions should apply to all cases arising under the original act, except where taxes had already been paid. *Held*, that the appeal must be determined in accordance with the amendment.

2. Const. art. 4, § 25, subd. 16, prohibiting the legislature from passing local or special laws releasing or extinguishing in whole or in part the liability of any corporation or person to the state, is not violated by an amendment to the collateral inheritance tax law (St. 1897, p. 77, amending Act March 23, 1893), exempting from its operation certain classes of corporations and relatives, and providing that the exemptions should apply to cases arising under the original act, except where taxes had already been paid.

3. Under Const. U. S. art. 4, § 2, providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and Rev. St. U. S. § 1978, providing that all citizens of the United States shall have the same right in every state as is enjoyed by the white citizens thereof to inherit property, the provision of the collateral inheritance tax law (Act March 23, 1893, as amended by St. 1897, p. 77), making a distinction between resident and nonresident relatives, and excluding nonresident relatives from its exceptions, is invalid.

4. The collateral inheritance tax law (Act March 23, 1893, as amended by St. 1897, p. 77) includes among those exempt from the tax "niece or nephew when a resident of this state." The position of this clause in the act shows that nieces and nephews were intended to be equally exempt with other enumerated relatives. *Held*, that the invalid limitation, "when a resident of this state," should be rejected, and the statute construed as if such part had not been enacted.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Leland Stanford, deceased, an order was made requiring

the executrix to pay a collateral tax on legacies, and she and the legatees appeal. Reversed.

Wilson & Wilson, for executrix. Gordon & Young, for Jerome B. and Philip W. Stanford. Edward R. Taylor, for Agnes Stanford Taylor. A. N. Drown, for Josiah Stanford, Jr. F. E. Spencer, for Trustees of the Leland Stanford, Jr., University. Cotton & Cotton, for certain nonresident nephews and nieces. W. S. Barnes, Dist. Atty. (Elliott McAllister, of counsel), for treasurer.

HARRISON, J. Leland Stanford died June 21, 1893, leaving a last will and testament by which he gave the sum of \$2,500,000 to certain trustees for the benefit of the Leland Stanford, Jr., University, and also legacies amounting to \$2,200,000 to certain of his nephews and nieces. May 7, 1896, the superior court for San Francisco made an order requiring the executrix of his will to pay into the treasury of the city and county \$235,750 as and for the collateral inheritance tax upon these and other bequests. From this order the present appeal was taken, May 18, 1896. After the appeal had been taken, the legislature, at its next session, passed an act, March 9, 1897 (St. 1897, p. 77), amending section 1 of the collateral inheritance act, approved March 23, 1893, by including among those who are exempt from the tax "niece or nephew when a resident of this state," together with certain classes of corporations, of which the above-named university is one, and provided that the exemption should apply to all cases arising subsequent to the passage of the original act, "except in those cases where the tax has been paid to the treasurer of the proper county."

1. The appeal herein must be determined in accordance with the law as it now exists, and not as it stood at the time the court made the order appealed from. *Bank v. Henderson*, 101 Cal. 307, 35 Pac. 899.

2. The power of the legislature to determine whether to impose a succession tax or an excise tax upon the right of inheritance, as well as its right to determine upon which heirs or legatees of a decedent such a tax shall be imposed, was held in *Re Wilmerding's Estate*, 117 Cal. 281, 49 Pac. 181, to be plenary; and any statute enacted for this purpose may be amended equally with any other statute. The legislature has the same power to add other classes to those who are to be exempted from the tax by an amendment to the original act as it would have had to exempt them from the tax in the original statute. The respondent does not controvert the effect of the amendment upon the estates of persons dying subsequent to its enactment, but insists that the provision in the second section of the act extending the exemption to cases arising prior to its enactment, when the tax has not

been already paid, is in violation of subdivision 16 of section 25 of article 4 of the constitution of this state, by which the legislature is prohibited from passing local or special laws "releasing or extinguishing in whole or in part the indebtedness, liability or obligation of any corporation or person to this state, or to any municipal corporation therein." The right of the legislature to repeal the entire act cannot be questioned, and upon such repeal without any saving clause there would be no statute authorizing the collection of any portion of the tax then unpaid, and the tax could not be collected.

If the legislature was of the opinion that the tax ought not to have been imposed upon nephews and nieces, it had the same power to repeal that portion of the statute authorizing the collection from them of the tax then imposed as it had to exempt them from the payment of the tax. Such a statute is neither a local nor a special act. It extends to every part of the state, and applies to every person within the class. A classification of the persons thus to be exempted from the collection of the taxes previously imposed is no more a special act than the same classification of those upon whom the tax is to be imposed, or who are to be exempt from its payment; and whether the legislature takes away the power of collecting the tax by direct words to that effect, or by a declaration that the persons in the class shall be exempt from its payment, is immaterial. In *Montague v. State*, 54 Md. 481, the legislature of Maryland had, by an amendment to the statute, included the "husband" in the exempted classes, and provided that the exemption should apply in all cases where the tax had not been actually paid. In passing upon the question here presented, the court reached the same conclusion as above, saying: "If the legislature is satisfied that a given tax is no longer necessary, that it is unjust, that a change of circumstances requires its repeal, that public policy demands that the repeal should be prompt, should give instant relief, and should therefore extend to all who had not yet actually paid, the legislature has in its discretion the constitutional right so to enact, without being at the same time compelled to embarrass the treasury by a sweeping restitution to all who had paid the tax from the time of its imposition. Under some circumstances such a retrospective exemption might be highly expedient, and under others not. The question is one of policy for the legislature, and not one of law for the courts." It was further objected in that case, as by the respondent here, that the tax claimed from the appellant had become a specific, ascertained debt due from him to the state, and that the act exempting the husband from its payment was void under a provision of the constitution of that state similar to the above subdivision of section 25, forbidding the general assembly from passing local or



special laws releasing persons from their debts or obligations to the state; but it was held that this provision of the constitution did not apply to a public general law releasing persons from their debts or obligations to the state, but that the inhibition was directed to "local" or "special" laws, and that the law under consideration was neither local nor special.

3. Of the nephews and nieces who are appellants herein, seven are residents and citizens of other states, and it is contended on their behalf that the provision in the statute, as amended in 1897, which purports to exclude them from the exemption given to resident nephews and nieces, contravenes the provisions of section 2, art. 4, of the constitution of the United States, which declares, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and is, therefore, invalid. The charge imposed upon the inheritance by the statute under consideration is in the nature of an excise tax (In re Wilmerding's Estate, supra), but, by whatever name it is designated, the power to impose the charge is referable to the power of taxation, and the above provision of the constitution guaranties to the citizens of each state an immunity in any other state from the burdens of taxation upon their persons or property or occupations which that state does not impose upon the persons or property or occupations of its own citizens. Mr. Cooley says (Const. Lim. p. 490) that this provision "secures in each state to the citizens of all other states the right to be exempt in property and person from taxes or burdens which the property or persons of citizens of the same state are not subject to." In *Ward v. Maryland*, 12 Wall. 418, it was held that a statute imposing a higher license tax for the sale of goods within the state of the nonresident than was imposed upon the resident of the state was in violation of this section, and invalid. In defining the words "privileges and immunities," as used in the constitution, the court said: "Beyond doubt, those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into another state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the state, and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens." In *Oliver v. Washington Mills*, 11 Allen, 268, it was held that a statute of Massachusetts which required corporations to reserve from each of their dividends one-fifteenth part of whatever was payable to holders of stock residing out of the state, and to pay it into the state treasury, was violative of this provision of the constitution; the court saying: "It is obvious that

the power of a state to impose different and greater burdens or impositions on the property of citizens of other states than on the same property belonging to its own subjects would directly conflict with this constitutional provision. By exempting its own citizens from a tax or excise to which citizens of other states were subject, the former would enjoy an immunity of which the latter would be deprived." See, also, *Corfield v. Coryell*, 4 Wash. C. C. 381, Fed. Cas. No. 3,230; *Campbell v. Morris*, 3 Har. & McH. 554; *Crandall v. State*, 10 Conn. 344; *Wiley v. Parmer*, 14 Ala. 627. Section 1978 of the Revised Statutes of the United States provides: "All citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." If, however, the state imposes upon the citizens of another state a tax upon their right of inheritance which it does not impose upon its own citizens, they do not have the "same right" to inherit property as is enjoyed by the citizens of that state. It must be held, therefore, that it is not within the power of the state, while exempting its own citizens from a tax upon their inheritances, to impose such tax upon the inheritances falling to citizens of other states.

4. It is then contended on behalf of the respondent that, by reason of the invalidity of this clause in the amendatory statute, the entire provision for exempting the succession of nieces and nephews from the tax must fail. A comparison of the statute as amended with the original statute makes it very evident that the purpose of the legislature was to include nephews and nieces with other relatives of the decedent whose inheritances should not be liable to the tax. The position in the section of the added clause—being placed in connection with other near relatives of the decedent—implies that the legislature intended them to be exempt from the tax equally with the other enumerated relatives. The clause "when resident in this state" was intended as a limitation upon the extent of the exemption, and not as a condition upon which the exemption should be extended to any of the nephews and nieces. That the legislature intended that the exemption should extend to nephews and nieces resident in this state is evident from its language, and that it did not intend that the exemption should extend to nephews and nieces not resident in this state is equally evident. But its intention in this latter respect fails by reason of its want of power to make such discrimination between the two classes. The statute is, therefore, within the rule of construction that, if the objects of a statute are so severable that one is not dependent upon the other, effect will be given to the object which is valid, while that which is invalid will be rejected, and the statute construed as if the invalid part had never been enacted. Mr. Cooley says

(page 211): "If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." See, also, *People v. McCreery*, 34 Cal. 433; *Hale v. McGettigan*, 114 Cal. 112, 45 Pac. 1049; *People v. Kenney*, 96 N. Y. 294; *Com. v. Hitchings*, 5 Gray, 482; *Ratterman v. Telegraph Co.*, 127 U. S. 411, 8 Sup.Ct. 1127.

5. It is not contended by the respondent that the bequest to the Leland Stanford, Jr., University is subject to the tax, if the provision making such exemption applicable to past cases is valid. The order is reversed, and the superior court is directed to make its order for the payment of the tax in conformity with the foregoing opinion.

We concur: GAROUTTE, J.; VAN FLEET, J.

(6 Cal. Unrep. 118)

**KERRY v. PACIFIC MARINE SUPPLY CO.** (S. F. 818.)

(Supreme Court of California. Aug. 26, 1898.)

**APPEAL—JUDGMENT—MODIFICATION—DAMAGES.**

Finding of damages in excess of amount averred in complaint established damages to amount claimed, so that judgment for the excessive amount need not be reversed, but merely modified.

On rehearing. For former opinion, see 54 Pac. 89.

**PER CURIAM.** Upon further consideration, we are of opinion that a reversal of the judgment in this case is not necessary, and that a modification will meet the ends of justice. The finding of damage is for an amount greater than the complaint avers. Still, the finding necessarily establishes that plaintiff was damaged to the amount which he claims. The judgment may, therefore, be modified, and it will still be supported by the finding in question. All other propositions having been resolved in favor of plaintiff and respondent, it would be a hardship to compel a new trial, if that result could properly be avoided. We think this may be done, for the reasons indicated, which reasons find support in many cases. *Fischer v. Blank*, 138 N. Y. 669, 33 N. E. 1040; *Cox v. Railway Co.*, 77 Iowa, 478, 42 N. W. 429; *Miller v. Wilkins*, 79 Ga. 675, 4 S. E. 261; *Frankhouser v. Cannon*, 50 Kan. 621, 32 Pac. 379; *Winter v. Fulstone*, 20 Nev. 260, 21 Pac. 201, 687. The two final sentences of the opinion are therefore eliminated. The judgment of reversal is vacated. The court below is directed to modify its judgment by reducing the same in the sum of \$239, or one-half of one cent per lineal foot for all of the piles. It is further ordered that appellant have his costs upon this appeal.

(121 Cal. 670)

**DEVINE v. BOARD OF SUP'RS OF SACRAMENTO COUNTY et al.** (Sac. 518.)  
(Supreme Court of California. Aug. 17, 1898.)

**COUNTY ROADS—BONDS.**

The levying of a tax for county road purposes on property in a city in which work and improvements on the street are done by virtue of laws relating to street work and improvements therein, being prohibited by St. 1883, p. 20, so that the road fund is one to which only part of the county contributes, and which is to be expended for the benefit of such part only, the county's bonds cannot be issued for construction of a road.

In bank. Appeal from superior court, Sacramento county; J. W. Hughes, Judge.

Action by James H. Devine against the board of supervisors of Sacramento county. Judgment for plaintiff. Defendants appeal. Affirmed.

Frank D. Ryan and J. Chas. Jones, for appellants. James B. Devine and H. G. Soule, for respondent.

**PER CURIAM.** This is an action to restrain the defendants from levying a special tax for the current year to create an interest and sinking fund to provide for the payment of the principal and interest of certain so-called Folsom road bonds. A general demurrer to the complaint was overruled, and, defendants declining to answer, judgment was rendered in favor of the plaintiff, from which the defendants appeal.

The only question to be determined is the validity of the bonds, and this depends altogether upon the power of the board of supervisors to issue them; for, so far as the proceedings leading to their issuance are concerned, they seem to have been perfectly regular in form. The issuance of the bonds in question was no doubt designed as a means of co-operation in carrying out the purposes of an act approved March 29, 1897 (St. 1897, p. 239), entitled: "An act to provide for the construction of a state highway or wagon road from Sacramento city to Folsom, in Sacramento county, and appropriating crushed rock and granite or stone blocks for drains and culverts for same." By the terms of this act, the governor was authorized to appoint three commissioners, whose duty it should be to construct a model road between the designated termini. No money was appropriated to pay the expense of building the road, but the directors of the Folsom prison were authorized and directed to furnish, free of cost, the necessary crushed rock for macadamizing, and cut stone for culverts, drains, etc. The act contains no invitation to Sacramento county to contribute funds to pay expenses, but prohibits the doing of any work on the road until the title to the lands upon which it is laid shall have been conveyed to the state. In October, 1897, the defendants, the board of supervisors, ordered a special election for voting upon a proposition to issue the bonds of the county to the



amount of \$75,000, "for the purpose of improving and macadamizing the public road, to wit, the highway in Sacramento county which is now situated and runs closely to the line of the Sacramento & Placerville Railroad, which now extends between said Sacramento city and the town of Folsom." At the election duly held in pursuance of this order, the proposition was carried by a large majority, and thereupon the board duly passed an ordinance providing for the issuance of the bonds, and for the creation of an interest and sinking fund to pay them. The bonds were subsequently issued, and sold at a premium. The ordinance makes no reference to the Folsom road act, or to the commission appointed thereunder. It does not appear that the two propositions have any necessary or legal connection, and it is seriously doubtful, to say the least, whether the board of supervisors could lawfully put the proceeds of county bonds at the disposal of the state commissioners, even if it had been so expressly provided in the ordinance, and the authority to issue the bonds were unquestioned. For these, and for other reasons which need not be stated, the question of the validity of these bonds must be determined without any reference to the Folsom road act. The inquiry is, merely, whether the board of supervisors of Sacramento county can issue bonds of the county to raise funds for the construction of a county road. There is, of course, no such authority, unless it is conferred by statute, and the only claim of statutory authority is based upon a clause of subdivision 13 of section 25 of the county government act of 1897 (St. 1897, p. 460), as follows: "And any county may incur or refund a bonded indebtedness for any purpose for which the board of supervisors are herein authorized to expend the funds of the county."

It is claimed that the board of supervisors of Sacramento county are authorized in the county government act, and in statutes to which it refers, to expend funds of the county in constructing county roads. This is not true in the sense of the clause above quoted. In a county like Sacramento, in which there is an incorporated city like the city of Sacramento, wherein work and improvements upon the streets is done by virtue of laws relating to street work and improvements within such municipality, no tax can be levied for county road purposes upon any property in such city. St. 1883, p. 20. The road fund, therefore, is a fund to which the whole county does not contribute. It is a special fund levied upon a portion of the county, to be expended exclusively for the benefit of that portion of the county upon which it is levied. But the bonds of a county—the bonds in question here—are the bonds of the whole county, and must be paid, if held valid, by means of a tax levied upon all the property of the county, including that within the city of Sacramento. The county government act does not countenance such a result. The

board of supervisors cannot borrow money on bonds of the whole county to expend upon an object for which they are only authorized to expend the funds of a part of the county.

In the case of *People v. Counts*, 89 Cal. 15, 26 Pac. 612, there was no suggestion that the road tax in that county (Mariposa) was not levied upon the entire county. The point upon which this decision turns was not presented, and we do not know that it could have been made. But, however that may be, we are satisfied that, since the board of supervisors are prohibited from taxing the city to pay for county roads, they cannot do indirectly, by issuing bonds, what they are forbidden to do directly; and, although it clearly appears that a very large majority of the citizens of Sacramento are in favor of the issuance of the bonds and of the construction of the road, the plaintiff, who is a taxpayer of the city, cannot be denied the relief which he asks. The judgment is affirmed.

The CHIEF JUSTICE, deeming himself disqualified, did not participate in the decision of this case.

6 Cal. Unrep. 110

MORE v. MILLER et al. (S. F. 897.)

(Supreme Court of California. Aug. 19, 1898.)

APPEAL—PREMATURITY.

An appeal from a final judgment before its entry is premature, inasmuch as the time within which such appeal may be taken does not begin to run until the entry.

In bank. On petition for rehearing. Modified.

For former opinion, see 53 Pac. 1077.

PER CURIAM. In this case appellants took the view that they were entitled to appeal from the order denying a motion for leave to intervene within one year after the entry of final judgment in the action. In the opinion heretofore rendered in this case, the appeal was dismissed, upon the ground that the order striking out the intervention was a final judgment, and an appeal should be taken from it as from a final judgment. It was further said that the appeal here in question was taken more than 13 months after final judgment denying leave to intervene was made and given. Upon petition for a rehearing, this court's attention is directed to the fact that the judgment striking out the intervention and denying leave to intervene has not been entered as a final judgment. An appeal taken from a final judgment before entry is premature, and the time within which an appeal may be taken from a final judgment does not begin to run until entry of the judgment. Under these circumstances, and for this reason, the judgment rendered in this case, is modified, and the appeal is hereby dismissed, upon the sole ground that it has been prematurely taken.

121 Cal. 297

AMBROSE v. BARRETT et al. (Sac. 390.)  
(Supreme Court of California. Aug. 19, 1898.)

In bank. For opinion in department, see 53  
Pac. 805.

PER CURIAM. Rehearing denied.

BEATTY, C. J. The principal question involved in this case is a new one in this state, and on that account I desire to state my reasons for dissenting from the order denying a rehearing before the full court. The action is to foreclose a mortgage, and the plaintiff, in addition to the allegations usual in such cases, charges in his complaint that the defendants, who are husband and wife, fraudulently represented that, if he would send them the note and a release of the mortgage to the place where they were sojourning in New York, they would pay him the amount due; that, relying upon their promise to that effect, he sent them the note and release, but they have never paid the debt, or any part thereof. The defendants in their answer admit their promise to pay upon surrender of the note and delivery of the release, and allege that they did pay accordingly. The only issue in the case, therefore, was upon the defense of payment. It was found by the superior court that the note had been paid, and that the defendants had practiced no fraud upon the plaintiff in obtaining the release. These findings were attacked by the motion for a new trial, based upon a statement containing all the evidence in the case; and the only question for this court to determine is whether the evidence in the record before us sustains the findings of payment and release. In regard to the evidence, it may be remarked that it consists mainly of written documents, including the depositions of the defendant Barrett and his witnesses, that it all came in without objection, and that it proves conclusively what the opinion of the court expressly concedes, viz. "that Barrett adopted the plan of having this money paid to Ambrose in the state of New York for the particular purpose of giving the sheriff an opportunity to levy upon it in the action contemplated by him against Ambrose." It may not be improper to refer to the evidence to show that this concession goes none too far, and that in fact it but faintly portrays the deliberate contrivance by which the defendant Barrett, acting for himself and wife, sought to bring the property of the plaintiff within a foreign jurisdiction, in order that he might be compelled to defend there against a claim which, under the laws of this state and of the United States, he was entitled to have litigated in California. At the time of the execution of the note and mortgage, all the parties were in California. Ambrose had been here many years, and the defendants for three or four years, engaged in various kinds of business. It is not expressly stated that any of them were residents of Califor-

nia, but the facts prove that all were residents here. The note was made payable at a San Francisco bank, and secured by a mortgage of lands in Fresno county. Within a few days after the date of the note and mortgage, the defendants went to New York, where they had formerly resided, and from there remitted the interest as it accrued. But when the note was about to fall due, instead of remitting the amount, Barrett wrote first to the San Francisco bank where it was payable, and next to plaintiff, requesting that the note, with a proper release, might be sent by express to New York, with leave to examine, and under a commission to the express company to deliver the papers upon payment of the money. In asking this favor of plaintiff, not the slightest hint was given by Barrett that he had any claim against him. On the contrary, the existence of his claim was studiously concealed. Indeed, concealment was essential to the success of Barrett's scheme, for it cannot be supposed that plaintiff would have voluntarily placed his property within reach of a New York attachment if he had had any reason to suspect Barrett's intention to sue him there, or that he was asserting a claim upon which an attachment might be based. Plaintiff, then, having no suspicion of Barrett's scheme, fell into the trap which had been laid for him. He sent the note and release by express, to be delivered upon payment of the amount due. The defendant went through the form of paying the money, received the papers, and then immediately took the money back under a writ of attachment issued in a suit which he had taken the precaution to commence in advance in a court of New York. The question is whether this transaction amounted to payment. The superior court has found that it did, and this court has sustained that conclusion upon grounds which, in my opinion, are untenable.

It seems to be assumed that the whole question is solved when it is determined that the express agent, at the moment of the attachment, held the money as the agent of the plaintiff, and that the case is the same as it would have been if he had been robbed by a third party. But the slightest reflection will show that this is a false analogy. The money was not taken from plaintiff's agent by a third party, but by the party himself who had pretended to pay it; for the writ of attachment was Barrett's own contrivance, and the officer who levied it was his agent. If I pay my debt, and my creditor is despoiled by a robber, he, of course, must suffer the loss; but if I hand my creditor the amount due upon a note secured by mortgage, and, as soon as I get possession of my note and a release, make a forcible recaption of the money, the debt is not paid, nor the lien discharged; and the result is the same whether the creditor is despoiled of all benefit of payment by force, or by a fraud deliberately contrived for that purpose. This proposition, I



assume, will not be controverted, and I am thus brought to the question upon which the case depends,—the question, that is to say, whether Barrett's contrivance was a fraud. Upon that point the opinion of the court is expressed as follows: "It may appear inferentially that Barrett adopted the plan of having this money paid to Ambrose in the state of New York for the particular purpose of giving the sheriff an opportunity to levy upon it in the action contemplated by him against Ambrose; and we find nothing in the record indicating any deeper scheme than this. In conceding that to be the fact, such concession would not operate to set aside and nullify the payment of the money to the agent of Ambrose. There would be no fraud in the transaction which could possibly compass that result. Looking at the case from all sides, we do not see a great injustice done to Ambrose by the judgment of the trial court. If Barrett's claim against him was a fraud and a myth, he should have pursued and recovered his money. If Barrett's claim was legal and just, the money has been well applied. If the claim was a fraud and a myth, the carelessness of Ambrose in neglecting to stamp its baseness with the seal of the courts of the state of New York leaves him now where equity will not greatly concern herself in securing for him a return of the money." It is from these views that I wish to express my dissent. There is no right of property more substantial or more meritorious in the eyes of the law than the right of a citizen not to be wrongfully subjected to a foreign jurisdiction in the litigation of claims against him; and the books are full of cases in which it has been held that judgments and other proceedings and orders based upon service of process upon persons or property forcibly or fraudulently brought within reach of the process are voidable for that reason. And these decisions do not rest upon merely technical grounds, but upon substantial reasons, which are well illustrated by this case. It is assumed in the extract above quoted from the opinion of this court that the plaintiff is entitled to no consideration, and that equity will not greatly concern herself in his behalf, because he did not go to New York, and there contest the merits of Barrett's claim, as if it were a matter of no moment that a citizen of California should be compelled to leave his home and his business, and travel some thousands of miles and back, to litigate a claim which it was his right to have litigated here. It is safe to say that he would in that case have been subjected to a heavy pecuniary loss, direct and indirect, and, if he could not legally or justly be compelled to submit to such loss, where is the difference between that and any other fraud?

The case seems to be plain enough on principle, but there is no lack of authority to sustain the view I have indicated. A case very closely in point is *Dunlap v. Cody*, 31 Iowa, 260, which was an action in Iowa upon

a judgment obtained in Illinois. The defendant in that case, while residing in Iowa, had been decoyed into Illinois by a false representation that some parties were about to erect a costly elevator there, the site of which he was requested to examine. As soon as he arrived, he was served with summons, and the judgment followed. The only difference between that case and this is that there it was the person, while here it was the property, which was decoyed into the foreign jurisdiction, and there the fraud was accomplished by the *suggestio falsi*, while here it was only a *suppressio veri*. The decision of the case, however, went upon grounds which cover broadly all frauds upon the jurisdiction. The court in its opinion reviewed the authorities very fully, and, as a result of its investigation, held that the fraud in obtaining jurisdiction vitiated the judgment, and that it was not incumbent upon the defendant to appear in the foreign jurisdiction to defend, or even for the special purpose of moving for a dismissal of, the action. In the course of its opinion the court said: "Do the means used to obtain jurisdiction of the person of the defendant in the courts of Illinois amount to fraud? It would seem that this question scarcely needs discussion. Fraud consists in the *suggestio falsi* or the *suppressio veri*. Both exist here. The false statement was made to defendant by plaintiffs' attorney that Hiatt and others were about to erect an elevator in Hancock county, Illinois, to cost between thirty thousand dollars and forty thousand dollars; and the defendant, being a carpenter, was induced to go to Illinois to look at the site of the proposed structure. The truth—that the object in getting defendant into the state of Illinois was to obtain jurisdiction of his person in an action against him, and avoid the bar of the statute of limitations of the state of Iowa—was suppressed. It cannot be supposed that if the real facts and purpose had been made known to defendant, he would voluntarily have gone to Illinois, and subjected himself to an action upon this demand, long since barred by the statute of limitations of the state in which he resides. Counsel representing plaintiff in this court, and who, it is but justice to say, were not concerned in obtaining the judgment in Illinois, do not seriously controvert the position that the mode of obtaining jurisdiction was fraudulent. They concede that it 'smells somewhat of fraud.' The only palliation which they are able to offer is the suggestion of a doubt whether it may not be considered a 'pious fraud,' in which 'the end justifies the means.' We do not think that it is entitled even to that small measure of charity. An enlightened and just administration of the law, no less than sound public morals, condemns such practices, and demands that the client whose cupidity could sanction, and the attorney whose venality could execute, such a purpose should alike

be disgraced. \* \* \* Now, in view of these authorities, we apprehend it would be admitted that if the plaintiff had seized the defendant, and carried him by force to Illinois, and there caused him to be served with a summons, the jurisdiction thereby acquired would be wrongful. Yet the only difference between the case supposed and the one under consideration is that in that case the volition would be overcome by physical force, while in this the will was rendered passive by false and fraudulent suggestions. Had the truth been known to the defendant, he would have been just as unwilling to have gone to Illinois in one case as the other, and we are unable to perceive why the cases should not be followed by similar consequences. It is claimed that the defendant should have appeared in pursuance of the summons, and there moved the court to dismiss the proceedings in consequence of the fraud. It may well be doubted whether such appearance, even for the purpose of objecting to the service, would not have placed him within the jurisdiction of the court for all purposes connected with the trial. Such, certainly, would be the effect of such appearance in this state. Revision, § 2840. But conceding that he would not be visited with such consequences in the courts of Illinois, and that there the defendant might be relieved from the effects of an insufficient service, such relief, in this case, could be predicated only upon the fraud of plaintiff in procuring the service. Why drive a defendant to the necessity of traveling, it may be, a thousand miles, to put in an appearance at court, and suggest to the court that it has no jurisdiction in consequence of the fraudulent act of plaintiff in procuring service? Under such a construction, it would, in many cases, cost more to make defense than to allow judgment to be taken, and permit the fraud to triumph."

The principles of this decision are approved in *Durringer v. Moschino*, 93 Ind. 498, and I have not found anything that conflicts with it, except in one case in Arkansas. In that case January sued Peel in Arkansas, where he resided, and gave notice that he would take depositions in St. Louis, Mo. Peel voluntarily went to St. Louis to attend at the taking of the depositions, where he was served with summons in an action commenced there on the same claims. Plaintiffs recovered judgment in the Missouri court, and upon that judgment brought suit in Arkansas, which Peel defended upon the ground that the jurisdiction of the Missouri court had been obtained by fraud. The court held that the jurisdiction had been fraudulently obtained, but disallowed the defense, partly because it had not been properly pleaded, and partly because the defendant had not appeared specially in the St. Louis court, and moved to dismiss the action there. They did not hold, however, as is suggested here, that he was bound

to defend on the merits in the foreign jurisdiction. On the contrary, they held that he was only bound to appear specially, and move to dismiss, because such an appearance would not be a submission to the jurisdiction.

These cases relate to frauds in obtaining jurisdiction of the person, but the same principles apply to questions regarding property. *Ilsey v. Nichols*, 12 Pick. 270, was a suit for damages for breaking outer doors to levy an attachment. It was conceded that the officer was liable for the damages caused by the breaking of the doors, but it was contended that the levy was good nevertheless, and that no damages should be awarded for the goods taken. The court held otherwise, and Chief Justice Shaw, after reviewing the authorities, states his conclusion in these words: "These cases, therefore, seem to establish the general principle that a valid and lawful act cannot be accomplished by any unlawful means; and, whenever such unlawful means are resorted to, the law will interpose, and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means to his rights." This language applies directly to the case in hand. If a sheriff in Massachusetts cannot make a lawful levy on goods, otherwise subject to attachment, when he breaks an outer door to get access to them, a sheriff in New York cannot make a valid levy on the property of a citizen of California, in behalf of a citizen of New York, who has by a deliberate fraud procured the property to be brought within that state for the express purpose of having it attached there; and the courts of California could easily interpose, and afford a suitable remedy in this case, by simply disallowing a plea of payment, founded upon a mere formal transfer of money, which was immediately retaken in pursuance of a fraudulent and unlawful design. Instead of affording to our own citizen this entirely suitable remedy, we deny him any relief, and give full effect to a fraud upon our own jurisdiction.

GAROUTTE, J. Owing to the many live and pressing matters now pending before the court, I have no time to devote to a further consideration of this case; but, in view of the dissenting opinion now filed, and in fairness to the court that denied the petition for a rehearing, I feel compelled to say a few words.

1. Barrett testified that the attachment of the money in New York was based upon an indebtedness of Ambrose to him upon an express contract. Ambrose testified in detail at the trial, but by no word intimated that such indebtedness did not exist. Hence we assume that it did exist, and therefore the contention of Ambrose in this case is more technical than substantial, as far as any question of justice is concerned.



2. As to the question of fraud practiced by Barrett upon the jurisdiction of the courts of this state or of New York, or the question of Barrett's fraud in obtaining jurisdiction over the person or the property of Ambrose in New York, matters so largely dwelt upon in the opinion of the Chief Justice, it is sufficient to say there is nothing in the pleadings suggesting such a defense. No such question was raised at the trial. The briefs of counsel filed in this court do not intimate it, and the petition for a rehearing does not advert to it. For these reasons, it is not a question in the case.

3. The transaction of paying the money at the home of Barrett in New York, through an express company, after an examination of the papers of release by the attorneys of Barrett, was an everyday, ordinary business transaction, and it is only by the barest inference that it can be said Barrett, with the then intent to attach the money, induced Ambrose to send the papers to New York. There is no evidence to that effect in the record, and the trial court substantially found the fact the other way.

4. If the transaction here involved had occurred between these parties at different points in the state of California, I do not believe the judgment of the trial court could have been other than it was; and this case, upon the pleadings, the trial, and the argument, stands exactly as though the dealings between the parties had all taken place within the confines of this state.

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121 Cal. 674

KNIGHT v. TRIPP. (S. F. 735.)

(Supreme Court of California. Aug. 23, 1898.)

GIFTS CAUSA MORTIS—DELIVERY—TESTAMENTARY DISPOSITION.

1. Delivery of an instrument in form of bill of sale, intended as a gift causa mortis of articles present and capable of delivery, is not a sufficient delivery.

2. Deceased, in contemplation of death, said to defendant that she wanted to give her property to him, or place it all in his hands, and tell him whom she wished to have it, and at the same time she requested him to take the key to a secretary in her room. Thereafter, on giving him instructions as to persons to have her property in case of her death, she indorsed notes in the secretary, and he put them back, and retained the key. *Held* not a sufficient delivery.

3. Where deceased attempted to make a gift causa mortis of all her property, defendant to distribute it, and pay debts and expenses, in case of her death, and have anything remaining, the gift is defeated entirely by a part only of the property being delivered to defendant.

4. There is a testamentary disposition, void because oral, where deceased transferred money in bank to defendant, with instructions as to persons he should give it to in case of her death, he to have anything remaining after her instructions were carried out.

In bank. Appeal from superior court, Alameda county; F. B. Ogden, Judge.

Action by Knight, administrator of Elizabeth Cook, against W. G. Tripp. From an

order granting a new trial after judgment for plaintiff, plaintiff appeals. *Reversed.*

F. E. Whitney and Reed & Nusbaumer, for appellant. Cary Howard and Wells Whitmore, for respondent.

HARRISON, J. The plaintiff, as the administrator of the estate of Elizabeth Cook, deceased, seeks by this action to recover from the defendant certain personal property, or its value, alleged to belong to said estate. The defendant claims the property under title derived from the deceased in her lifetime. Mrs. Cook had been ill for several months, and, with the purpose of seeking relief, was about to undergo a surgical operation, from which she apprehended danger. On the morning of May 30, 1895, the defendant came to her house by previous appointment, to see her, and she informed him of this purpose, and stated that she wanted to dispose of her property; that she had once made a will, but had destroyed it, and had made up her mind that she might as well give her property away while she was living, saying to him: "I want to give it to you, or place all of it in your hands, and tell you those whom I want should have it." Upon the defendant's suggestion she consulted an attorney in the matter, under whose advice she acted, and on the next day signed the following instrument, which had been prepared by the attorney, and delivered it to the defendant: "For and in consideration of one dollar, to me in hand paid by W. G. Tripp, and other considerations to me moving, I do hereby sell, assign, transfer, and deliver to said W. G. Tripp all my household furniture, wearing apparel, and all other personal property owned or held by me in that certain house in the city of Oakland known and designated as '680 Tenth Street.' Dated May 31, 1895. Elizabeth L. Cook." This instrument is in form a bill of sale, but defendant testified that no consideration was given therefor. On the same day she assigned to the defendant three bank books representing money deposited by her in certain savings banks in Oakland, and which he immediately caused to be transferred to his account in the banks. On the next day she indorsed to him certain promissory notes held by her, and also assigned to him two certificates of stock for five shares each in the Equity Building & Loan Association. She underwent the surgical operation on the 12th of June, and in two days thereafter died. The present action was brought to recover the above property. Judgment was rendered for the plaintiff, and upon motion of the defendant a new trial was granted. From this order the plaintiff has appealed.

It is claimed by the defendant that by this transaction the property was transferred to him absolutely as a gift *inter vivos*, while the plaintiff contends that Mrs. Cook intended no more than to transfer it as a gift causa mortis, and that her intention failed of ef-

feet for the reason that the property was not delivered by her to the defendant. The circumstances attending the transaction very clearly preclude it from being considered as a gift of the property *inter vivos*. Mrs. Cook was an invalid, 54 years of age, and it must be assumed that she had at least a hope that she would come safely out of the surgical operation that she was about to undergo, and that her life would be prolonged thereby. Under these circumstances it would require very clear evidence to authorize a conclusion that she intended to divest herself absolutely of all her property in favor of one who had no claim upon her estate, and who was under no obligation to supply her wants. There is no direct evidence that such was her intention, or that anything to that effect was said by her. Her disposition of the property was evidently made in contemplation of her death under the surgical operation, but it was not necessary for her to state that fact as one of its terms. If the circumstances under which it was made were such as to authorize such conclusion, it will be treated the same as if it had been so stated by her. Civ. Code, § 1150. At the interview between them on May 31st the defendant prepared the following memorandum of the disposition that Mrs. Cook desired to be made of the property to be transferred to him: "May 31, 1895. Instructions of Mrs. E. L. Cook as to the disposal of her property in the event of death. W. G. Tripp is to have the house and lot and contents of the house at 680 Tenth street, and all other real estate, and is to pay all debts and funeral expenses, for permanent care of the cemetery lot, and such monuments as he may choose for herself and husband. To pay E. A. Jenner, of Belvedere, two thousand dollars; Fred B. Kimball, Webster City, Iowa, one thousand dollars; Fred W. Cook, New York, one thousand dollars; C. F. Nicklaus, Oakland, Cal., two thousand dollars; Mrs. Fannie Hilton, Oakland, five hundred dollars; Miss Grace Hilton, five hundred dollars; Miss Carrie Hilton, five hundred dollars; Mrs. Pierce, Oakland, one thousand dollars; Miss Maggie Gates, Oakland, two hundred dollars. Any property remaining after these instructions are carried out is to belong to W. G. Tripp." The following addition appears to have been afterwards made to this memorandum: "June 8, 1895. Trunk and contents in closet under the back stairs is to be delivered to Mrs. Hilton." This memorandum is not signed by any one, nor does it appear that Mrs. Cook ever saw it, or knew its contents, but the defendant testified that he prepared it in her presence, in the course of the conversation between them in regard to the disposition of the property, and that it contains the substance of what was said to him by her. By this memorandum the disposition of the property is limited to the event of death, and the defendant was to have the property "remaining after these instructions

are carried out." He also testified that the money was to be paid to these persons only in the event of her death. It is very clear, therefore, that it was not intended by Mrs. Cook to make a present, irrevocable gift of the property to him, and that she did not intend that he should, in any event, have all of the property for himself.

Whether the transaction constituted a valid gift *causa mortis* must depend upon what was said and done by Mrs. Cook at the time of the alleged transfer. Gifts *causa mortis* are not regarded in the law with favor, since they are in contravention of the general rules prescribed for the testamentary disposition of property, and therefore should in all cases be established by clear and convincing proof of the requisites of such a gift. For the purpose of preventing frauds and perjuries, the statute requires a testamentary disposition of property to be made by a written instrument, executed with certain formalities; and, while a gift *causa mortis* is testamentary to the extent that it is made in contemplation of death, and becomes absolute only upon the death of the donor, it is at the same time subject to the rules governing a gift *inter vivos*. The actual delivery of the thing given is made the substitute for the formal writing required for a testamentary disposition, but without such delivery the words of the donor are unavailing to constitute a gift. "*Donatio perfectur possessione accipientis.*" All gifts are necessarily *inter vivos*, for a living donor and a living donee are indispensable to a valid gift; but when the gift is made in contemplation of impending death, and as a provision for the donee in the event of such death, it is called a gift *causa mortis*. This designation of its character does not, however, change the elements requisite for rendering the gift complete. There can be no gift without an intention to give, and a delivery, either actual or constructive, of the thing given. Civ. Code, § 1146, defines a gift to be a transfer of personal property, made voluntarily, and without consideration; and the rule that mere words of gift are ineffective unless accompanied by a delivery to the donee of the thing given, if it is capable of delivery, is reproduced in section 1147. There must be both a purpose to give and the execution of this purpose. The purpose must be expressed,—either orally or in writing,—and it must be executed by the actual delivery to the donee of the thing given, or of the means of getting possession and enjoyment thereof. A written instrument may be available for designating the property intended to be given, as well as to show the intention of the donor, but by itself it no more establishes the gift than would the same words orally delivered by the donor. "A gift *causa mortis* is not aided by the execution of the written instrument, except so far as that may contribute to greater certainty in the proofs. Such gifts cannot be effected by formal instruments of conveyance or assignment. They



are manifested by, and take their effect from, delivery." *McGrath v. Reynolds*, 116 Mass. 556. It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and complete gift. *Miller v. Jeffress*, 4 Grat. 472; *Cutting v. Gilman*, 41 N. H. 147; *Emery v. Clough*, 63 N. H. 552; *Yancey v. Field*, 85 Va. 756, 8 S. E. 721; *Walsh's Appeal*, 122 Pa. St. 177, 15 Atl. 470; *Newman v. Bost* (N. C.) 29 S. E. 848; *Hart v. Ketchum* (Cal.) 53 Pac. 931. Only Mrs. Cook and the defendant were present at the interview between them, and the defendant is the only witness who gives any account of what was then said. None of the writings introduced have any reference to a gift, and, as there was no one else present at the conversation between the defendant and Mrs. Cook, the character of the transaction must be determined from his testimony alone. At the interview of May 30th she did not make any disposition of the property, but postponed her action until after she had consulted an attorney. Her statement at that interview, "I want to give it to you, or place all of it in your hands, and tell you those whom I want should have it," indicates merely a purpose which is not fully disclosed, and the second clause of the statement is to be regarded as signifying the meaning which she attached to the word "give" in the first clause, and is to be construed as her desire to make the defendant her agent for the disposition of her property, rather than that he should himself be her beneficiary. What the advice of her attorney was is not shown, but under his advice the above assignments and instruments of transfer were prepared and were executed by her. It is not shown that anything was said by her at the time she signed these instruments, or on the next day, when she indorsed the promissory notes and the certificates of stock. The defendant, when requested to state fully all that she said at the time she made the transfer of the bank books to him, testified: "She said she wanted to assign this money to me; she wanted to give me this money, with all the rest of her property, under certain conditions that she had given in regard to its disposal." These are all the expressions shown to have been made by Mrs. Cook of her intention in thus transferring the property to the defendant, and it must be held that they are insufficient to sustain the claim of a gift.

The promissory notes and the certificates of stock were kept by Mrs. Cook in a tin box, which was locked, and placed in a secretary, which was also kept locked. This secretary stood in the room which was occupied by Mrs. Cook during her illness, and remained there until after her death. There was also in the secretary some jewelry, which does not appear to have been mentioned by her, and which the defendant says he did not have in his hands at any time until after her death, when he took it out of the secretary. On the 30th of May, at her first

interview with the defendant, Mrs. Cook handed to him the key of the secretary, but as she did not on that day determine the disposition she would make of her property, no significance can be attached to this act. No use appears to have been made by him of the key until June 1st, when he took the notes and certificates of the stock from the secretary, and, after Mrs. Cook had signed the indorsements thereon, he put them back into the box, locked it up, and put it into the secretary, where it remained until after her death. He appears to have retained the key to the secretary, and after her death he took from it the tin box with its contents. At the time Mrs. Cook gave him this key she did not accompany it with any words of gift, and her request to him to take it is more consistent with her desire that he should be merely its custodian than with a purpose to give him the secretary, or any of its contents. The subsequent placing of the notes and certificates in the secretary, or in the tin box, after their indorsement by Mrs. Cook, would not, in the absence of words to that effect, constitute a delivery of these instruments to the defendant. As the secretary, as well as all the household furniture, continued to remain in the possession of Mrs. Cook until her death, the above instrument of transfer is not available to the defendant to establish a delivery of the articles mentioned therein. A constructive delivery which will satisfy the statute is limited to such property as is not capable of actual transfer or immediate delivery. A delivery of the key to a receptacle, which is itself present and capable of delivery, will not, of itself, constitute a delivery of the contents of the receptacle. *Hatch v. Atkinson*, 56 Me. 324; *Keepers v. Deposit Co.*, 56 N. J. Law, 302, 28 Atl. 585; *Gano v. Fisk*, 43 Ohio St. 462, 3 N. E. 532; 2 Schouler, Pers. Prop. § 163; *Newman v. Bost*, supra. In *Debinson v. Emmons*, 158 Mass. 592, 33 N. E. 706, it appeared that the donee was a joint occupant with the donor of the room in which the trunk was placed, and the opinion of the supreme court was rested upon the decision of the trial court that the evidence established an actual delivery of the trunk. It is evident that it was the intention of Mrs. Cook to dispose of her entire estate for the purposes mentioned in the memorandum of May 31st, and that the payments therein named were not to be made by the defendant unless he should receive the whole of her estate. It was clearly her intention that he should not have the whole of her estate, and, as he would not be required to make any of the payments in case he should receive only a portion of it, it must follow that by reason of his failure to obtain the property, other than the money, for want of a delivery in her lifetime, her entire purpose must fail. Unless the gift can be maintained as a whole, the failure of the principal part must defeat it entirely.

See *McGrath v. Reynolds*, supra. The moneys in the bank at the time of the assignment of the bank books to the defendant amounted to \$8,702.53, and by the memorandum of instructions made by the defendant he was directed to pay out \$8,700, aside from all debts and funeral expenses. The value of the entire personal property received by him is \$10,802, and he testified that he has already paid \$1,800 for debts and expenses. The character of the assignment of the bank books is not shown, but as it was sufficient to enable the defendant to obtain the money represented thereby, it may be considered with the same effect as if the deceased had drawn the money herself, and placed it in his hands, to be disposed of as directed in the memorandum, and that the moneys named in the memorandum were only to be paid to the persons therein mentioned in the event of her death. She did not, by this act, make a gift of the money to the defendant, but constituted him her agent to make the payments for the purposes and to the persons named in the memorandum, "in the event of [her] death"; and only after the "instructions" thus given by her had been carried out was any property remaining to belong to the defendant. Such disposition of her estate was testamentary, and could not be made orally. The defendant was merely her agent to carry out her instructions, and upon her death his agency terminated, and the money remained a part of her estate subject to administration. *Hart v. Ketchum*, supra. The order granting a new trial is reversed.

We concur: TEMPLE, J.; McFARLAND, J.; GAROUTTE, J.; HENSHAW, J.; VAN FLEET, J.

122 Cal. 56

HALE & NORCROSS SILVER MIN. CO.  
et al. v. FOX et al. (S. F. 1,330.)

(Supreme Court of California. Sept. 2, 1898.)

SUPERSEDEAS—APPEAL.

Motion for supersedeas will be granted, the superior court having proceeded to enforce order appealed from, pending motion to dismiss the appeal on the ground that the order was not appealable.

Department 1. Appeal from superior court, city and county of San Francisco; William R. Dangerfield, Judge.

Action by the Hale & Norcross Silver Mining Company against M. W. Fox and others. From judgment for plaintiffs, defendants appealed, and now move for writ of supersedeas. Granted.

Wm. T. Baggett and E. S. Pillsbury, for appellants. Deal, Tauszky & Wells, for respondents.

PER CURIAM. Motion for a writ of supersedeas. A motion heretofore made to dismiss the appeal in this cause, upon the

ground that the order appealed from is not appealable, was continued until the hearing of the appeal upon its merits, for the reason that the motion could not be determined without an examination into the merits of the appeal. 52 Pac. 1131. Thereafter, upon the superior court proceeding to enforce the order appealed from, the present motion for a supersedeas was made in behalf of the appellants, and was resisted at the hearing, upon the ground that the order is not appealable; thus presenting the same question whose hearing had been continued.

This question cannot be determined by a mere inspection of the order appealed from, but, as was held upon the former motion, involves the merits of the order, and a judicial consideration of the facts and averments upon which the order was made. It would therefore be in contravention of the practice of this court to determine the question in advance of the hearing of the appeal. If the order is appealable, the appeal deprived the superior court of the power to enforce it while the appeal is pending; and whether it is appealable is a question to be ultimately decided by this court, and is now pending here upon motion to dismiss, and while that motion is undetermined it is the duty of the superior court to refrain from its enforcement. *Rugles v. Superior Court*, 103 Cal. 125, 37 Pac. 211. The application for the writ is granted.

121 Cal. 503

SHERMAN v. WRINKLE. (L. A. 411.)

(Supreme Court of California. Aug. 20, 1898.)

In bank. For opinion in department, see 53 Pac. 1090.

PER CURIAM. The petition for rehearing is denied, but, as our attention has been called by the petition for rehearing to the fact that the court below failed to directly find that the land in contest is not suitable for cultivation, the judgment is hereby modified by directing the court below to make a finding on that subject, and that, if it finds that the land is not suitable for cultivation, then to enter judgment for defendant, as directed in the opinion hereinbefore filed.

121 Cal. 539

SAN JOSE SAFE-DEPOSIT BANK OF  
SAVINGS v. BANK OF MADERA  
et al. (Sac. 438.)

(Supreme Court of California. Aug. 26, 1898.)

MORTGAGE—WHAT CONSTITUTES.

Where one borrows money with which to redeem from a foreclosure sale, and, as security therefor, assigns to the lender all his right, as redemptioner or otherwise, by reason of the redemption, and authorizes him to obtain from the sheriff a deed of the property in his own name, the borrower does not convey the land absolutely, but only hypothecates his interest in it, and the lender holds the sheriff's deed as a mortgage.



Modified opinion. For former opinion, see 54 Pac. 83.

PER CURIAM. The opinion heretofore rendered in the above-entitled cause is modified by striking from the fourth paragraph thereof the words "inclusive of the right under the statute (Code Civ. Proc. § 707) to receive the rents from the terre tenant"; and also that portion of the opinion commencing with the words "What has been said," at the beginning of the fifth paragraph, and extending thence to and including the words "decision of the trial court," in the last paragraph.

121 Cal. 682

MEYER v. HEGLER. (S. F. 563.)

(Supreme Court of California. Aug. 30, 1898.)

NOTES—PARTNERSHIP OR INDIVIDUAL LIABILITY.

Plaintiff, on application of J., a member of the firm of H. & J., made a loan on the note of J. to the firm, indorsed by latter, being told by J. that the money was being borrowed to diminish the firm's indebtedness, and the check for the loan was drawn in favor of the firm, and used in payment of the debt. Held, that this was not a loan to the firm, so as to make it liable on the note otherwise than as an indorser, though plaintiff was not told that the loan was to pay J.'s share of the indebtedness.

Harrison, McFarland, and Van Fleet, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Daniel Meyer against John H. Hegler and another. Judgment for plaintiff. Defendant Hegler appeals. Reversed.

H. C. Firebaugh and Henning & Bowen, for appellant. Rosenbaum & Scheeline, for respondent.

BEATTY, C. J. The defendants, Hegler and Johnson, constitute the firm of Hegler, Johnson & Co., and this is an action upon a promissory note made by Johnson to the firm, and by him indorsed in the firm name, with waiver of protest, etc. The cause was tried in the superior court without a jury, where it was found, among other things, that the note was indorsed by the firm of Hegler, Johnson & Co., and that the consideration for it was the sum of \$10,000, theretofore loaned by the plaintiff to the firm. The defendant Hegler, appealing from the judgment and from an order denying his motion for a new trial, attacks these findings as unsupported by the evidence, and this presents the only question we are called upon to consider; for, under the facts here disclosed, there can be no serious contention that either Hegler or the firm would be bound by a note executed in this form by Johnson alone, in discharge of his individual obligation, or for money borrowed for his individual purposes. The note in suit was executed by Johnson in August, 1893, in renewal of a note for the same amount (\$10,000), which was executed in May, 1892; and

the real and only question to be determined is whether the former note constituted a firm obligation. There is no substantial conflict in the evidence bearing upon this question. At the date of the former note, May, 1892, the firm of Hegler, Johnson & Co. was indebted to the Pacific Bank in about the sum of \$20,000, payment of which was being pressed. Hegler was able to provide for his half of this indebtedness, and did so, but Johnson was compelled to borrow \$10,000 in order to contribute his share towards the payment of the firm debt. He applied to the plaintiff for a loan of that sum, and the plaintiff agreed to advance it on a note indorsed by the firm, with certain collateral security furnished by Johnson. The note of May, 1892, was thereupon drawn up under the direction of plaintiff, and by its terms Johnson promised to pay to the order of Hegler, Johnson & Co. \$10,000 on demand. This note was indorsed by Hegler in the firm name, and delivered to plaintiff, who drew his check in favor of the firm for \$10,000. The check was deposited in the firm name, and the proceeds applied upon the firm debts. The question is, what obligation was assumed by the firm in this transaction? Did it become indebted to the plaintiff as for money loaned to the firm, or did it assume merely the obligation of an indorser of Johnson's paper? Did the plaintiff loan \$10,000 to the firm, or did he merely discount the note of a third party held by the firm? Looking only to the face of the transaction, there can be but one answer to these questions. The plaintiff bought Johnson's note from the firm, and paid the firm for it, and the firm assumed the ordinary liability, and only the liability, of an indorser. But it is contended that, although this was the form of the transaction, and the form prescribed by the plaintiff himself, the substance was something entirely different, and that the firm became indebted to plaintiff directly and unconditionally, because plaintiff gave his check to the firm, and the proceeds were used to pay firm obligations. This conclusion, however, does not seem to follow. The holder of a note who indorses it and procures it to be discounted always receives, and is entitled to receive, the value of the note, and to use the proceeds in his business; but he does not for that reason become directly and unconditionally indebted to his indorsee.

There is a further contention on the part of the plaintiff that the firm was bound as a maker of the first note, because plaintiff was told by Johnson that he was borrowing the money to diminish the firm's debt to the bank, and because he would not otherwise have loaned it. I cannot see that this evidence strengthens the case for the plaintiff in the slightest degree. It is entirely consistent with all the other uncontradicted evidence in the case, which clearly shows that Johnson applied for a loan, not to the firm, but to himself individually, in order that he might pay his share of the firm debt; in order, in other words, that he might con-

tribute his share to the necessary increase of the firm's capital. He was borrowing the money for himself, and all plaintiff required was the indorsement of the firm, and the assurance that the money was to be used in reducing the firm indebtedness. With this understanding, and with this object in view, the transaction was put in a form exactly corresponding to the situation and circumstances of the parties. Johnson, having no ready money, gave his note to the firm for his share of the firm debt. Plaintiff discounted the note for the firm, and very properly and naturally drew his check in favor of the firm, which, with equal propriety and perfect right, used the proceeds in its business. The liability on the part of the firm for which the plaintiff chose to contract was that of an indorser, and I do not see how, under the facts of this case, it can be held otherwise liable. This being so, the finding of the superior court that the consideration of the note in suit was the sum of \$10,000 loaned to the firm cannot be sustained, nor is it true, in a legal sense, that the note in suit was indorsed by the firm. More than a year had elapsed from the date of the former note, without any demand or notice of nonpayment, and the liability of the firm as indorser was at an end. The only obligation remaining in force was that of Johnson alone, and he had no authority to use the name of the firm in renewing his own note.

Some reliance is placed upon the fact that installments of interest falling due on the first note were sometimes paid by means of checks drawn in the firm name of Johnson, Hegler & Co. The claim seems to be that this was an acknowledgment by Hegler that the first note was given for a firm debt. I do not think such conclusion would necessarily follow, even if the checks had been drawn by Hegler himself; but the evidence shows without contradiction that they were drawn by Johnson, or by the bookkeeper under his direction, and without the knowledge of Hegler. The judgment against Hegler and order appealed from are reversed.

We concur: TEMPLE, J.; HENSHAW, J.; GAROUTTE, J.

HARRISON, J. I dissent. There was evidence to justify the court in finding that the consideration for the note sued upon was the sum of \$10,000 theretofore loaned by the plaintiff to the firm of Hegler, Johnson & Co. The original note was signed by the defendant Johnson, and was indorsed to the plaintiff in the firm name by the defendant Hegler, and was taken by the plaintiff upon the representation that the money received thereon was to be used in payment of certain indebtedness of the firm. A check for its amount was drawn to the order of the firm, and deposited by it to its credit with the Pacific Bank, and on the same day the greater portion of the money was drawn out

by the firm, and used in the payment of its promissory note. As the consideration of the note was used for the benefit of the firm, and as both partners joined in executing it in the form required to enable the firm to obtain this consideration, it became the obligation of the partnership. This evidence tended to sustain the above finding, and, the superior court having determined that it was sufficient therefor, this court cannot review its weight for the purpose of overcoming the decision of that court. The note in suit was executed in renewal of this former note, and in the same form, but the name of the maker and the indorsement of the firm were both written by the defendant Johnson. As the consideration for the original note was given and used for the benefit of the firm, and as both members of the firm united in its execution to the plaintiff, in order to receive this consideration, it became an obligation of the partnership to him, irrespective of any private agreement between the partners, and irrespective of the form in which the obligation was made. The plaintiff testified that when he took the original note he had no knowledge of any such agreement, or that the money was to be used for any other purpose than that of the partnership. At the time of the execution of the note in the suit there was nothing to put him upon notice that it was given for the individual debt of Johnson. Nothing had occurred since the original note was given to impair his right to believe that the debt evidenced by it was a partnership transaction, and he had the right to assume that the firm regarded the note as a partnership obligation, and that the form adopted for this note had been agreed upon by them for all notes to be executed for its obligations. The defendants had continued their partnership relations and business at the same place. As a member of the firm, Johnson had authority to bind it by a renewal of its obligations. If he had taken up the old note, and given a new one in the name of the firm, there would be no question of the liability of the firm thereon. It is equally bound by his renewal, made in the same form which had been adopted by the partners when the debt was originally created.

We concur: McFARLAND, J.; VAN FLEET, J.

122 Cal. 18

In re GAULD. (S. F. 924.)  
(Supreme Court of California. Sept. 1, 1898.)

CERTIORARI—WHEN LIES.

Certiorari does not lie to annul proceedings of a board before it has made a final order in the matter.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Application by George G. Gauld for writ



of review directed to the board of supervisors of the city and county of San Francisco. Demurrer to petition was sustained, and petitioner appeals. Affirmed.

Woods & Levinsky, for appellant. Harry T. Cresswell, City Atty., Robt. A. Friedrich, and Crittenden & Van Wyck, for respondent.

**GAROUTTE, J.** The present litigation was inaugurated upon application for a writ of review to annul the proceedings of the board of supervisors of the city and county of San Francisco looking towards the future granting of a franchise for the conduct of the telephone business. A demurrer was sustained to the petition of Gauld, and the case is now before the court upon the sufficiency of the facts set forth in that petition to justify the issuance of the writ. The sufficiency of the petition is attacked from many points, and we need notice but a single one. At the time this proceeding was inaugurated no franchise had been granted by the board of supervisors. The matter was in fieri. No final action of the board had been had, and for this reason certiorari was not the remedy. The office of this writ is in no sense that of a restraining order. It is not the purpose of the writ to restrain or prohibit, but to annul. And until the proceedings of the inferior tribunal or board have culminated in a final order, there is nothing to annul. Conceding, for present purposes only, that the writ of review would lie to annul an order of the board of supervisors granting a franchise, we have no such case here, for no franchise had been granted when the application was filed, and it necessarily follows the application for the writ is premature. There is an abundance of authority in this state supporting these views. *Wilson v. Supervisors*, 3 Cal. 386; *People v. County Judge*, 40 Cal. 480; *Lamb v. Schottler*, 54 Cal. 321; *Sayers v. Superior Court*, 84 Cal. 645, 24 Pac. 296. For the foregoing reasons the judgment is affirmed.

We concur: **HARRISON, J.; VAN FLEET J.**

122 Cal. 28

**SAVINGS BANK OF SAN DIEGO COUNTY  
v. CENTRAL MARKET CO. et al.**  
(L. A. 418.) 1

(Supreme Court of California. Sept. 1, 1898.)

NOTES—MAKERS—PAYMENT—MORTGAGES—PERSONAL JUDGMENT.

1. A note reciting, "We promise to pay," and signed by a corporation and by several persons, with the words "as stockholders" after their names, and the word "trustee" after the names of some of them, is the note of such persons as well as of the corporation, their signing not being in a representative capacity, or in ratification of the act of the officers of the corporation.

2. A note is not paid by the taking of another in place thereof, unless received by express agreement as payment.

54 P.—18

3. A second mortgagee may maintain an action for personal judgment, the mortgaged property having been exhausted by foreclosure of the first mortgage, though he was made a defendant in the suit by the first mortgagee, and did not appear therein.

Department 2. Appeal from superior court, San Diego county; J. W. Hughes, Judge.

Action by Savings Bank of San Diego County against the Central Market Company and others. Judgment for defendants. Plaintiff appeals. Reversed.

W. T. McNealy and Withington & Carter, for appellant. M. A. Luce and W. J. Hunsaker, for respondents.

**TEMPLE, J.** This action was brought by the plaintiff, a savings bank now in liquidation, to recover \$25,000 and interest upon a promissory note, in words and figures as follows: "November 11, 1891. \$25,000. San Diego, Cal. One year after date, without grace, for value received, we promise to pay to the order of Savings Bank of San Diego County, at their banking house in the city of San Diego, the sum of twenty-five thousand dollars, with interest thereon from this date until payment at the rate of ten per cent. per annum, payable quarterly, and, if not so paid, then to become part of the principal of this note, and to bear like rate of interest till paid; both principal and interest to be paid in United States gold coin. And we further agree that, in the event of suit being brought against us, then there shall be added to any judgment against us rendered in said suit, as counsel fees, an additional sum of three per centum in like gold coin, upon the amount of the principal and interest hereof accrued at the time of the entry of such judgment, or, if paid before judgment and after action commenced, then on the amount at the date of payment. The Central Market Company, by J. H. Barbour, Pt. Bryant Howard, Secretary. Bryant Howard, J. H. Barbour, Trustee, M. H. Howard, M. H. Howard, Trustee, F. W. Stewart, Chas. S. Hamilton, J. H. Barbour,—As Stockholders."

It is alleged that the note was secured by a second mortgage upon certain real estate; that the first mortgage, which was given to secure the payment of the sum of \$50,000 and interest, had been foreclosed in an action in which plaintiff was made a party defendant; that under said foreclosure the property was sold for the amount due on the first mortgage, and, there having been no redemption within the time allowed by law for a redemption, a deed had been executed to the purchaser, and the security had become valueless without any fault on the part of plaintiff. Plaintiff therefore demands judgment for the amount due on the note against all of the defendants.

The defendants Bryant Howard and M. H. Howard denied the execution of the note by them, and averred that they signed the note merely to ratify the action of the officers of

1 Rehearing denied October 1, 1898.

the Central Market Company, which was the true debtor and maker of the note; that the note had been paid by the giving of another note, which was accepted in lieu of the note sued upon; and that plaintiff is precluded from maintaining the action by its failure to appear in the foreclosure suit mentioned in the complaint, and to obtain a deficiency judgment therein. At the conclusion of the testimony on the part of plaintiff the court granted a motion for a nonsuit as to the individual defendants, which was based upon the grounds: (1) The complaint does not state a cause of action, and shows that the note sued upon was not executed by them as their note. (2) The evidence shows that the said defendants did not execute the note to bind themselves individually, but signed the same merely as stockholders, for the purpose only of ratifying and giving authority to the acts of the officers who signed on behalf of the Central Market Company. (3) It appears that the note was secured by mortgage, which has not been foreclosed. Also, that the right of plaintiff to maintain the action was barred by the foreclosure of the first mortgage. (4) The note was paid by a new note before the action was brought. And (5) a novation is shown by which the plaintiff accepted a new note, guarantied by certain parties, in lieu of the note sued upon.

The first two propositions may as well be considered together. The case went off upon defendants' motion for a nonsuit, and there was really no evidence of the intent of the individual defendants in signing the contract, nor of knowledge of such intent on the part of the payee, except such as may be inferred from the surrounding circumstances. These amount to little beyond the fact that a mortgage was given to secure the note by the corporate defendant. All these matters are, however, immaterial if, as I think, the question must be determined from a mere inspection of the instrument. The question is argued on both sides as though it involved the question whether the individual defendants signed the contract in a representative capacity or not,—whether they intended their signatures to be taken as the signing of the contract by the corporation or not. And hence many cases are cited in which the court has been called upon to determine whether one who has affixed to his signature the word "agent," "president," etc., is personally bound. But in all of those cases the construction was that the signature of the agent or other representative was intended to be and should be considered the signature of the principal, whereby the principal made the contract. It is not, and never has been, contended that Howard put his personal signature to this note for any such purpose. Such a contention is inconsistent with the defense made by the defendants, and with the grounds upon which the motion for nonsuit was made and granted. The defense is that they signed the note as stock-

holders for the purpose of ratification. Before they could ratify, there must be something to ratify. The idea implies at least a formal contract, and generally, and certainly in this case, that those who ratify do not sign in a representative capacity. If they intended to ratify, they signed for themselves as stockholders, although the addition to their signature of the phrase "as stockholders" was of no consequence. If that was their intent, then the purpose was to confirm the act of the officers in the execution of the contract, and not to formally execute it for the corporation by their signatures. It is obvious that the individual defendants did not sign the note in a representative capacity, and there is nothing on the face of the note which indicates any such intention, and, notwithstanding the earnest and able argument of their attorneys, such is not now their real contention. Now, what is their contract? It reads, "We promise to pay," and if we substitute "The Central Market Company promises to pay" then the signature of Bryant Howard as stockholder becomes meaningless. It now is, in effect, "We, the Central Market Company and Bryant Howard, as stockholder, promise to pay" (making the first named represent all). By what process, sanctioned by law, can this contract, which is entirely unambiguous, be divided and changed, and made to read that the corporation promises to pay, and Bryant Howard as a stockholder ratifies the contract made in the name of the corporation for the purpose of making it a valid corporate act? The contracts to pay and to ratify are radically different. That which was signed is an agreement to pay only. It must be kept in mind that no question has ever been or could be raised as to the execution of the note by the corporation. Its mode of signing in order to make it a valid corporate note is beyond criticism. It does not appear that the power of its president and secretary has ever been doubted, or that it could be. There has never been a reason for such ratification, and, since it is not claimed that the signers were all the stockholders, they could not have ratified the execution of the note had it been necessary that it should have been ratified. Furthermore, had all the stockholders signed the note in the same way, it could not have been deemed a ratification, for the writing expresses no such intention, but, on the other hand, an unambiguous promise to pay. That they promised to pay as stockholders is as unimportant as it would have been had they promised as citizens of the United States. That may show why they promised to pay this debt, but it cannot affect their liability. The addition of "trustee" to some of the names is also immaterial. *Brewster v. Sime*, 42 Cal. 139.

2. The fourth and fifth points are substantially identical. There is no evidence which tends to show an express, or any, agreement that the new note should be received as pay-



ment. The action of the bookkeeper and his statements as to what Howard or Barbour said upon the subject do not even tend to prove such express agreement. In *Griffith v. Grogan*, 12 Cal. 317, Judge Field said: "Unless received by express agreement as payment, it did not extinguish the debt." This language is quoted with approval in *Comp-toir D'Escompte v. Dresbach*, 78 Cal. 15, 20 Pac. 28, where the subject is again considered and the authorities cited. The last case is cited upon this point in *Society v. Burnett*, 106 Cal. 530, 39 Pac. 922, and the same doctrine is there announced. See, also, *Dellapiazza v. Foley*, 112 Cal. 380, 44 Pac. 727. It will not help the defendants to call the transaction a novation. If it were a novation, then the new note was accepted as a discharge of the old one. It might as well be called payment. It still required an express agreement that one obligation shall be substituted for the other.

3. The note was secured by mortgage, and the mortgage has not been foreclosed. Moreover, there was a prior mortgage upon the property, which was foreclosed. The plaintiff was a party defendant, and duly served with summons. It did not appear in the action, and the prior mortgage was foreclosed as against it, and the property sold for the debt secured by the first mortgage, and a deed had been made to the purchaser before this action was commenced. It is contended that under the provisions of section 726 of the Code of Civil Procedure the only mode in which plaintiff can obtain a personal judgment is to foreclose, and take a deficiency judgment if the security proves insufficient. And, further, that as the plaintiff, through its own neglect, failed to apply for and obtain such judgment in the action brought to foreclose the first mortgage, but allowed judgment to go against it, it is barred of any action whatever for the recovery of its debt. Doubtless it was upon this ground that the learned judge of the trial court granted the motion for a nonsuit, basing its decision upon the ruling in *Brown v. Willis*, 67 Cal. 235, 7 Pac. 682. That case differs from this mainly, if not solely, in that there the defendant appeared, and set up his second mortgage, and then allowed judgment to go against him, which did not recognize his lien, or give him judgment for his debt. It was said he might have had his rights adjudged, and did not, and is barred. In the opinion authority is quoted to the effect that a defendant in an action is bound by a judgment against him as to defenses which he might have made. I am unable to comprehend the rationale of the decision, unless it was upon the theory that the second mortgagee had made himself an actor in the case, had put his rights as a mortgagee in issue, and had then, through his neglect, allowed judgment to go against him, adjudging that he had no lien or claim upon the premises. The only issue tendered to the junior mort-

gagee, by merely making him a party to a suit to foreclose brought by the prior mortgagee, is in the allegation that the right or claim of the junior mortgagee is subject to the lien claimed by the plaintiff in the foreclosure suit. As to any possible defense he may have to that issue so tendered, he is concluded by the decree whether he appears in the case or not. The doctrine appealed to does not and cannot go beyond that.

Aside from the legislative policy declared in section 726 of the Code of Civil Procedure, plaintiff was under no obligation to intervene, file a cross complaint, and set up his mortgage, and obtain a foreclosure in that action. Conceding that the individual defendants were merely sureties or guarantors, to the effect that the security was sufficient to pay the debt, the question would be, has plaintiff, by his neglect or otherwise, lost any part of the security to their injury? The failure to obtain a decree foreclosing its mortgage did not have that effect. The question, then, is whether section 726 or the decisions of this court prohibit a suit of this character under the circumstances. It has been held that a mortgagee cannot waive his security and bring a personal action. *Barbieri v. Ramelli*, 84 Cal. 154, 23 Pac. 1086. And in the same case it was held that he cannot maintain a personal action even if the security is worthless because of prior liens. It has also been held that, if he loses his right to foreclose through his negligence, he cannot then bring a personal action to recover his debt. *Society v. Thornton*, 109 Cal. 427, 42 Pac. 447. On the other hand, it has been held that, after the mortgage security has been exhausted, a personal action may, under some circumstances, be maintained for the deficiency. In *Vandewater v. McRae*, 27 Cal. 596, after foreclosure, a sale, and judgment for a deficiency, plaintiff was allowed to sue an indorser of the note. In *Blumberg v. Birch*, 99 Cal. 416, 34 Pac. 102, one who had foreclosed his mortgage against an absent mortgagor, where a personal judgment could not be entered, was allowed afterwards to maintain a personal action to recover the debt still unpaid. It was there said that it does not follow that, "after the mortgage security has been exhausted, leaving a deficiency which is no longer secured, no new action on the note can ever be maintained." In *Bank v. Casaccia*, 103 Cal. 641, 37 Pac. 648, suit was brought to foreclose a mortgage given to secure a note which had been assigned as additional security for another note, which was also secured by mortgage. The principal note had been foreclosed, and a subsequent suit to foreclose the mortgage given to secure the note assigned as collateral. It was contended that plaintiff could not maintain this second suit, but should have brought one suit to foreclose both mortgages. It was held that, having foreclosed the principal mortgage, and having exhausted the security, plaintiff could

maintain this action on the second mortgage. It was said: "The obvious purpose of the statute is to compel one who has taken a special lien to secure his debt to exhaust his security before having recourse to the general assets of the debtor. When he has done this, or when, without his fault, the security has been lost, the policy of the law does not prohibit a personal action." See, also, *Donaldson v. Grant* (Utah) 49 Pac. 779. Was not the security lost in this case without fault on the part of plaintiff? It was the fault of the mortgagor, and not of the junior mortgagee, that default was made in the payment of the first mortgage, and that it became necessary to foreclose it. I know of no rule of law or equity which required the second mortgagee to bring suit to recover his debt when the first mortgagee saw fit to do so. It is apparent that, had he foreclosed, he would have received nothing. I cannot conceive upon what theory the mortgagor or any of the payors can complain that he did not do so. Plaintiff has no longer a lien upon the property, and his debt is not now secured by mortgage. He did not voluntarily release his security. He has not waived nor lost it by his negligence. It was lost by the fault of the mortgagor in not paying the first mortgage. If there had been a surplus, and the plaintiff had failed to get it by his neglect, it might be different. I see no difference now between this case and the case suggested in *Toby v. Railroad Co.*, 98 Cal. 490, 33 Pac. 550, of a mortgage upon a ship which had been burned. Plaintiff has no security or lien, and it has not been lost through its neglect.

The particular mode of entering the personal judgment for the deficiency is not an important matter in the policy inaugurated in section 726. The important matter was to prevent a multiplicity of suits, and to compel the creditor to first exhaust his security. The mode provided for the entry of the judgment is a mere matter of convenience; is, in fact, a privilege given to the mortgagee. As we have seen, where this cannot be done, a separate personal action may be had. Here, if plaintiff had filed a cross complaint in the action to foreclose, other parties would have been necessary. I see no difference in principle, or any injury to defendants, in the course pursued. Under these views the evidence which was excluded by the ruling complained of does not seem important. The judgment and order are reversed, and a new trial ordered.

We concur: HENSHAW, J.; McFARLAND, J.

122 Cal. 1

WITTER v. ANDREWS et al. (L. A. 301.)  
(Supreme Court of California. Aug. 29, 1898.)

BILL OF EXCEPTIONS—AMENDMENTS—NOTICE.

Under Code Civ. Proc. § 650, providing that, when proposed amendments to bill of ex-

ceptions are served, "the proposed bill and amendments must, within 10 days thereafter, be presented by the party seeking the settlement of the bill to the judge \* \* \* upon 5 days' notice to the adverse party," requires the notice to the adverse party, as well as the presentation to the judge, to be within the 10 days.

Commissioners' decision. Department 2. Appeal from superior court of San Luis Obispo county.

Action by W. G. Witter against J. P. Andrews and another. Judgment for defendants. Plaintiff appeals. Affirmed.

G. F. Witter, Jr., for appellant. Unangst & Kemp, for respondents.

CHIPMAN, C. Action to enforce payment of an assessment for street work. Judgment was given for defendants on motion for nonsuit, from which, and from the order granting defendants' motion, plaintiff appeals. The judgment was filed and entered June 26, 1896, and notice of judgment was served June 27th. The record shows the following: July 6th plaintiff served his proposed statement on appeal. On July 11th defendants served proposed amendments to statement. July 15th plaintiff delivered to the judge the proposed statement and amendments. July 30th plaintiff served notice on defendants that the statement and amendments were presented to the court July 15th for settlement; and on August 1st, he served notice on defendants that the statement would be presented to the judge for settlement on August 8th. At the hearing defendants' attorney filed written objections to the settlement of the statement. The court overruled the objections, and settled the statement, to which defendants excepted. Plaintiff did not move for a new trial, and no notice of such motion was necessary to entitle him to have the errors reviewed of which he complains, if he had pursued the statutory course. Plaintiff presented for settlement what he termed "a proposed statement on appeal." The Code makes no provision for the settlement of a statement on appeal (Code Civ. Proc. § 950), and, as he did not serve a notice of motion for a new trial, he is not entitled to have "a statement of the case" to be used on an appeal from the judgment. But he was entitled to a bill of exceptions, and, as there is no substantial difference between a statement and a bill of exceptions, he should not be deprived of the fruits of his appeal because he called the document presented a statement, rather than a bill of exceptions. *People v. Crane*, 60 Cal. 279. See, also, *Jue Fook Sam v. Lord*, 83 Cal. 159, 23 Pac. 225. Treated as a bill of exceptions, section 950, Code Civ. Proc., requires it to be settled as provided in sections 649 or 650, Code Civ. Proc. It is provided by section 650, supra, that when the proposed amendments to the bill are served "the proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who tried or



heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge." In this case plaintiff delivered the proposed statement and amendments to the judge within the time required, to wit, July 15th, but he did not serve at that time any notice on defendants. Plaintiff did, however, on July 30th, notify defendants that he had presented the statement and amendments to the judge for settlement on the 15th day of July. Later—August 1st—he notified defendants that the statement and amendments would be presented to the court for settlement on August 8th, and on that day the matter came up, defendants objecting as before stated. The statute plainly required that the statement and amendments should be presented to the judge within ten days "upon five days' notice to the adverse party." The notice to the adverse party was as necessary as the presentation to the judge. The subsequent notices came too late. It was error for the judge to settle the statement against the objection of defendants. *Henry v. Merguire*, 106 Cal. 142, 39 Pac. 599, and cases there cited; *Gallardo v. Telegraph Co.*, 49 Cal. 510; *Jue Fook Sam v. Lord*, *supra*; *Hayne*, *New Trial*, § 260. The judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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122 Cal. 68

**SMITH v. JORDAN. (L. A. 399.)**

(Supreme Court of California. Sept. 2, 1898.)

**BILL OF EXCEPTIONS—TIME OF PRESENTATION.**

In case of appeal from order made before final judgment, bill of exceptions presented 20 days after the order is too late, as, though Code Civ. Proc. § 649, expressly allows, in such case, presentations of bill for settlement only at time of ruling complained of, appellant is, after analogy with the provisions of section 650 allowing 10 days after judgment for presentation of bill, entitled to 10 days after the order therefor, he is entitled to no more.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by William R. Smith against May Agnes Jordan. From order dismissing attachment, plaintiff appeals. Affirmed.

Mulford & Pollard, for appellant. Chas. Wellborn, Geo. J. Denis, and A. W. Hutton, for respondent.

**CHIPMAN, C.** This is an appeal from an order dissolving plaintiff's writ of attachment. The order was made and entered February 18, 1897. The proposed bill of exceptions, by which the appeal comes here, was served on defendant's attorneys March 10, 1897, and was not presented to the judge or filed with the clerk until March 22d, at which time it was presented to the judge for settlement, no judgment having been rendered in the action. Defendant objected to the settlement on the ground that it was not prepared, proposed, served, or presented to the court or counsel within the time allowed by law. The court, however, settled the bill, and defendant now renews the objection, which he may do. *Gumpel v. Castagnetto*, 97 Cal. 15, 31 Pac. 898.

It was said by this court in *Flagg v. Puterbaugh*, 98 Cal. 134, 32 Pac. 863, that where the case falls under section 649, Code Civ. Proc. (as this case seems to do), the bill of exceptions should be allowed and settled within a reasonable time, "and that the analogy furnished by sections 650 and 651, Id., should determine what is a reasonable time." Section 650 requires the party, within 10 days after entry of judgment, etc., to prepare draft of a bill and serve the same, and within 10 days after such service the adverse party may file amendments, and the bill and amendments must within 10 days thereafter, upon 5 days' notice to the adverse party, be presented to the judge. The proposed bill here was not prepared and served until 20 days after the order was made.

Under the practice pointed out in *Flagg v. Puterbaugh*, it was plaintiff's duty to prepare and serve his proposed bill within 10 days after the order was made. This court said in that case that it "should lean in favor



of giving to litigants every reasonable opportunity of presenting their cases on the merits"; and the court accordingly gave a construction to section 649 which would have served the purpose of plaintiff in the present instance had he pursued the course indicated. It was there said, also, that a bill of exceptions to an order such as we have here was necessary only because of rule 29 of this court, and litigants were told to follow the practice prescribed by sections 650 and 651. To sustain the trial court in settling the bill of exceptions, under the circumstances of this case, would require us to remove all limit of time in the steps to be taken, and leave the courts practically without any guide. This view of the matter makes it unnecessary to pass upon the merits of the questions involved in the appeal. The order dissolving the writ should be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order dissolving the writ is affirmed.

122 Cal. 57

BLAIR v. BLAIR. (S. F. 1,386.)

(Supreme Court of California. Sept. 2, 1898.)

DIVORCE—JUDGMENT—REVIEW.

Where the result of two considerations of a case by a trial court is a refusal in each instance to grant a divorce on the ground of mental cruelty, and the evidence is conflicting in all substantial matters, a new trial will not be ordered.

Department 1. Appeal from superior court, city and county of San Francisco; Wm. R. Daingerfield, Judge.

Action by Alice J. Blair against Walter B. Blair. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

R. Thompson and W. W. Barrows, for appellant. Dunne & McPike, for respondent.

GAROUTTE, J. This is an action for divorce, plaintiff claiming that defendant has practiced upon her extreme cruelty. The trial court found against the allegations of the complaint, and appellant is now prosecuting an appeal from the judgment and order denying her motion for a new trial. The single question presented by the record is, does the evidence support the findings of fact? No sound purpose would be subserved by an extended review in this opinion of the evidence. It is sufficient to say that the case is one of conflicting evidence. The cruelty relied upon to support the complaint is largely mental cruelty, and in such cases especially it is for the trial court to weigh and measure the evidence in order that the ultimate fact may be properly determined. The evidence may be said to be conflicting in all substantial matters. The trial court had it

under consideration twice, and in each instance held against plaintiff's contention. Under well-settled rules, we will not order a new trial under the circumstances here disclosed. For the foregoing reasons the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

122 Cal. 37

PEOPLE v. BEACH et al. (Cr. 422.)

(Supreme Court of California. Sept. 1, 1898.)

INFORMATION—COMMITMENT—CRIMINAL LAW.

1. An information cannot be set aside on the ground that defendant has not been "legally committed," in that there was not evidence before the magistrate to show an offense, where evidence was heard by the magistrate.

2. Defendant, moving to set aside the information on the ground that there was no order of commitment, has the burden of showing this.

Department 2. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge.

Information of Ben Beach and another was set aside, and the people appeal. Reversed.

W. F. Fitzgerald, Atty. Gen., and Henry E. Carter, for the People. Farrall & Carroll, for respondents.

TEMPLE, J. This appeal is from an order setting aside an information on the ground that defendants had not been legally committed. It is contended that the defendants had not been legally committed, because the evidence before the magistrate did not show that a public offense had been committed. If the magistrate had no power or jurisdiction to hold the examination, if no complaint had been made charging the defendants with a public offense, and perhaps if no evidence at all was taken by the magistrate, and there was no waiver by the defendants, it might be held that the defendants had not been legally committed. *People v. Howard*, 111 Cal. 655, 44 Pac. 342. The phrase "legally committed" refers to the examination of the charge and holding the defendant to answer by the magistrate. *Ex parte Baker*, 88 Cal. 84, 25 Pac. 966. If a magistrate, upon a complaint duly made, and charging a public offense, has heard the evidence, and has committed the defendant, that ends the matter so far as concerns this motion. The question here is not, as upon habeas corpus, whether a person is illegally deprived of his liberty, but whether he can legally be tried upon a criminal charge. A preliminary examination and commitment by a magistrate are required before an information can be filed, and an examination by a grand jury before an indictment, not so much to protect the liberties of the citizen as to protect him from being prosecuted upon slight evidence or mere suspicion, or at the instigation of private malice. A trial before a jury must still be had before a final judgment can be

made depriving an accused person of his liberty. These precautions are entirely conventional, although since the days of the star chamber they have been deemed of the highest importance. The guaranty of a speedy trial to an accused person has made such precautions of less importance than formerly as affecting the liberty of the people. The right to have a charge dismissed is regulated by statute, and, as we have seen, the phrase "legally committed" means only that the accused has been committed by a magistrate who has jurisdiction to hold the examination, and who has actually heard the evidence, and determined that probable cause exists for holding the defendant. The point was decided in *People v. More*, 68 Cal. 500, 9 Pac. 461. Counsel attempt a distinction on the ground that the alleged defect there was that venue was not shown, but the difference is not obvious. If the point was founded in fact there as here, the evidence failed to show an offense for which the magistrate could legally hold the accused person. The decision was a construction of section 995 of the Penal Code, and holds that on the motion to set aside the information the superior court cannot review and overrule the finding of the magistrate that the evidence taken before him was sufficient.

The point is also made by the respondents that it does not appear that an order for the commitment of the defendants was indorsed on the depositions, or in fact that any such order was made. It is a sufficient reply to this suggestion that it does not appear that such order was not regularly and properly made. On a motion by the defendant to set aside an information on the ground that the defendant has not been legally committed it is certainly incumbent upon the moving party to establish his contention. The presumption is that official authority has been regularly and legally exercised, until the contrary is shown. The bill of exceptions purports to show what evidence was submitted to the superior court, and it shows no attempt to attack the information upon that ground. The order appealed from is reversed.

We concur: HENSHAW, J.; McFARLAND, J.

122 Cal. 19

BOOTH et al. v. OAKLAND BANK OF SAVINGS et al. (S. F. 1,046.)

(Supreme Court of California. Sept. 1, 1898.)

TRUST—COMPLAINT—DEPOSIT IN BANK.

1. A trust is created where one having a deposit in a savings bank stated to its teller that she wanted it so either of her two sisters could, in the event of her death, draw the money without probate proceedings, and thereupon gave an order to the bank to pay to either of them or herself, and furnished their signatures, and the bank added their names to the pass book, and in like manner changed the account in the ledger.

2. A complaint claiming money deposited in

a bank by B., as to which she created a trust in favor of plaintiffs, is sufficient where it states that B. made the deposit, and that plaintiffs are the owners of it, and entitled to receive it, without stating that B. owned it, this being a matter of evidence to show plaintiff's ownership.

3. In the absence of a claim by a third person, a bank is estopped to deny the ownership of one who makes a deposit in her own name.

4. A statement in an answer cures the omission thereof from the complaint.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; John Ellsworth, Judge.

Action by Cornelia E. Booth and another against the Oakland Bank of Savings and others. Judgment of nonsuit. Plaintiffs appeal. Reversed.

M. M. Estee, Chas. A. Shurtleff, and F. E. Whitney, for appellants. John Yule, E. M. Gibson, and Benj. F. Woolner, for respondents.

HAYNES, C. This appeal is by the plaintiffs from a judgment of nonsuit and from an order denying their motion for a new trial. The action was brought to recover from said bank certain moneys originally deposited by Frances A. Bell, and her executors were made parties because of a claim made by them of a right to receive and control said money as a part of her estate. The bank does not question its liability to some one, and therefore its counsel does not appear upon respondents' brief.

Frances A. Bell died in the city of Oakland January 27, 1895, in which city she had resided for many years. She was a widow, and, so far as the record shows, without children, or any relatives except her two sisters, Cornelia E. Booth and Aurelia L. James, both of whom resided in the city of Chicago. Aurelia L. James, originally a plaintiff in this action, died during its pendency, and her administrator was substituted. The defendants Taggart and Montgomery are the executors of the will of said Frances A. Bell, deceased. On and prior to May 17, 1893, Mrs. Bell had on deposit with said savings bank \$8,503.99, and on that day she drew out \$3,300, leaving on deposit \$5,203.99. Samuel Breck, Jr., teller of the bank, called for plaintiffs, testified: That he saw Mrs. Bell in regard to her savings account on the date last above mentioned. That she was desirous of adding the names of her sisters, so that, in the event of her death, they could draw the money without probate proceedings. That he asked her if she wanted the account, in the event of her death, made payable to her sisters jointly, and she said she wanted it so that either one could draw it after her death. That he immediately prepared a blank for her to sign, and she signed it in his presence. Said instrument or order is as follows: "To Oakland Bank of Savings, May 17, 1893: In re savings deposit 7,041, in my name. Pay to the individual order of either Cornelia E. Booth, or Aurelia L. James, or



myself. [Signed] Frances A. Bell." That Mrs. Bell furnished the signatures of her said sisters from letters which she had at that time, and pasted them in the signature book, and the bank added said names to the pass book, and on the same day, in like manner, changed the account in the ledger. That as to her reason for changing the account, he could not recall the language she used, but the substance was that she wanted to fix the account so that, in the event of her death, her sisters, who were in the East, could draw her money without the estate being probated, and that she said nothing about who was to draw the money during her life. That he told her at the time in putting these names in that they could draw the money in her lifetime, and that she answered it made no difference; they would not do it. The evidence further shows that Mrs. Bell was greatly attached to her sisters; that for several years she had been afflicted with heart disease, having frequent "spells" or acute attacks; that she frequently stated to her friends that she had but a short time to live; that she expected to die in one of these attacks, and desired to so arrange her money then in said savings bank that her sisters could have the immediate benefit of it without waiting for administration upon her estate. She was a woman of deep religious convictions, a regular attendant at church, and died upon the street, while returning from church, in the manner and from the cause which she had anticipated. Mrs. Bell informed her sisters of the disposition she had made of the money in the savings bank by a letter, which reads as follows: "Dear Sisters Aurelia and Cornelia: By putting your names on my bank book, and giving your signatures to the bank, I find that, if anything should happen to me, you can draw the money that may be to my credit, dividing equally between you two. This seems the better way for me to arrange matters; otherwise all money, with mortgages, would have to pass through probate, making a delay of months before you could get anything. You will see the advantage of having money in savings bank rather than in investment it would take so long to realize upon. It will be necessary to leave bank book here. No one can draw money without order from me, and only you two in the event of my death. Mrs. Beeny will take charge of the book. I have all confidence in her attending to my request. I cannot tell what may be in bank. Whatever it is, just divide it equally between you two. My will provides for others. You can communicate with Mrs. J. H. Beeny, Centennial, 14th street, Oakland, and she will tell you what to do." In the fall of 1893 Mrs. Bell visited her sisters in Chicago, and then stated to them "that she had but a short time to live, and had deposited the said sum of money with the said bank to the three names jointly, for the use of her sisters, Aurelia L. and Cornelia E., and then

and there stated that it was subject to the check of either sister on demand," and "that she had another account in some bank in San Francisco, which was in her own name only." Other evidence of a similar character was given, but need not here be repeated. The ground of the motion for nonsuit was that plaintiffs have failed to prove by competent testimony either an absolute gift to her said sisters, or a gift made by her in view of death.

There can be no doubt of the intention of Mrs. Bell in this matter, and that intention should be consummated if the law will permit it; and, if there is any ground upon which the evidence would justify a judgment in favor of the plaintiffs, the motion for a nonsuit should have been denied. The evidence falls far short of establishing a completed gift from Mrs. Bell to the plaintiffs; and, although there are features in the case resembling a gift causa mortis, there are other features which distinguish it from such a gift. But these need not be discussed, as there was evidence offered on behalf of the plaintiffs to show that Mrs. Bell purposed to create a trust for the benefit of the plaintiffs, and that the trust was accepted by the bank. It is well settled that a trust in personal property need not be in writing, and it is equally well settled that no set form of words is necessary to create a trust. The Civil Code (section 2221) provides: "Subject to the provisions of section 852, a voluntary trust is created, as to the trustor and beneficiary, by any acts or words of the trustor indicating with reasonable certainty: (1) An intention on the part of the trustor to create a trust; and (2) the subject, purpose, and beneficiary of the trust." The bank teller testified that Mrs. Bell wanted the deposit made payable so that "either one of her sisters could draw it after her death." The substance was that she wanted to fix the account so that, in the event of her death, her sisters, who were in the East, could draw her money without the estate being probated. She said nothing about who was to draw the money during her life. "I told her at the time in putting these names in that they could draw the money during her lifetime. She answered it made no difference; they would not do it." This testimony, and the transaction between Mrs. Bell and the bank, taken with the letter addressed to the plaintiffs, informing them of what she had done, and what they could do, and where they could obtain the pass book, would have authorized the court, in the absence of any other evidence, to find that it was her purpose to create a trust in their favor. *Blasdel v. Locke*, 52 N. H. 238; *Institution v. Hathorn*, 88 Me. 122, 33 Atl. 836; *Martin v. Funk*, 75 N. Y. 134; *Mable v. Bailey*, 95 N. Y. 206; *Cunningham v. Davenport*, 147 N. Y. 43, 41 N. E. 412; *Gerrish v. Institution*, 128 Mass. 159. The Code does not require that the beneficiary shall be informed

of the trust, or shall express an acceptance. If an acceptance is necessary, the demand made by these beneficiaries upon the bank, and this action to compel the execution of the trust, are certainly sufficient. That as to the trustee a trust was created, and accepted, is clear. Civ. Code, § 2222. "The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission." Id., § 2251. This trust was not rescinded. The circumstance that Mrs. Bell retained the power to withdraw the deposit does not affect the validity of the trust. Section 2280 of the Civil Code provides: "A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued." I do not think it necessary to determine whether the control over the fund reserved by Mrs. Bell is to be regarded as a power of revocation, or whether the whole transaction is to be regarded as a trust in her favor of so much of the fund as she might see proper to withdraw in her lifetime, and of the remainder for her sisters. In either case the practical result is the same; for a power of revocation as to the whole may be exercised as to a part, and, when so exercised, does not affect the remainder. The court, therefore, instead of granting a nonsuit, should have determined whether the evidence was sufficient to create such trust, and rendered its judgment accordingly.

I think the view I have taken of this case, and the conclusion reached, is fully sustained by this court in the case of *Hellman v. McWilliams*, 70 Cal. 449, 11 Pac. 659. That action was brought to determine whether the estate of Eli W. Hawkins, deceased, or his minor children, were entitled to certain money in the hands of the plaintiff. In September, 1879, there was due to Hawkins from the Odd Fellows Savings Bank the sum of \$14,334, evidenced by a pass book of said bank, which was then in liquidation. Hawkins made a verbal assignment of said money to Hellman for the use and benefit of the minor children of Hawkins, but reserving to himself the right to draw such sums of said money from the trustee as he might deem proper for his own use. To facilitate the collection of the money from the bank, Hawkins, at Hellman's request, made a written assignment of said claim to the Bank of California, and said bank collected and paid over to Hellman \$8,959.20, of which sum Hawkins drew at different times prior to his death \$6,271.44, leaving in the hands of Hellman \$2,687.76, and remaining uncollected \$5,375.53. The court below found there was a trust, and that the children were entitled to the money remaining in the hands of Mr. Hellman, and that remaining uncol-

lected from the Odd Fellows Bank; and the judgment was affirmed. In the case at bar two or three small amounts were withdrawn, and other deposits made, by Mrs. Bell, but the amount on deposit at the time of her death exceeded that on deposit on May 17, 1893, and no new direction appears to have been at any time given to the bank. The possession of the bank book from the time the deposit was changed to the time of Mrs. Bell's death is immaterial. The bank had full knowledge of the transaction, and that it held the deposit after her death solely as trustee for the plaintiffs.

It is contended by respondents that the complaint does not state a cause of action. A demurrer upon that ground was interposed and overruled. The point made by respondents is that it is not alleged that Mrs. Bell "was the owner of the money at the time it was deposited, or at any time." The complaint alleges that Mrs. Bell made the deposit, and that plaintiffs are the owners of it, and entitled to receive it. The ownership of the plaintiffs is all that is material to be alleged. As to the former ownership, that is only a matter of evidence, which need not be directly alleged. Besides, the presumption is that the money Mrs. Bell carried to the bank and deposited in her own name was her money, and the bank is estopped to deny it, unless a claim is made by another, who shows a better right; and the executors, in their answer, admit that they claim that the deposit was the property of Mrs. Bell at the time of her death, and now belongs to her estate. If the complaint were defective in the particular claimed, the defect is cured by the answer. I advise that the judgment and order appealed from be reversed.

We concur: CHIPMAN, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

(122 Cal. 3)

PLASS v. PLASS et al. (S. F. 1086.)<sup>1</sup>

(Supreme Court of California. Aug. 30, 1898.)

RESULTING TRUST—TENANTS IN COMMON—RIGHT IN INCOME—EVIDENCE—LACHES—HARMLESS ERROR—IMPEACHMENT.

1. Testimony of plaintiff that C. told him that the purchase price of a piece of land he was purchasing was \$6,000, and that plaintiff could have a third interest in it, and that plaintiff gave C. \$2,000, and that C. then paid for it, is sufficient, as against the mere recital of \$4,000 in the deed and the receipt for purchase money, to support a finding that \$6,000 was the purchase price.

2. Plaintiff's right by reason of a resulting trust to a third interest in property bought by C. is not affected by the fact that C. paid only \$4,000 for the property, and all of it was his own money, though he told plaintiff the purchase price was \$6,000, and that plaintiff could have a third interest therein; plaintiff having

<sup>1</sup> Rehearing denied September 29, 1898.



given him \$2,000 with which to pay for such interest.

3. There is shown no resulting trust in favor of plaintiff for a third of the land bought of B., and taken in the name of C., merely because, with the knowledge of plaintiff, it was paid for with income from land which plaintiff and C. owned in common, and in the proportion of one to two, and worked together; there being no presumption that plaintiff's interest in the income, as in the land, was one-third.

4. A resulting trust in favor of plaintiff for a third of the land bought in the name of C. is not shown by the testimony of a third person that C. told him plaintiff had such an interest therein; plaintiff, when called as a witness, not having so testified, but merely that he supposed he was to have an interest, as it was bought with income from land which he and C. owned and worked together.

5. Suit to establish a resulting trust is not barred by laches, however much time has lapsed; the cestui que trust having been in possession of the property, or in joint possession with the trustee, the latter admitting his rights.

6. It is harmless error, in an action to establish a resulting trust in land bought in the name of C.,—part from H., with money of plaintiff and W., and part from B., with income from the land bought from H.,—to reject evidence that thereafter C. bought land which plaintiff did not know of, and claimed no interest in; such evidence, offered to show C. was dealing with the incomes of the other two tracts as his own, and to rebut the claim of W. that C. always consulted with him about his business affairs, being too inconsequential to require reversal because of its rejection.

7. A question, to lay foundation for impeachment, whether, at certain time and place, witness had a certain conversation with P., need not state that P. was present, or that no one else was present, though Code Civ. Proc. § 2052, requires such a question to state the "persons present."

Commissioners' decision. Department 2. Appeal from superior court, Napa county; E. D. Ham, Judge.

Action by William Plass against Catherine Plass, executrix of Charles W. Plass, deceased, and others. Judgment for plaintiff. Defendants appeal. Reversed in part.

P. S. King, A. J. Hull, John T. York, and F. E. Johnston, for appellants. M. M. Estee, C. A. Schurtleff, and T. B. Hutchinson, for respondent.

CHIPMAN, C. This action is brought to obtain a decree that Charles W. Plass, deceased, held an undivided one-third of the premises described in the complaint in trust for plaintiff, and that plaintiff is the owner of an undivided one-third of said property. Plaintiff had judgment, from which the defendants Phillip Plass, as executor and individually, and Charles Plass, Jr., appeal upon bill of exceptions. Briefly stated, the court found that a resulting trust arose in favor of plaintiff in the property first described in the complaint, known as the "Haskell Ranch," by reason of plaintiff's having paid one-third of the purchase price thereof, and a like trust in the property next described, known as the "Goodrich Ranch," by reason of its having been purchased with the income of the "Haskell Ranch," of which income plaintiff was one-third owner.

1. Appellants contend that the evidence is insufficient to justify the decision of the court, for the reason that certain findings upon which it rests are unsupported by the evidence:

First, that the purchase price of the Haskell ranch was found to be \$6,000, whereas the evidence showed that it was \$4,000; and, second, that plaintiff furnished \$2,000 of this money with which to make the purchase. Appellants rely upon the fact that the consideration mentioned in the deed and in a contemporaneous receipt given by a temporary custodian of the money (one Calhoun) was \$4,000. The evidence apart from the deed and the receipt tended to show that Charles (now deceased) represented to his brother William (plaintiff) that the purchase price of the Haskell ranch was \$6,000, and when plaintiff was asked by his brother, "How much do you want of it," he replied, "I said I would take one-third of it." Plaintiff further testified: "The next day \* \* \* I gave him two thousand dollars, and he says, 'I ain't got quite enough,' and I loaned him eight hundred dollars [which latter sum was afterwards repaid], and he ran right up and paid the money to Calhoun. When he came back he said, 'All right; that he had bought the land.' \* \* \*" Again: "He told me Judge Grant [the owner] told him he could have it for six thousand dollars. \* \* \* I counted out two thousand dollars, and gave it to him. \* \* \* He took the two thousand dollars from me to buy a one-third interest in the property for me. \* \* \* He told me that he had bought the property with that money." This evidence, uncontradicted except by the receipt and deed, certainly tended to support the finding as to the price paid, which we cannot now disturb. Furthermore, we cannot see how the finding could injure defendants, for, even if it should have shown the consideration to be \$4,000, and the cause of action was otherwise supported by the evidence, plaintiff had a one-third interest in the purchase, and that is what he now claims. If he paid \$2,000, which the evidence tended to show he did pay, and the property cost but \$4,000, it supports his claim to one-third interest in the purchase. The most that can be claimed is that the deed and the receipt tend to discredit plaintiff's evidence, which is a question we cannot take away from the trial court, or review here. And this disposes of appellants' second point, that, as the consideration paid was but \$4,000, it follows that Charles did not use William's money in the purchase at all, but had enough of his own, and used it. The evidence tended to show that he took William's money for the purpose of making the purchase on the basis of \$6,000, in which William was to have a one-third interest. If Charles in fact made the purchase for \$4,000, after having so represented the cost to William, it might be good ground for William to claim a half interest, instead of a third, but

it surely cannot be urged in support of a claim that William had no interest whatever in the purchase. Charles could not take the money of William, under the circumstances shown here, to be used for a particular investment on his and William's joint account, and make the investment, and afterwards treat the money as a loan. To hold that he could do so would violate the plainest principles of equity and fair dealing. William answered on cross-examination, when asked whether he knew that his brother Charles used his (William's) money in making the purchase: "No, sir; I can't swear to it." Nor was it necessary that he should see the money paid. He gave the money to his brother Charles for the purpose of being invested in this particular property, and the investment was made by Charles in accordance with the mutual understanding. His representatives, who stand in his shoes, cannot, nor could Charles if he were alive, now be heard to defeat William's interest by claiming that the purchase was made wholly with the money of Charles, and that he kept William's money for other uses. Neither is the fact, if it be the fact, that Charles was able to buy the land on his own account, at all inconsistent with his making this particular purchase for the mutual benefit of himself and his brother. There is much evidence tending to corroborate the testimony of plaintiff as to his interest in the property. It is not without conflict with defendants' evidence; it may be "suspicious, if not highly improbable," in some particulars, as claimed by defendants; but there was sufficient evidence to support the findings, and under the rule well settled we cannot disturb them. We think that, as to the Haskell ranch, the evidence tended to establish a resulting trust, within the principles stated in *Woodside v. Hewel*, 109 Cal. 481, 42 Pac. 152.

Third. It is contended that the evidence does not support the finding that the Goodrich ranch was purchased from the incomes of the Haskell ranch for the sum of \$3,000, and that one-third of the purchase price was paid by respondent, William Plass, and from his own money and property, and that "up to the time of his death the said Charles W. Plass held the legal title to an undivided one-third" of said property "in trust for plaintiff." It appears from the evidence that after the purchase of the Haskell ranch, October 11, 1856, it was leased until 1858, when Charles moved onto it with his family, and his brother William (plaintiff) also went into possession with him, and remained there until Charles died, and until the present time. Plaintiff testified: "As to the income from the ranch during the time me and my brother were on it, I do not know how much it amounts to. I never kept run of it." He testified that they made money every year farming the Haskell place. "I never kept any accounts between myself and my brother Charles W. Plass. Whenever I wanted money, I would ask him for it, and

he would give it to me. Neither myself or my brother ever received any money, as salary, wages, or monthly wages, for our work there. \* \* \* We both went to work, we gathered the crop, it was put in the sack, and whenever it was on the market he would come to me and say, 'We can get so much for it.' Always asked my consent to sell. Always consulted me to sell. As to buying things for the ranch, I would go and get what I wanted on the ranch for it, and he same. We never got anything that amounted to anything, but what we consulted with one another." He testified that he did not know how much wheat was raised on the ranch, nor the prices received between the time of purchase of the Haskell ranch and the Goodrich ranch, which latter was purchased July 3, 1863. In speaking of this purchase, plaintiff testified: "We had a transaction relating to the purchasing of the Goodrich ranch, being the second tract described in the complaint. We had money loaned over to Suisun. My brother Charles came to me and said: 'They want eighteen hundred dollars on that ranch. Do you think it's worth it?' Says I, 'Yes; it is worth that.' 'Well,' says he, 'we will let them have eighteen hundred dollars.' and he sent right over to Suisun, where he had loaned this money to Mr. Dollerhide; and there was three thousand dollars of it. \* \* \* We paid twenty-two hundred dollars on it. Well, after that we paid off a couple of his hired men, and he deeded the place to us. \* \* \* It was deeded to Chas. W. Plass. He did the business. \* \* \* The money that was paid for the Goodrich property came from the Haskell ranch, where it was made. \* \* \* After we purchased the Goodrich place, by brother consulted with me about it all the time. \* \* \* We farmed it up till four years ago, when we (Chas. W. Plass and I) leased it." One of the tenants was Frank Alexander. He was a witness, and testified that he leased the Goodrich ranch "the first time five years ago, this fall." "I called at the house, and Chas. W. Plass was not very well at that time, and he told me to go out and bring William in; that William had as much to say about the matter as he did; that he would have to consult William; and I went out to the barn, and we went back and talked it over, us three; and the result of it was that they told me they would let me know in a few days; and in three or four days William Plass came over, \* \* \* and told me I could have the place." The witness testified to other instances relating to the planting of wheat, when Charles told him William would have to be consulted; that Charles signed all the leases; that William "could not write; said he didn't have any education, if I remember just right." Again he testified, when asked if Charles had ever told what interest William had in the place, that William owned or had a third interest in the place. To several other persons it appears that Charles stated that William was



interested in this place; that once, when a right of way was to be obtained over it, Charles stated that William would have to be consulted, and he was consulted, and consented; likewise as to the sale of pasturage on the place, and its management in other particulars. One witness testified that Charles and William had money loaned on the Goodrich place, and had to take the place, as a witness learned from Charles Plass; the price being about four thousand dollars. Plaintiff on cross-examination also stated that the Goodrich place "came from a mortgage"; that William had loaned the Goodriches some money, and, on settlement of the indebtedness, Goodrich deeded the property to Charles. Plaintiff testified: "At the time the Goodrich deed was taken I certainly supposed that I was to get a portion of the Goodrich ranch, because it was the money that we had made together. \* \* \* I heard him [Charles] tell Goodrich that, if he would make the ranch over to him, he would pay off the accounts of the men." He was asked, if he knew that the Haskell deed was taken in Charles' name, "if he didn't feel anxious about having the Goodrich deed made all right," to which he answered: "No, no, sir; he told me, and I trusted it all to him." Several witnesses testified to the fact that, in the general management of the business of the two places, Charles represented that William was interested, and would have to be consulted; such as matters of sale of grain, insurance, payments of money, etc. In speaking of the Goodrich deed, plaintiff testified: "There was no understanding or agreement between myself and my brother as to whose name this deed should be taken in. I did not know in whose name it was taken in, and never made any inquiry. My brother said to me: 'All right. Dolan has got the papers.' He never said anything to me about it, or any interest I claimed in it, and I never asked him for it. The money that paid for the deed was made on the ranch, and the way I know this is that he had no other money that I could see; and, if he had other money, I might not have known it. I kept my eyes open to see what my brother was doing generally, but not in the way of money matters. I left that all to him. When he sold crops, he took the money and put it in the bank, and did what he pleased with it. He did not have to consult me about it." The defendants introduced the deeds to the property, showing that Charles was the grantee; also, the right of way referred to executed by Charles; also, the mortgage of Goodrich to Charles, and its satisfaction by Charles; also, deeds to certain lands adjoining and forming part of the Goodrich place. Defendants Phillip and Charles Plass, Jr., testified in effect that plaintiff never, so far as they knew, assumed any control of the property, or claimed any interest in it, and in other respects gave evidence contradictory of plaintiff's evidence. No other witnesses were called by defend-

ants. The will of Charles was introduced by defendants, from which it appears that deceased devised all his property to his wife, Catherine, and his brother William (plaintiff), during their natural lives, and at their death to go to defendants,—four-fifths to Phillip, and one-fifth to Charles.

The foregoing is the principal evidence bearing upon the claim of plaintiff to one-third of the Goodrich place. The evidence, fairly interpreted, indicates that William had some interest in the Goodrich ranch. That interest, however, depends entirely upon the interest he had in the incomes of the Haskell ranch. The evidence as to his interest in that land showed the exact amount of money paid by him towards its purchase, its purchase price, and the precise quantity of his interest. But as to his share or interest in the incomes, out of which it is claimed by him the Goodrich ranch was paid for, there is no evidence whatever; nor is there any evidence as to the quantity of interest William was to have in the Goodrich ranch, nor as to what proportion of the incomes used in its purchase he was entitled to. There never was any accounting between the brothers, and William had no knowledge and gave no evidence as to the amount of the incomes, gross or net. We do not think a presumption should be indulged that his interest in the incomes was one-third, or any given proportion, and that one-third of the money paid for the Goodrich place belonged to him, in order to help out what the law requires to be made certain and unambiguous and beyond conjecture. His ownership of a one-third interest in the land is not inconsistent with his ownership of a less interest in the income, or no interest at all. The brothers lived together under the same roof, and contributed their labor; but Charles was evidently the managing man, and was possessed of the superior ability to conduct the business. Their relation must have been the subject of some agreement as to the division of the proceeds of the ranch, and the terms of that agreement ought not to be left entirely to presumption. Where the tenant out of possession sues the tenant in possession for rents, issues, and profits, it is essential to be averred that the latter occupied the premises upon an agreement with the former as receiver or bailiff of his share of the rents and profits. It is essential to recovery that this circumstance exist. *Pico v. Columbet*, 12 Cal. 414; *Howard v. Throckmorton*, 59 Cal. 79. If the incomes had been received by Charles as rentals paid by third persons while William was out of possession, he would have had a claim, and the law would presume his interest to be commensurate with his interest in the land. But we do not think this rule as to presumptions would apply where the two were engaged in producing the crops in an action to establish a resulting trust. It was as much the duty of William to prove his interest in the incomes as in the land, inasmuch

as he claims an interest in the Goodrich ranch because of his ownership of part of the incomes. If this were an accounting for the incomes, we do not think he could rest alone upon the presumption of his ownership. In a case such as we have here, neither his joint ownership in the lands, nor his joint possession, nor both together, can give rise to the presumption that he owned one-third of the incomes. The rule under which resulting trusts are created has its origin in the natural presumption that he who supplies the money means the purchase to be for his own benefit rather than that of another; and it has been held that the burden of proof rests upon the nominal purchaser to show that the party from whom the consideration moved did not mean the purchase to be in trust for himself, but a gift to a stranger. *Dudley v. Bosworth*, 10 Humph. 9; *Perry, Trusts*, § 139. But this presumption cannot aid or produce the presumption that the money belonged to, and was furnished by, the person claiming as cestui. He must first prove that the money was his, and was used to make the purchase. And the burden of proof on the whole case rests on the one who seeks to establish a resulting trust to show by clear evidence the necessary facts. *Perry, Trusts*, § 139; *Johnson v. Quarles*, 46 Mo. 423, approved in *Philpot v. Penn*, 91 Mo. 44, 3 S. W. 386. The evidence discloses no relationship as partners in the incomes, for there was no evidence of an agreement to share the profits of the business, from which is implied also an agreement to share losses. *Civ. Code*, §§ 2395, 2404. Plaintiff testified that Charles could do what he pleased with the money, and did not have to consult him about it. But if William was entitled to some part of the incomes, either as co-tenant or partner, and the Goodrich ranch was purchased from these incomes, that property would, at most, belong to each in the proportion they held their interests in the incomes,—it would be income in a new form. But until there was an accounting it would not be possible to ascertain the interest of William in that ranch. William testified that they made money each year on the Haskell ranch, and that the Goodrich ranch was purchased with money “from the Haskell ranch, where it was made”; but, as no accounting was ever had between the brothers, it is pure conjecture that of the earnings of the Haskell ranch, which went to purchase the Goodrich place, William was entitled to one-third on an accounting, or any particular proportion, and it is also conjecture that he was to have a one-third interest in this purchase. One witness testified that he heard Charles say that William had a third interest in the Goodrich place, but that is not enough to establish a resulting trust, as against the deed to Charles, where the beneficiary of the trust cannot, or at least does not, testify, when called as a witness, to any such interest. His interest in the Goodrich

place must necessarily depend upon facts as yet unascertained. To infer from this evidence that he had a one-third interest in these incomes, and that his one-third interest would on an accounting amount to one-third the cost of the Goodrich place, would do violence to the principles governing resulting trusts heretofore laid down by this court in *Woodside v. Hewel*, supra, and the cases there cited. The court there said: “It is a familiar rule that it is incumbent upon him who would claim that a trust exists in his favor to establish the fact by clear, convincing, and unambiguous testimony; that the presumption that the person in whose name the legal title to land is vested is the absolute owner thereof is not to be overcome by surmise or conjecture, or by any evidence that fails to afford satisfactory proof of the fact to the tribunal before which it is presented; \* \* \* and that, if he would claim an interest pro tanto according to the proportion of the consideration furnished by him, he must show the precise amount paid by him, as well as the amount for which the purchase was made, in order that the court may determine the respective rights of the parties in the property purchased. The presumption of ownership arising from the legal title will not be overcome, unless the interest of the claimant can be determined; and the testimony presented in support of the equitable claim must clearly show, not only the existence of the trust, but also the extent to which the property is held in trust; otherwise the legal title will prevail.” Tested by these principles, we do not think that plaintiff has sufficiently established a trust in his favor as to the Goodrich ranch. There is no breach of trust or fraud alleged. Plaintiff knew of the investment, and consented to it. No question of bad faith arises. It is clearly the case of an investment of funds which, if held and invested by Charles for the benefit of both himself and William, it must have been upon some mutual agreement, the terms of which were certain and definite, and should not be left to mere conjecture or implication. And yet there is no evidence of any agreement; and the most that William testified to is, “At the time the Goodrich deed was taken, I certainly supposed that I was to get a portion of the Goodrich ranch, because it was the money that we had made together.” But he testified to no portion, nor to any definite interest in the purchase money. It was said in *Baker v. Vining*, 30 Me. 121: “No case has been found where a resulting trust has been held to arise upon payments made in common by the one asserting his claim and the grantee in the deed, wherein the grantor acknowledges the receipt of the consideration from him alone, when the amount belonging to one and the other is uncertain and unknown even to those who make the payments, and no satisfactory evidence is offered exhibiting the portion which was really the property of each. The trust



springs from a presumption of law, because the alleged cestui que trust has paid the money. Such presumption must be attended with no uncertainty. The whole foundation is the payment, and this must be clearly established." Assuming that the payment here was out of the common funds, there is lacking the essential element of proof as to plaintiff's interest therein. It must not be overlooked that plaintiff made no claim for many years after his rights accrued, and not until after his brother's death; and although his laches alone did not bar his claim, as we shall presently show, this fact should make the court more cautious in scrutinizing the evidence, and furnishes strong ground for applying the rule that all the elements of the trust should be clearly proved.

2. It is contended that plaintiff is barred by his own laches; citing 1 Perry, Trusts, § 141; Harris v. Hillegass, 66 Cal. 79, 4 Pac. 987; Bell v. Hudson, 73 Cal. 285, 14 Pac. 791; Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610; Douglass v. Douglass, 72 Mich. 86, 40 N. W. 177. Harris v. Hillegass, supra, was a suit for an accounting of the affairs of a partnership which had been dissolved 20 years prior to the commencement of the suit. Bell v. Hudson, supra, was a similar action brought 26 years after the death of one of the partners by the administrator of his estate. Speidel v. Henrici, supra, was a suit to enforce a trust, and was brought 50 years after plaintiff's rights, if he had any, had accrued, during all which time he took no steps to follow up his rights, or to demand an account of the trustees. Douglass v. Douglass, supra, was an action to set aside certain deeds, one of which was made 27 years and the other 30 years prior to the commencement of the action, and of the facts upon which the complainant relied she had full knowledge for more than 20 years. It is undoubtedly true that courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them. Where conscience, good faith, and reasonable diligence are wanting, the court is passive and does nothing, and its equitable powers will not be called forth into activity. But we have no such case here. Speaking of the statute of limitation, Mr. Justice Temple said in Love v. Watkins, 40 Cal. 547: "I have never yet met with a case, whatever the character of the trust, where the statute has been held to bar the rights of the beneficiary in favor of the trustee, when the beneficiary has continued in possession according to his right, and no adverse claim made by the trustee. Such a case would be at variance with the fundamental idea of statutes of limitation, that possession draws to it, or rather extinguishes, all adverse claims and titles." What is here said is equally true where, under like circumstances, the rights of the beneficiary are sought to be barred by his laches. And I under-

stand the rule to be that laches cannot be invoked to defeat a resulting trust in favor of one who has been in continuous and undisputed possession of the property in which it is sought to establish a trust, or is in joint possession with the trustee,—the latter admitting the rights of the beneficiary. Neglect to assert his rights for a long period of time while in joint possession with the trustee may be evidence tending to show that the beneficiary has no rights, but such neglect cannot of itself constitute a bar. So long as the rights of the cestui que trust are admitted, laches cannot be set up. Appellants cite 1 Perry, Trusts, § 141, quoting: "Courts will not enforce a resulting trust after a great lapse of time, or laches on the part of the supposed cestui que trust, especially when it appears that the supposed nominal purchaser has occupied and enjoyed the estate." It is, however, stated in the same section by the learned author that "if the trust is admitted, and there has been no adverse holding, lapse of time is no bar"; and, again, "Any excuse for delay that takes hold of the conscience of the chancellor, and makes it inequitable to interpose the bar, is sufficient." See cases there cited. The facts in this case make the rule relied upon by appellants inapplicable.

3. It is claimed that the court erred in its rulings at the trial. But two assignments are urged. One relates to the exclusion by the court, upon the offer of defendants, of a deed made to Charles Plass by one Easterby to certain lots in the city of Napa in 1868, after the purchase of the property in question. Plaintiff makes no claim to any interest in these lots. Defendants claimed that this purchase tended to show that Charles was dealing with the incomes of the Haskell and Goodrich ranches as his separate property; thus rebutting the claim that these incomes were the joint property of Charles and William, and also tending to rebut the claim of William that Charles always consulted him about his business affairs, while of this one William admitted entire ignorance. It seems to me that this evidence should have been admitted, but at the same time it was so light in weight and inconsequential in character that a reversal should not be ordered because of its rejection. The other ruling complained of related to a question put by plaintiff to the witness Phillip Plass for defendants, for the purpose of laying the ground for impeachment. The objection now is that the question did not embody in it the names of the persons present at the alleged conversation. The question was whether or not the witness did not directly after his father's death, at Ingall's store, in Napa, in the evening, "have the following conversation with T. R. Parker, to wit:?" (Then follows the conversation.) No names of persons present, other than that of Parker, are given, and his name only by implication as the person to whom the wit-

ness addressed himself. The court, upon objection being made, said if any other persons were present the question would be refused, and, it appearing there were none others, it was admitted. The point would seem to be whether, when no other persons than the witness and the person to whom he addresses himself are present, is it necessary to state in the impeaching question "no other persons being present," or some equivalent, and is it necessary to name this person to whom the witness has spoken "as being present"? We do not think the rule given in section 2052, Code Civ. Proc., requires more than that the statements must be related to the witness, "with the circumstances of times, places, and persons present," and this does not mean that counsel must state negatively that no other persons were present. We think, also, that, where only the two are present, it is quite superfluous to require a statement that the person spoken to was present. Presumably, he was present, or he could not have been spoken to. Much the same point was decided in *People v. Bosquet*, 116 Cal. 75, 47 Pac. 879.

We do not think the evidence sufficient to support the judgment that a resulting trust was created in favor of plaintiff to an undivided one-third interest in the so-called "Goodrich Ranch," and for that reason the judgment, so far as it relates to the real property known as the "Goodrich Ranch," should be reversed, and a new trial ordered; and as to the other real property, known as the "Haskell Ranch," the judgment relating thereto should be affirmed.

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment appealed from, so far as it relates to the lands described in the complaint, and known as the "Haskell Ranch," is affirmed, including judgment for costs; and, so far as it relates to the lands described in the complaint and known as the "Goodrich Ranch," the judgment is reversed, and as to the latter lands a new trial is ordered; such trial to be had upon the evidence already taken, and such other evidence as may be presented by either party.

(122 Cal. 39)

**DENNIS et al. v. BINT et al. (L. A. 235.)<sup>1</sup>**  
(Supreme Court of California. Sept. 1, 1898.)

**ADMINISTRATORS—ISSUE OF LETTERS—SALES OF REALTY—ACTION TO SET ASIDE—ACCRUAL OF CAUSE—LIMITATIONS—JUDGMENT—CONCLUSIVENESS.**

1. The omission of a seal from letters of administration cannot be called in question in proceedings by heirs attacking a sale by an administratrix, duly confirmed, where the administratrix acted as such, and the letters recite that the seal was affixed, and the court repeatedly made orders recognizing the administratrix.

2. Code Civ. Proc. § 1573, requires an action to set aside an administrator's sale to be commenced within three years from the discovery

of grounds invalidating the sale. *Held*, that where the matters relied on to impeach the sale had been of record more than 10 years, and there was adverse possession of the land, the complaint should explain the failure to acquire earlier knowledge.

3. Code Civ. Proc. § 1573, provides that an action for the recovery of real estate sold by an administrator must be commenced within three years next after the settlement of the administrator's final account. *Held*, that where the estate is in condition to be closed, the statute will commence to run from a time thereafter reasonably necessary to obtain a settlement of the account. *Per* McFarland, Garoutte, and Van Fleet, JJ. *Beatty, C. J., contra.*

4. Where an administrator neglects to bring an action to recover property of the estate until it is barred by the statute, an heir, though a minor at the time the cause of action accrued, is also barred, since the administrator's relation to the heir is that of trustee. *Per* McFarland, Garoutte, and Van Fleet, JJ.

5. Code Civ. Proc. § 1573, provides that no action for the recovery of real estate sold by an administrator can be maintained by an heir unless it be commenced within three years next after the settlement of the administrator's final account. Section 1574 provides that this limitation shall not apply to minors or others under legal disability to sue at the time the right of action accrues, but that all such persons may sue at any time within three years after the removal of the disability. *Held*, that as to minor heirs their right to sue is barred in three years after they reach their majority, irrespective of the settlement of the administrator's account. *Per* Beatty, C. J.

6. An administratrix's deed was defective, and on being told of the fact she authorized an attorney to institute a suit to quiet title in her name against the purchaser, so as to cure the defect. She received full value for the property, and the title was defective through her own fault. The proceedings in the suit were regular in form, and resulted in a judgment for defendant. *Held*, that in an action by the heirs to have the administratrix's sale set aside for the defect, the judgment would not be disregarded as collusive and fraudulent. *Per* Beatty, C. J.

Harrison, Henshaw, and Temple, JJ., dissenting.

In bank. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Frank H. Dennis, Kitty N. Whittemore, and Willard W. Dennis against Ira Bint and others. Demurrers as to plaintiffs Frank H. Dennis and Kitty N. Whittemore on the ground of the bar of the statute of limitations were sustained. Demurrer as to Willard W. Dennis was overruled, and the court, in its findings at the trial, sustained said defendants' plea of the statute of limitations. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

T. E. Gibbon and C. O. Whittemore, for appellants. McLachlan & Cohrs, H. R. Metcalfe, W. E. Arthur, and W. S. Wright, for respondents.

**PER CURIAM.** When this case was in department the opinion hereto attached was prepared by Mr. Commissioner BRITT. After full consideration of the appeal in bank, we are satisfied with that opinion, and with the conclusion there reached, and for the reasons therein given the judgment and order appealed from are affirmed.

<sup>1</sup> Rehearing denied September 30, 1898.



"BRITT, C. Action to recover possession of a tract of land in Los Angeles county, and to set aside a sale thereof made in probate. Defendants, more than a hundred in number, deraign through one Turner, who was the purchaser at said sale. Plaintiffs assert title as heirs of their father, Charles J. Dennis, who owned the land at the time of his death. Against the validity of the sale they claim that the person who was appointed administratrix of the estate of said deceased sold the land without having qualified as administratrix, and without right to act in that capacity; also that the petition and notice on which the court ordered the sale were insufficient to confer jurisdiction to make the order. There is no charge of actual fraud in the sale. It appears that the purchaser paid full value for the property. Defendants, in whose favor judgment passed below, rely on several lines of defense. Our examination of the case leads us to doubt whether any of them has much merit, excepting only their plea of the statutes of limitation; and to this defense alone we shall direct our attention.

"The action was begun February 8, 1893. Afterwards an amended complaint was filed, to which a demurrer was sustained as to the plaintiffs Frank H. Dennis and Kitty N. Whittemore, and as concerns them the question argued by counsel is whether, on the showing made by their pleading, the action was barred by lapse of time. It appears from said complaint that Charles J. Dennis died December 2, 1881, and that on January 9, 1882, on the petition of his surviving wife, Clotilda J. Dennis, mother of the plaintiffs, the superior court of said county ordered that letters of administration of his estate issue to her 'upon her taking the oath and filing a bond according to law.' It seems that she filed a bond, but it is alleged that she failed 'to take and subscribe the oath required by law and the said order of the court.' There is an averment that 'no letters of administration upon the estate have been issued.' There is, however, annexed to the complaint as an exhibit, and made part thereof, a copy of a document filed in the court in the matter of the estate of said deceased, purporting to be letters of administration issued to said Clotilda on February 1, 1882, signed by the clerk, and in the form prescribed for such letters by section 1362, Code Civ. Proc., except that the seal of the court was not impressed thereon. Similarly, a copy of the petition for an order to sell the land, wherein said Clotilda made oath that letters of administration on the estate had been duly issued to her, is exhibited with the complaint; also several orders of the court are set out, reciting acts done by her as such administratrix. Altogether, the allegations and exhibits of the complaint show that letters, such as they were, did issue to said Clotilda, and that she acted as administratrix thereunder. Upon her petition the court made an order on May 15, 1883, purporting to

authorize her to sell the land. For present purposes we may allow that this order was void for want of the notice required in such proceedings by sections 1538, 1539, Code Civ. Proc. However, pursuant thereto the administratrix sold the land, and on August 27, 1883, after obtaining an order confirming the sale, she executed a deed to the purchaser. He and those claiming under him thenceforward had possession of the premises. There has been no settlement of the final account of the administratrix. When the action was begun, both the plaintiffs Frank H. Dennis and Kitty N. Whittemore were more than four, but less than five, years past the age of majority. Plaintiff Willard W. Dennis was still a minor some five months under that age. There is an allegation in the complaint in general terms that the grounds of the action and the facts alleged concerning the invalidity of the sale were not known or discovered by any of the plaintiffs until within one year of the commencement of the action.

"The special statute of limitations contained in the chapter of the Code of Civil Procedure relating to sales of property of decedents is as follows:

"Sec. 1573. No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud, or other grounds upon which the action is based.

"Sec. 1574. The preceding section shall not apply to minors or others under any legal disability to sue at the time the right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability."

"It is contended that according to the allegations of the complaint the land was never sold by an executor or administrator, and hence that said section 1573 can have no application. The question is, in effect, whether the heirs can be permitted to say in this collateral proceeding that there was no administration of their father's estate at all. It is clear that the court had jurisdiction of the estate of the deceased, and to appoint the administratrix. Therefore, if the letters issued had been duly attested, it is unquestionable that, as against any collateral attack, they would have been conclusive evidence of her due qualification, and of her authority to act as administratrix. *Westcott v. Cady*, 5 Johns. Ch. 342, 343; *Moreland v. Lawrence*, 23 Minn. 84; *Trust Co. v. Beebe*, 40 Minn. 7, 11, 41 N. W. 232; *Duson v. Dupre*, 32 La. Ann. 896; *Insurance Co. v. Tisdale*, 91 U. S. 243; *Woerner, Adm'n*, § 266; 1 *Williams, Ex'rs* (7th Am. Ed.) 676, note; *Ryan v. Mort-*

gage Co., 96 Ga. 322, 23 S. E. 411. This seems to have been conceded in one of the cases most relied on by appellants,—*Pryor v. Downey*, 50 Cal. 399: 'The letters of administration may indeed, when issued, be evidence of the regularity of the previous proceedings,' etc. The purpose of the seal is to authenticate the document, show that it actually emanated from the court. Here the letters recited that the seal was affixed, and Mrs. Dennis acted as administratrix, claiming to hold valid letters. The court recognized her as administratrix, and repeatedly made orders reciting that she was such. The authenticity of the letters having been thus postulated and presumed in the quarters where duty and interest combined to require the truth of the matter to be known, it would seem that the presumption should be deemed conclusive against the present attack; and, in our opinion, the absence from the letters of the impress of the seal does not impair their effect, in this action, as evidence of her authority as administratrix. In *Whyler v. Van Tiger*, 14 Pac. 846, this court upheld, against the suit of a minor, a lease of lands made by one who had been appointed his guardian, and had given bond as such, but who had taken no oath and had not received letters of guardianship. That case well illustrates the tendency of the law to discountenance the collateral impeachment of the authority of such officers, but it has not the controlling importance supposed by respondents, because of differences in the statutes concerning the qualification, etc., of guardians and administrators. See, further, *Ganahl v. Soher*, 68 Cal. 95, 8 Pac. 650; *Gallagher v. Holland*, 20 Nev. 167, 18 Pac. 834; *Baldwin v. Standish*, 7 Cush. 207; *People v. Dunning*, 1 Wend. 16; *Amblar v. Leach*, 15 W. Va. 677; *Van Fleet*, Coll. Attack, § 353. We have given careful attention to the cases urged by plaintiffs upon the attention of the court,—*Pryor v. Downey*, 50 Cal. 388; *Staples v. Connor*, 79 Cal. 14, 21 Pac. 380,—in which it was held that a sale of lands made in probate by one who, although acting as administrator, had not qualified by taking the oath and filing a bond, was void, and might be successfully impeached by the heirs in an action like the present. But in those cases, as well as in *Re Estate of Hamilton*, 34 Cal. 464, there had been no issuance of letters of administration; and we are not satisfied that their doctrine is so clearly salutary that it should be extended beyond the facts on which it rests.

"It is further claimed that the case is taken from the operation of the statute by the averment that the grounds of the action were discovered within one year next before the commencement of the suit. Aside from other considerations which may bear on this point, the statement of the complaint is insufficient for the purpose claimed because unaccompanied by any explanation of the failure to acquire knowledge earlier,—so as regards the

adult plaintiffs at least. The matters relied on to impeach the sale were patent of record, and there was adverse possession of the land. Mere ignorance of the facts, therefore, without some valid excuse for ignorance, was of no consequence. *Hecht v. Slaney*, 72 Cal. 363, 14 Pac. 88; *Moore v. Boyd*, 74 Cal. 167, 15 Pac. 670; Commissioners' note to section 1573, Code Civ. Proc., Ed. 1872. The minor plaintiff is in no better position for reasons presently to appear.

"Lastly, it is insisted that because there has been no settlement of the final account of the administratrix the statute has never begun to run. Formerly said section 1573, which was drawn from section 190 of the probate act of 1851, required an action to recover estate sold by an executor or administrator to be brought within three years next after the sale; and following it then, as now, was the provision of section 1574—section 191 of the probate act—that the preceding section should not apply to minors or others under legal disability, who might sue within three years after removal of the disability. The result of the cases involving or illustrating the effect of these sections, in their original form, is that, if the administrator failed to sue to recover the land or set aside the sale within three years next following the sale,—the administration so long continuing,—then the heirs as well as himself were barred, even though the heirs were minors; this on the ground that under our system the administrator represents the heirs,—he the trustee, they the cestuis. *McLeran v. Benton*, 73 Cal. 329, 342, 14 Pac. 879; *Staples v. Connor*, 79 Cal. 15, 21 Pac. 380; *Patchett v. Railway Co.*, 100 Cal. 505, 35 Pac. 73; *Meeks v. Olpherts*, 100 U. S. 564; *Meeks v. Vassault*, 3 Sawy. 206, Fed. Cas. No. 9,393; *Cunningham v. Ashley*, 45 Cal. 485. But in 1880 section 1573 was amended so as to provide that the action cannot be maintained unless commenced within three years next after the settlement of the final account, and the question is whether, under the amendment, the representative may, by refraining from procuring the settlement of his final account, indefinitely postpone the running of the statute. It may simplify the view somewhat to consider the case as it would have been presented had the administratrix brought the action, as she had the power to do. *Meeks v. Olpherts*, supra. The complaint shows that there were no debts of the deceased, and that by the sale of the land now in dispute the administratrix received in the month of August, 1883, funds sufficient several times over to pay the expenses of administration and the allowance made by the court for the support of the family. The estate was then in condition to be finally closed, and it was her duty to proceed to a final account, and to obtain a settlement thereof. Code Civ. Proc. § 1652. Our whole scheme for settling the estates of decedents 'looks to a speedy close of administration.' *Maddock v. Russell*, 109 Cal. 423,



42 Pac. 139. In our opinion, the administratrix was allowed, under the amendment of 1880, a reasonable time in which to obtain settlement of her final account, and that, failing in this, the statute began to run; and, were she the plaintiff here, it could be pleaded against her with effect. What is such reasonable time must depend, in general, on the circumstances of each estate; but here it is apparent that much more than a reasonable time expired more than three years prior to the commencement of the action. There is no novelty in this proposition. It follows from the principle of quite extensive application that one cannot avoid the statute of limitations by delay in taking action incumbent upon him. Thus it was held that an executor of a will probated in Illinois, who had unreasonably delayed to take out ancillary letters of administration in New York, was not entitled to the benefit of a statute of the latter state which excepted from the general statute of limitations a certain period 'after the granting of such letters.' *Kirby v. Railroad*, 120 U. S. 130, 7 Sup. Ct. 430. And see *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, approving *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051; *Mickel v. Walraven*, 92 Iowa, 423, 60 N. W. 633; *Thomas v. Beach Co.*, 115 Cal. 136, 46 Pac. 899. If this be not the correct view of the statute, and if the right to sue can be preserved to the administrator and those whom he represents for ten years by failure—without excuse—to settle his final account, then it may be preserved in like manner for fifty years, or indefinitely. 'The statute of limitations is intended, not for the punishment of those who neglect to assert their rights, but for the protection of those who have remained in possession under color of title believed to be good.' *Marshall, C. J.*, quoted in *Tynan v. Walker*, 35 Cal. 641. The policy of the statute is to quiet titles to real estate sold by order of the probate courts (*Harlan v. Peck*, 33 Cal. 521); and we do not feel at liberty to say that the legislature intended to withhold such protection indefinitely from purchasers at probate sales at the option of the representative or of those who might compel him to account. The principle above stated is illustrated in the opinion of this court in *Meherin v. Produce Exchange*, 117 Cal. 217, 218, 48 Pac. 1074. While the facts there were different from those here, the rule there declared seems to be applicable to the case at bar. That was an action by plaintiffs to have it adjudged that they were members in good standing of the defendant, the defendant having suspended them about eight years before the commencement of the action. The lower court held that the action was barred, and the judgment was affirmed. This court, in discussing the question whether the statute commenced to run before a demand had been made by plaintiffs for reinstatement, said as follows: 'In such a case a party cannot extend the statute of limitations indefinitely by failing to make a de-

mand. Opinion by Beatty, C. J., in *Bills v. Mining Co.*, 106 Cal. 21, 39 Pac. 43; *Prescott v. Gonser*, 34 Iowa, 179; *Baker v. Johnson Co.*, 33 Iowa, 151; *Codman v. Rogers*, 10 Pick. 119. In the case last cited the court say: "A party must not be permitted to sleep over his rights to the prejudice of the party to whom he makes the claim, who, by the delay, may be deprived of the evidence and means of effectually defending himself. A demand must be made within a reasonable time, otherwise the claim is considered stale; and no relief will be granted in a court of equity. What is to be considered a reasonable time for this purpose does not appear to be settled by a precise rule. It must depend on circumstances. If no cause for delay be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. There is the same reason for hastening the demand that there is for hastening the commencement of the action; and, in both cases, the same presumptions arise from delay." Since, therefore, the administratrix could not maintain the action because of lapse of time, it follows, in accordance with the authorities already cited, that the plaintiffs cannot maintain it, and the demurrer was properly sustained to the complaint of *Frank H. Dennis and Kitty N. Whittemore*. A like conclusion applies to the case of *Willard W. Dennis*, for, although as to him the demurrer was overruled, and the case went to trial, yet the plea of the statute was again interposed against him by answer, and was sustained by the findings of the court. He is included in the effect of the bar of the statute against the administratrix, and the findings are sustained. If it be objected that he is placed thus in worse position than if the administratrix had in due time obtained the settlement of her final account, the answer is that this is the logical outcome of the system which clothes the administrator with the right of action in such cases, and makes him the representative and trustee of the heirs. The laches of the trustee while he holds office as such must be imputed to the beneficiary, and the remedy of the heir is against the administrator. *Wheeler v. Bolton*, 54 Cal. 302; *McLeran v. Benton*, 73 Cal. 343, 14 Pac. 879. The judgment and order denying a new trial should be affirmed."

We dissent: *TEMPLE, J.; HARRISON, J.; HENSHAW, J.*

*BEATTY, C. J.* I concur in the judgment. The most important question in the case is whether Mrs. Dennis ever became administratrix of her husband's estate. She certainly never had letters of administration in due form, and expressions have been used in the opinions of this court in several cases which at first glance would seem to imply that without letters regularly issued in due form there is no administration; or, in other

words, that letters of administration, instead of being merely evidence of authority to administer, are themselves the only source of such authority. In *re Estate of Hamilton*, 34 Cal. 469; *Pryor v. Downey*, 50 Cal. 399; *Staples v. Connor*, 79 Cal. 15, 21 Pac. 380. But a critical examination of these cases will show that in none of them was the proposition as here stated actually involved. In every instance there had not only been a failure to take out regular letters of administration, but also a failure to comply with one or more of the essential conditions expressly imposed by the order (or, in the last case, the law) authorizing the party to administer; that is to say, he had failed to take the oath, or file the bond, or both. None of those cases, therefore, is necessarily inconsistent with the view that one who has fully complied with all the conditions of the order of appointment by taking the oath, filing his bond, etc., and who has acted as administrator under the orders and direction, and with the sanction and approval of the court, should, as against any collateral attack upon his authority, be held to be the administrator, whether he holds letters in due form or not. And this, in my opinion, is the correct view. Letters of administration do not constitute the authority of the administrator, but are merely evidence of it; and the only object of the statute in requiring letters to issue under the seal of the court, and to be recorded with the oath of office subscribed and attached, is to create and preserve permanent and authentic evidence of the due qualification and authority of the administrator. For this purpose it is highly important that the directions of the statute should be strictly followed, in order to prevent a failure of proof when other evidence has been lost. But this evidence of authority is not exclusive, and when, as in this case, there is other satisfactory evidence, or an admission in the pleadings that all the conditions of the order of appointment have been complied with, and when the appointee has gone on and administered the estate under the direction of the court, receiving, with its approval and sanction, a fair price in exchange for the property of the estate, there is neither reason nor precedent for holding that there has in fact been no administration merely because formal letters of administration have not been issued.

But it may be objected that the statement is not correct that the administratrix in this case is shown to have complied with all the conditions of her appointment, because it clearly appears, not only from the pleadings, but from the evidence, that she never subscribed the oath of office. This is true, but it is also true that the order of the probate court did not require her to subscribe, but only to take, the oath, which she did. It is not charged in the complaint that she did not take the oath, and the order of the court which is set out in the complaint shows that

she was not required to subscribe it. On the trial of the action as between the minor plaintiff and the defendants it was also found upon sufficient evidence that the administratrix took the oath. All this may sound extremely technical, but such is the nature of the case. The plaintiffs here are endeavoring, upon the ground of purely technical defects in a probate sale, to recover land for which their natural guardian, while assuming to act as administratrix of their ancestor's estate, received full value from bona fide purchasers, who, as we may infer from the large number of defendants, have subdivided and improved it, thereby adding immensely to its value. To such a contention a technical objection, if sufficient, is all that is required. My conclusion is that Mrs. Dennis must, in this proceeding, be held to have been the duly-authorized administratrix of her deceased husband's estate. But, although she must be held in any collateral proceeding to have been the duly-authorized administratrix, it must be conceded that the order of the superior court for the sale of the land in controversy was void for want of the notice required by sections 1538 and 1539 of the Code of Civil Procedure, and, this being so, it is necessary to inquire whether the defect in the title of defendants has been cured by lapse of time or otherwise.

As to the bar of the statute of limitations I do not concur in the commissioner's opinion that the time prescribed by section 1573 of the Code of Civil Procedure commences to run from the time when the final account of the administrator ought to be settled. The principal argument in favor of this proposition is that upon any other view the right of action might be indefinitely prolonged by the mere fault of the administrator in failing to present his final account. But this argument loses all its force when it is considered that the period of limitation prescribed by sections 1573 and 1574 is not the only limitation upon which purchasers at probate sales may rely. They, like all other holders of land, have the benefit of the general statute making five years' adverse possession a bar, and it is not possible, therefore, that the neglect of an administrator or executor to account could perpetuate any infirmity of their title. As against minor heirs, they have the additional protection of section 1574, which, upon what I deem to be its proper construction, bars the right to sue in three years, after such heirs reach their majority, irrespective of the settlement of the administrator's account. Under this section I think it appears from the complaint that the action of the two plaintiffs herein, who were more than three years past their majority when the original complaint was filed, was barred, and that the ruling of the court sustaining the demurrers as to them was correct, and that the judgment as against them should be affirmed upon this ground alone. They are not saved by their allegation that the



facts upon which their action is founded came to their knowledge within three years of the commencement of the action, because they offer no explanation or excuse for their ignorance. But the minor plaintiff is not, in my opinion, affected by either section 1573 or section 1574 of the Code of Civil Procedure, and, if his action is barred by any period of limitation, it must be by the five-year period prescribed in section 318 et seq. of the Code of Civil Procedure. The court, indeed, finds that his action was barred by these sections, but this finding is attacked, and I can discover in the record no evidence of adverse occupancy or payment of taxes to support it. Of course, if Mrs. Dennis was administratrix,—as we hold she was,—a right to maintain this action accrued to her as representative of the heirs and creditors immediately upon the execution of her deed,—i. e. in the year 1883,—and this right of action, without reference to the provisions of sections 1573 and 1574 of the Code of Civil Procedure, was barred by five years' adverse possession and payment of taxes under the general statute of limitations. But, as above stated, proof on these points is lacking, and, if the judgment against the minor plaintiff could not be sustained upon other grounds, I should be compelled to hold the order denying a new trial erroneous.

But the defendants did not rely alone upon the statutes of limitation. They rely also upon a judgment quieting their title to the lands in controversy. It seems that three or four years after the sale of the land in controversy by the administratrix the defect in the proceedings was discovered, and she was informed that legal proceedings were necessary to cure the infirmity in the title. The exact nature of the defect was not disclosed to her, and was perhaps purposely concealed; but with full knowledge that the title was defective by reason of some irregularity of procedure, and without making any inquiry as to the extent to which it affected the title, she authorized the employment of an attorney to take steps to cure it. He, for that purpose, commenced an action in the name of the administratrix against her vendee and her successors to quiet the title. The proceedings in that case, which are entirely regular in form, resulted in a judgment in favor of the defendants, and upon that judgment the defendants herein rely. It is contended in behalf of the plaintiffs that they are not bound by that judgment, because it was collusive and fraudulent. There can be no doubt that the object of all parties to that action was simply to cure the defective title of the defendants, and that there was no real controversy waged between them. But there is equally little doubt that the object was entirely commendable. The plaintiff had received the full value of the land, and by her fault the title of the purchasers was defective. It was her duty to do what lay in her power to perfect the title, if she

intended to keep the price of the land. This duty she seems to have recognized, and her agent and attorney were given authority to proceed accordingly. What they did in suffering a judgment in favor of the purchasers was precisely what they were expected, and, in effect, instructed, to do. The result accomplished was equitable and just, and there is no equity in the demand of the plaintiffs that it be set aside.

6 Cal. Unrep. 119

**J. M. GRIFFITH CO. v. CITY OF LOS ANGELES. (L. A. 390.)**

(Supreme Court of California. Sept. 3, 1898.)

**SEWER CONTRACTS—CONSTRUCTION—GENERAL INTENT—MUNICIPAL CORPORATIONS—CHARGES FOR EXTRAS—QUANTUM MERUIT.**

1. A contract with a city for constructing a sewer provided that the city should withhold a certain sum from the contract price for six months after the completion of the work, to make any repairs necessary, and at the end of such period should pay the contractors said sum, or so much thereof as had not been paid, for the repairs. Part of said sum was expended for repairs made before the expiration of the six months, and the additional expenditures for repairs within the succeeding two months exceeded the sum retained. The city began the work of repairs well within the six months, and the good faith of its acts was in no way questioned. *Held*, that the contractor could not recover the balance in excess of the cost of repairs expended at the end of the six months, within the rule that particular clauses of a contract are subordinate to its general intent. Civ. Code, § 1650.

2. A contract with a city for constructing a sewer provided that no extras were to be allowed, except in case of a change in the route or appliances, and then only when the valuation of the changes should be agreed on between the parties, and indorsed on the contract, or, if unable to agree, when the valuation fixed by the city engineer should be indorsed on the contract. On the request of the city engineer, steel bands were used for the pipe, which constituted a change in the contract. The city council had no knowledge of the change until after the pipe was laid, and no indorsement respecting the bands or the price was made on the contract. The contract did not give the city engineer authority to act for the city in making the agreement. St. 1889, p. 506, provides that the city shall not be liable on a contract, unless in writing, and by order of the council. *Held*, that the contractor could not recover the value of the bands.

3. The city was not impliedly liable as on a quantum meruit, since it had no opportunity to elect whether or not to accept the sewer with the bands; it being imbedded below the surface of the earth at the time payment for the extras was demanded.

Commissioners' decision. Department 1. Appeal from: superior court, Los Angeles county; Waldo M. York, Judge.

Action by the J. M. Griffith Company against the city of Los Angeles to recover the balance due under a sewer contract. From a judgment for plaintiff for only part of the money sued for, it appeals. Affirmed.

C. K. Holloway and J. S. Chapman, for appellant. W. E. Dunn, for respondent.

BRITT, C. On April 24, 1893, the city of Los Angeles, defendant here, and certain persons, who may be called the "contractors," executed several instruments in writing, which for present purposes we may regard as a single contract, whereby the contractors agreed to construct (at their own cost for labor and material) sections 3 and 6a of an outfall sewer leading from said city to the Pacific Ocean, for which construction the city agreed to pay them the aggregate sum of \$77,450. Said contractors constructed said sections of sewer, and received most of the compensation provided in the contract. They assigned to the plaintiff, a corporation, their claims against the city for some unpaid balances, and for the value of certain alleged extra materials used by them in the work aforesaid. This is an action on the claims so assigned. Plaintiff had judgment below for some hundreds of dollars, but failed as to the bulk of its demand.

1. By the terms of said contract the conduit in said sections of sewer was to be a pipe constructed of redwood staves bound with steel bands, and it was provided that the city might retain 10 per cent. of the price specified in said contract for the space of six months after the completion of the work and its acceptance by the city, "during which time the contractors are obliged to keep the pipe in repair," and that in case of their default in that particular the city should make the repairs, using so much of the sum retained as might be necessary for that purpose. On February 23, 1894, the city and said contractors made a further agreement in writing, reciting that said sections 3 and 6a of the sewer were completed and ready for acceptance by the city, and providing that in lieu of retaining 10 per cent. of the contract price for application to repairs after acceptance, as allowed in the prior contract of April 24, 1893, the city should withhold the sum of \$5,000, and that if at any time during such period of six months after acceptance of said sections any repairs should, in the opinion of the city council, become necessary on said sections, or either of them, the council might at once make the same, and deduct the cost thereof from said sum of \$5,000; also, "that at the expiration of six months the city shall pay the said contractors the said sum of \$5,000, or so much thereof as has not been paid for the purposes above mentioned." The city retained said sum, and has never paid the same to said contractors, or to the plaintiff, their assignee. The court found that the city expended for repairs on said sections of the sewer to August 23, 1894, inclusive, the sum of \$1,894.35, and prior to October 7, 1894, its expenditure in that behalf exceeded \$5,000; also, that work on such repairs was begun by the city on July 10, 1894, and continued until February 20, 1895. Plaintiff contends that it should recover the sum of \$3,105.65, which is the excess of the amount retained by the city above the payments made for re-

pairs up to August 23, 1894; plaintiff claiming this date to mark the end of the period of six months, during which the city could rightfully expend for repairs any part of said sum of \$5,000 withheld as aforesaid. This contention is founded mainly on the clause of the instrument of February 23, 1894, that "at the expiration of six months the city shall pay to the contractors the said sum of \$5,000, or so much thereof as has not been used for the purposes above mentioned." Particular clauses of a contract are subordinate to its general intent (Civ. Code, § 1650), and the contracts before us afford a clear case for the application of the principle. The plain object of said instrument of February 23, 1894, understood in connection with the cognate provisions (which it modified) in the contract of April, 1893, was to indemnify the city, to the amount of \$5,000, for the cost of repairing defects which might be disclosed in sections 3 and 6a of the sewer during six months next following acceptance thereof by the city, and which the city should at once proceed to make good. The city began the work of repairs well within the period of six months. The continued prosecution thereof involved a cost exceeding the sum retained by it under the several contracts. The good faith of its conduct is in no wise impugned. We think, therefore, that the general intent of the indemnifying provisions of the contracts ought not to be overridden by the particular clause that at the expiration of six months the city should pay to the contractors so much of the sum withheld "as has not been used for the purposes above mentioned." On the theory urged by plaintiff, if the whole line of pipe had collapsed on the last day of the six months during which the city was allowed to repair at the contractors' expense, the city would still have been obliged to pay over the indemnifying fund, unless it could on that day actually expend it in replacing the ruin. We conclude that the judgment denying plaintiff's claim to any part of said sum of \$5,000 was right.

2. Said contract of April 24, 1893, contained the following: "The amount herein agreed to be paid for said work is in full for said sections of sewer complete. No extras are to be allowed, except in case of a change in route or plans, and in that case the payment of the same shall be as stated in the specifications hereto attached." In the specifications referred to it was provided that: "The city engineer reserves the right to make any desired change in the plans, but the changes so made, with the price to be added to or deducted from the contract price, shall be agreed upon between the parties hereto and indorsed upon the contract; and, if they shall be unable to agree upon a price for such alterations, then the city engineer shall fix a fair and reasonable valuation upon such work, and this valuation shall be indorsed upon the contract, and when so indorsed shall be binding upon the parties thereto.



If not so indorsed, then the original price shall be neither increased nor diminished." On the request of the city engineer, who had direction of the work, the contractors used in the construction of said sections of sewer a large number of steel bands for the pipe, in addition to those required by the specifications. It may be admitted, without deciding, that such action of the engineer was a change of plans, so far as his authority in that behalf extended. It does not appear that the city council had any information of the use or intention to use the additional bands until after said sections of sewer were completed, when the contractors presented an account against the city for the same as extras, at the rate of 85 cents each, amounting to \$4,012. The city engineer certified that 70 cents each was a just price for them. No indorsement respecting such bands or the price was made on the contract. The court found that they were worth \$3,304, the value certified by the engineer. Plaintiff claims that it should have had judgment therefor. Occasion for said additional material seems to have arisen through no fault of the contractors. The contract, however, was plain that no extras should be allowed except on change of route or plans, and, in case the engineer should change the plans, still no extra payment was provided for, unless the changes so made, with the price to be added to or deducted from the contract price, "shall be agreed upon between the parties hereto," viz. the city and the contractors. If they could not agree on the price, then the engineer should fix the same. These provisions evidently mean that no changes of plan should become a part of the contract, to be paid for by the city, unless it should agree thereto. The contract does not purport to clothe the engineer with authority to agree for the city. The city charter (section 207) provides "that the city of Los Angeles shall not be bound by any contract, or in any way liable thereon, unless the same is made in writing, by order of the council," etc. St. 1889, p. 506. The course pursued by the engineer and the contractors, however just may have been their intentions in fact, ignored any right of the city to determine either the extent or the price of changes in the work then under contract. If it could be effectual to charge the city against its will for the additional bands, then it is not perceived that the contract afforded any protection whatever to the city against the indefinite expansion both of the plan and the cost of the sewer at the pleasure of the engineer and the contractors. In our opinion, the terms of the contract do not support plaintiff's claim for the value of said bands. Nor is the city impliedly liable as upon a quantum meruit. It never had opportunity to elect whether it would or would not accept the sewer with the double bands, if that circumstance be material. When the contractors demanded payment for the bands, they had already re-

ceived far the greater part of the contract price, and the sewer was imbedded below the surface of the earth, in the right of way provided by the city for its reception. Moreover, as we understand the charter of the city (section 207, above referred to), no liability of that amount can be incurred by the city except in virtue of its written contract. See *Zottman v. City and County of San Francisco*, 20 Cal. 96, 107; *Pavement Co. v. Broderick*, 113 Cal. 628, 45 Pac. 863; *McDonald v. Mayor, etc.*, 68 N. Y. 23. The judgment should be affirmed.

I concur: CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(122 Cal. 73)

PEOPLE v. BLACK. (Cr. 434.)<sup>1</sup>

(Supreme Court of California. Sept. 6, 1898.)

CRIMINAL LAW—JURISDICTION—PROPERTY STOLEN ELSEWHERE.

1. Pen. Code, § 789, providing that the jurisdiction of an action for stealing property in another state and bringing it into California is in any county into which it has been brought, does not apply to property stolen in Canada.

2. Under Pen. Code, § 497, providing that one stealing property in another state or country, and bringing it into California, "may be convicted and punished" in the same manner as if such larceny had been committed in California, the superior court of the city and county to which the property was brought had jurisdiction of the accused and the offense.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

John Black was convicted of grand larceny, and he appeals. Affirmed.

Wm. Hoff Cook and Eugene N. Deuprey, for appellant. Wm. F. Fitzgerald, Atty. Gen., and W. H. Anderson, Asst. Atty. Gen., for the People.

GAROUTTE, J. The defendant has been convicted of a felony, based upon an indictment framed under section 497 of the Penal Code. This section reads: "Every person who in another state or country steals the property of another, or receives such property knowing it to have been stolen, and brings the same into this state, may be convicted and punished in the same manner as if such larceny or receiving had been committed in this state." It is charged that the defendant committed grand larceny in stealing certain articles of jewelry in the dominion of Canada, and bringing said articles into the city and county of San Francisco, state of California. Upon this state of facts it is insisted that the superior court of the city and county of San Francisco, state of California, had no jurisdiction to try the defendant for such offense. Indeed, it is insisted that there is no statutory authority vesting any particular superior

court in the state of California with jurisdiction to try such an offense. By section 789 of the Penal Code it is provided that the jurisdiction of a criminal action for stealing in another state the property of another, or receiving it knowing it to have been stolen, and bringing the same into this state, is in any county into or through which such stolen property has been brought. It will be perceived that this section only covers cases arising in two different states, and is not broad enough to include those cases arising between a state of the United States and a foreign country, as the dominion of Canada. It is contended upon the part of the people that the word "state," as used in this section in the first instance, should be given a broader construction, and should be held to include any and all foreign territory, but we cannot agree with this contention; for, in the second instance, it is plainly apparent that the word "state" refers to a particular territory within the boundaries of the United States, and, such being the fact, by elementary rules of construction it must be held that the word "state," as used in the first instance, nothing appearing in the statute to the contrary, should bear the same signification.

By section 497, *supra*, it is declared that a defendant doing the acts outlined by that section shall "be convicted and punished in the same manner as if such larceny or receiving had been committed in this state." Upon a fair and liberal construction of this language, we conclude there is no force in defendant's position that there is a lack of jurisdiction in the superior court of the city and county of San Francisco to try him. The word "punished," as used in the section, refers plainly to the penalty to be affixed to the crime, but the word "convicted" is much broader in meaning. And when the statute says, "convicted as if such larceny \* \* \* had been committed in this state," the word "convicted" includes the accusation and the trial. And, if the statute in terms had said such a defendant may be charged, tried, convicted, and punished in the same manner as if such larceny had been committed in this state, the error of defendant's contention as to lack of jurisdiction would be palpable; yet such is the fair significance of the word "convicted," as used in the section of the Code. If the defendant is to be charged, tried, and convicted as though the larceny had been committed in this state, then he should be charged, tried, and convicted as though the larceny had been committed in the city and county of San Francisco. It necessarily follows that the superior court of the city and county of San Francisco had jurisdiction, by virtue of the foregoing section of the Code, of the person of the defendant and the defense charged.

Under the great weight of authority, if the defendant had been charged with the crime of grand larceny committed in the city and county of San Francisco, state of California,

it would seem the evidence introduced at this trial showing the commission of the larceny in the dominion of Canada, and the felonious bringing of the stolen property into the jurisdiction of the city and county of San Francisco, state of California, would support an indictment in said city and county charging larceny. See Bish. New Cr. Law, § 136 *et seq.* But in the present case the form of the indictment does not justify the consideration of that somewhat interesting question.

The court has examined with care the many alleged errors of the superior court occurring during the progress of the trial of the case. Many of these alleged errors are technical in the extreme, and, after a full consideration of all the matters relied upon for a reversal of the judgment and a retrial of the defendant, we find nothing in the record demanding such a result. For the foregoing reasons the judgment and orders appealed from are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

122 Cal. 76

In re WILLIAMS' ESTATE. (S. F. 1490.)  
(Supreme Court of California. Sept. 6, 1898.)

#### APPEAL—RIGHT TO REVIEW.

An executor cannot appeal from an order of distribution, where the court had jurisdiction, since he is not "aggrieved" thereby, under Code Civ. Proc. § 1666, making such order conclusive on the heirs and legatees, subject only to be reversed or modified on appeal.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

After settlement of the final account of the executor of the last will and testament of James Williams, deceased, an order of distribution was made, from which the executor appealed. On motion to dismiss appeal. Granted.

A. Boyer, for appellant. Evans & Meredith, for respondents.

HARRISON, J. The final account of the executor of the last will and testament of the above-named decedent was settled February 23, 1898; and after its settlement the superior court, upon the petition of the respondents herein, made an order distributing to them the estate remaining in the hands of the executor. From this order the executor has taken the present appeal. The respondents have moved to dismiss the appeal upon the ground that the executor has not the right to appeal from the order, for the reason that he is not an "aggrieved" party. At the hearing upon the motion it was conceded on behalf of the executor, and it also appears from the bill of exceptions which was taken by him to the granting of the order, that jurisdiction to hear the petition for distribution had been acquired by the superior court



before making the order appealed from. The ground upon which the executor claims the right to present the appeal is the insufficiency of the evidence before the court to authorize it to find that the petitioners are entitled to the estate. The executor has no interest in the distribution of the estate, further than to be protected, if he shall dispose of the property in accordance with its terms; and, if the court had jurisdiction to hear the petition, the order or distribution will be a complete protection against any claim that may be made against him by reason of his compliance therewith. The statute declares that the order is "conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal." Code Civ. Proc. § 1666. The persons here enumerated are the only ones who could claim any portion of the estate, and consequently are the only ones who can be "aggrieved" by an order of the court made in a matter in which it had jurisdiction of the subject-matter and of the parties entitled thereto. The motion to dismiss the appeal is granted.

We concur: HENSHAW, J.; GAROUTTE, J.; VAN FLEET, J.; McFARLAND, J.

122 Cal. 77

CITY OF LOS ANGELES v. HANCE, City Clerk. (S. F. 1,587.)

(Supreme Court of California. Sept. 6, 1898.)

STATUTES—SUBJECT AND TITLE—REPEALING ACTS.

Under Const. art. 4, § 24, providing that every act shall embrace but one subject, which shall be expressed in its title, but that, if any subject embraced in the act is not expressed in the title, the act shall be void only as to so much thereof as shall not be so expressed, Laws 1897, p. 75, entitled "An act authorizing the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, to issue bonds therefor, and to provide for the payment of the same," is void in so far as section 4 thereof attempts to repeal St. 1893, c. 48, amending St. 1889, p. 399, § 6, authorizing the incurring of indebtedness by municipal corporations.

In bank. Mandamus by the city of Los Angeles against C. H. Hance, city clerk. Writ granted.

W. E. Dunn, for petitioner. Lee & Scott, for respondent.

BEATTY, C. J. This is an original proceeding by mandamus to compel the city clerk of Los Angeles to countersign certain improvement bonds of that city, which he has hitherto refused to sign, upon the sole ground that section 6 of the act of March 19, 1889, entitled "An act authorizing the incurring of indebtedness by cities, towns and municipal corporations," etc. (St. 1889, p. 399), as amended by act of March 1, 1893 (St. 1893, p. 61), has been repealed by the act of March 9, 1897 (St. 1897, p. 75). The case has been submitted

upon demurrer to the petition, and it is conceded by counsel for respondent that it is his duty to countersign the bonds if section 6 of the act of 1889, as amended in 1893, has not been repealed by the act of 1897. In view of this admission, we confine ourselves to the single question here stated; and, if there are any other questions which might arise upon the facts alleged in the petition, we do not decide them.

The title of the act of March 9, 1897 (page 75), is as follows: "An act authorizing the common council, board of trustees or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, to issue bonds therefor, and to provide for the payment of the same." The provisions of the act seem to be generally such as are germane to its title; but section 4, which purports to repeal conflicting laws, enumerates, among others, chapter 48 of the Statutes of 1893. Chapter 48 of the Statutes of 1893 is the act of March 1st, amending section 6 of the act of March 19, 1889. The subject of the repealing act, as expressed in its title, is entirely foreign to the subject of the section attempted to be repealed; and the question to be determined is whether an act or part of an act can be repealed when the title of the repealing act announces no such intention, and when the repeal of the existing law would have no effect one way or another upon the operation of the new law. We think it very clear that in such a case no repeal is effected, because the repealing clause is in conflict with that part of section 24 of article 4 of the constitution which reads as follows: "Every act shall embrace but one subject, which shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title." Our conclusion is that section 6 of the act of 1889 remains in force, and that the writ of mandate should issue as prayed. It is so ordered.

We concur: McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.; HARRISON, J.

122 Cal. 65

DRISCOLL v. WINTERS et al. (S. F. 788.)

(Supreme Court of California. Sept. 2, 1898.)

GUARANTY—CHANGE IN PRINCIPAL CONTRACT—LIABILITY OF GUARANTOR.

Civ. Code, § 2819, providing that a guarantor is exonerated if by any act of the creditor without the consent of the guarantor the original obligation of the principal is altered in any respect, applies to a guaranty of payment under a contract whereby the principal was to take and pay for a certain amount of milk daily, though the contract, as modified without guarantor's consent, provided that the principal should purchase a less amount daily.

Department 1. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by William Driscoll against Andrew Winters on a contract, and against Joseph S. Myers on a guaranty of such contract. From a judgment for plaintiff, defendants appeal. Reversed as to defendant Myers.

Welles Whitmore, for appellants. Galpin & Zeigler and Chas. S. Peery, for respondent.

GAROUTTE, J. Winters contracted to purchase of Driscoll 16 3-gallon cans of milk daily for the period of one year. He agreed to pay Driscoll therefor 45 cents per can. Myers entered into a writing guarantying the performance of this contract upon the part of Winters. A short time after this guaranty was given, by the mutual consent of Winters and Driscoll, and without the knowledge of Myers, the contract was modified to the extent that Winters should purchase only 13 cans of milk daily. Upon the expiration of the year, Winters failing to pay for the milk furnished, Driscoll brought this action against both him and Myers for the agreed price of the milk furnished, and judgment was rendered against them for the amount claimed. They have now appealed from that judgment, and also from the order denying their motion for a new trial.

As to the guarantor, Myers, the judgment is wrong. He was released from all liability upon his undertaking when the original contract between Driscoll and Winters was changed without his consent. Section 2819 of the Civil Code declares: "A guarantor is exonerated \* \* \* if by any act of the creditor without the consent of the guarantor the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal in respect thereto in any way impaired or suspended." This section is but a restatement of a common and elementary principle of law. In the present case the obligation of the principal (Winters) was altered in a material and important respect. If the two contracting parties could alter the contract without the consent of Myers by reducing the number of cans of milk to be furnished, and still Myers be bound, then they could for the same reasons increase the number of cans of milk to be furnished, and likewise bind him for the price of the increase. The obligation of the principal is altered in either case, and such alteration is prohibited by the law. Respondent, in his brief, declares that Myers has no reason to complain that he is only charged with the price of 13 cans of milk daily, rather than 16 cans; but Myers has the right to declare that it is not nominated in his bond that he should be bound for 13 cans of milk. Such was not his contract. The contract, the performance of which Myers guarantied, has been set aside and displaced by a second contract, and the performance of that contract was not guarantied by him. It is claimed that only those alterations in the original obligation which tend to increase the liability

of the surety or guarantor operate as a release. The authorities are all the other way. It is not for a court to say that the alteration of the obligation redounds to the benefit of the guarantor. No one has authority to make contracts for his benefit, and courts cannot enforce such contracts against him, for he in no sense is a party to them. We find this question extensively discussed by the code commissioners in the annotated edition of the Code. See note under section 2819. The views there expressed are all opposed to respondent's contention. There is nothing in the record which demands a reversal of the judgment as to defendant Winters. It therefore follows that as to defendant Myers the judgment and order denying a new trial are reversed, and that as to defendant Winters the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

122 Cal. 72

COONAN v. LOEWENTHAL. (S. F. 1,343.)  
(Supreme Court of California. Sept. 2, 1898.)

APPEAL—DISMISSAL—BOND.

An appeal will not be dismissed on the ground that the undertaking was filed before service of the notice of appeal, where the affidavits of the parties as to whether it was so filed are contradictory.

In bank. Appeal from superior court, Humboldt county; Z. W. Wilson, Judge.

Action by J. T. Coonan against J. Loewenthal. Defendant appeals. Heard on motion to dismiss the appeal. Denied.

Chamberlin & Wheeler, for appellant. J. F. Coonan and Buck & Cutler, for respondent.

PER CURIAM. Respondent moves to dismiss the appeal upon the ground that the undertaking on appeal was filed before the notice of appeal was served. The notice of appeal shows by indorsement that it was served, but the particular day upon which it was served does not appear thereon. The material question is, was this notice of appeal served upon the 27th day of January, or upon the following day? Upon this question the affidavits of various parties who were acquainted with the fact are before the court. Those affidavits squarely contradict each other, and under such circumstances we will not order the appeal dismissed. The motion to dismiss is denied.

122 Cal. 70

SHEAD v. HINMAN et al. (L. A. 377.)  
(Supreme Court of California. Sept. 2, 1898.)

CONTRACT—CONSTRUCTION—COLLECTION FEES.

Under an agreement for collecting a claim, which, after describing the claim, stated that the "collection charges on above will be 25 per cent.," the collector was not entitled to the stipulated percentage on the face of the claim, but only on the sum actually collected.



Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by L. A. Shead against C. L. Hinman and others. There was a judgment for plaintiff, from which, and from an order denying a motion for a new trial, defendants appeal. Affirmed.

H. O. Collins, Del Valle & Munday, and Edwin A. Meserve, for appellants. Wm. J. Variel, for appellee.

CHIPMAN, C. This is an action to recover money from defendants as plaintiff's agents, to which they make claim for commissions. Plaintiff had judgment, from which, and from the order denying motion for new trial, this appeal is prosecuted, and comes here on a statement of the case.

Plaintiff held a promissory note for \$5,000, principal, against one Parsons, then living in Detroit, Mich. The court found that defendants, as collectors, undertook to collect this note upon the terms and conditions of a certain written contract, the body of which reads as follows:

"Los Angeles, Cal., June 4, 1894. Received from L. A. Shead, via E. Densmore, 1840 E. 2nd street, city, for collection, subject to the terms and conditions specified on the back hereof, the following: No. 4,692. L. B. Parsons, note \$5,000.00. Graves & Pile.

"Our collection charges on above will be 25 per cent."

On the back of the contract were several conditions printed, one of which provided for payment of a reasonable attorney's fee and court costs if suit is brought.

Upon the face of the contract, defendants contend that they were to receive all costs and expenses, including attorney's fees, and in addition 25 per cent. of \$5,000, whether that amount was collected or not. Plaintiff claims that defendants were entitled only to 25 per cent. of the amount actually collected. It appears that the note was sent by defendants to an attorney in Detroit, who brought suit upon it. Pending the action the maker of the note paid \$2,500 on compromise, in discharge of the indebtedness. The court allowed defendants for the Detroit attorney \$450 as fees, and \$50 for court costs and expenses, and \$5.80 for telegrams paid out by defendants. The court disallowed the claim of \$325 claimed as fees for attorneys in California, and allowed defendants \$625 commissions, being 25 per cent. on the sum collected, to wit, \$2,500, making \$1,130.80 in all, and gave plaintiff judgment for \$1,369.20. Defendants claim that they should have recovered \$325 for fees of attorneys in California, and 25 per cent. of \$5,000, leaving due plaintiff \$419.20, which they tendered plaintiff before suit. We do not think there can be any doubt that the true meaning of the contract, to be derived from its terms alone, is that plaintiff was to pay 25 per cent. of

the amount collected. The note was given to defendants for collection, and the charges were for collection, to be measured by the amount collected at the per centum named. It would be an unreasonable construction of the contract to say that by its terms plaintiff agreed to pay \$1,250 for the collection, whether more or less than \$5,000. There was accumulated and accumulating interest on the note. If it had been paid in full, principal and interest, defendants would have been entitled, by a reasonable construction, to the stipulated per cent. upon the whole amount collected; and a like reasonable construction would give them only the per cent. upon the amount collected if less than the face of the note. Some claim is made by defendants that the contract was changed by subsequent oral agreement, made at the time of the compromise, by which plaintiff agreed to allow them \$1,250 net, and attorney's fees and costs, and also that the evidence showed that they were entitled to \$325 to pay the California attorneys. But the court found that there was no new agreement as to commissions, and that defendants had never paid out any money to California attorneys, and that no services were rendered by any California attorneys. Upon these points the evidence is conflicting. There was evidence tending to support the findings, and, under the oft-repeated rule, they cannot be disturbed. The judgment and order should be affirmed.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

122 Cal. 53

GRAND v. DREYFUS. (L. A. 414.)

(Supreme Court of California. Sept. 2, 1898.)

SLANDER—COMPLAINT—INDUCEMENT—INNUENDO—CHARGING A CRIME.

1. A complaint in an action for slander setting forth the alleged slanderous language as, "If he (meaning plaintiff) continues to sell (meaning steal) my hogs, I will send him (meaning plaintiff) where he was another time (meaning the state's prison of the state of California)," without any statement of extrinsic facts showing the words charged to have been used in an offensive sense, different from their ordinary meaning, does not state a cause of action, notwithstanding Code Civ. Proc. § 460, provides that it is not necessary to state extrinsic facts for the purpose of showing the application to plaintiff of the defamatory matter out of which the cause of action arises, since it does not dispense with the averments necessary at common law to show the meaning of the words.

2. Where the words spoken are not slanderous per se, the innuendo cannot introduce a meaning broader than the words naturally bear, unless connected with proper introductory averments.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by Gerard Grand against Louis G. Dreyfus for slander. From a judgment for plaintiff, defendant appeals. Reversed.

Richards & Carrier, for appellant. B. F. Thomas, for appellee.

CHIPMAN, C. Action for slander. Plaintiff had the verdict of a jury, with damages assessed at \$300. Defendant appeals from the judgment on bill of exceptions. The pleadings are verified. A general demurrer to the complaint was overruled. The alleged slanderous words were spoken in the French language to Frenchmen, and are set forth in French, with their meaning in English, to wit: "If he (meaning the plaintiff) continues to sell (meaning steal) my hogs, I will send him (meaning plaintiff) where he was another time (meaning the state's prison of the state of California). I have had many other occasions to have had him arrested." And it is alleged that the words so spoken in the French language were understood by the persons to whom spoken as above translated and explained in English. The answer does not specifically deny using the language concerning the selling of the hogs, nor that the language was intended to convey the meaning as alleged, nor that the words were understood as translated; but it is denied that any of the words were falsely or maliciously spoken, or were understood to mean "that defendant had had many occasions to have had plaintiff arrested." Defendant also sets forth that he held a chattel mortgage on the hogs, executed by plaintiff, and that while it was in force plaintiff sold certain of the hogs so mortgaged, without obtaining the consent of defendant, and without notifying him of such sale, and without his knowledge, and without notifying the vendee that the hogs were mortgaged to defendant; and defendant claims that he had reference to these facts when speaking the words stated in the complaint. Defendant also alleges that plaintiff had been guilty of the charge alleged in the complaint to have been made against him by defendant, of unlawfully selling hogs in which he (defendant) had an interest as mortgagee, and that whatever defendant said of and concerning plaintiff was said in the belief of its truth and verity, and as a warning to others, and not from any motives of malice towards plaintiff.

Defendant moved for a nonsuit at the close of plaintiff's evidence, and he now urges error in overruling his motion. The points presented are: (1) That the complaint does not state sufficient facts, because there is no statement in the nature of a colloquium of the extrinsic facts showing the words charged to have been uttered or used in an offensive sense, different from their ordinary meaning and import; and (2) the language does not state a slander per se, and there are no allegations as to the tendency of the language to directly injure plaintiff in his trade

or business, and there are no allegations as to what constitutes his trade or business, and there is no allegation of actual damage caused by the natural consequence of the slander. The alleged defamatory matter here charged falls under subdivision 1, § 46, Civ. Code, reading: "Slander is a false and unprivileged publication other than libel, which: (1) Charges any person with crime, or with having been indicted, convicted or punished for crime. \* \* \*" Section 460, Code Civ. Proc., provides that: "In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff. \* \* \*" It is beyond dispute that the word "sell," regarded in its ordinary meaning, does not carry with it the impression conveyed by the word "steal." It was held in *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845, that "the statute dispenses with the colloquium and innuendo only so far as they show that the defamatory words applied to the plaintiff, and goes no further. The averments necessary in common-law pleading to show the meaning of the words must still be made." It was also there held that where the words spoken are libelous in themselves, and were uttered in the vernacular of those to whom they were addressed, it is not necessary to make any averment other than that they were spoken of and concerning the plaintiff, nor to allege that they were understood by the hearers to apply to the plaintiff. Where the words are not libelous in themselves the rule is different. *Townsh. Sland.* §§ 308, 310. The office of the innuendo is merely to interpret the meaning of the language used. Indeed, the word "meaning" is the synonym of the word "innuendo," and so is the phrase "that is to say"; and hence it is held that, where the words spoken are actionable, an innuendo undertaking to state the same in other words is superfluous; if not actionable or libelous per se, the innuendo cannot introduce a meaning broader than the words naturally bear, unless connected with proper introductory averments. *Van Vechten v. Hopkins*, 5 Johns. 220; *Pollard v. Lyon*, 91 U. S. 225; *Young v. Cook*, 144 Mass. 41, 10 N. E. 719; *Townsh. Sland.* §§ 308, 335. Mr. Townshend says: "It [the innuendo] may serve for an explanation, to point a meaning where there is precedent matter, expressed or necessarily understood or known, but never to establish a new charge. It may apply what is already expressed, but cannot add to nor enlarge nor change the sense of the previous words. If the words before the innuendo do not sound in slander, no meaning produced by the innuendo will make the action maintainable, for it is not the nature of an innuendo to beget an action." *Id.* § 335. It has been held that words like these,



"You swore false," "You took a false oath," "He swore false before Esquire Andrews," "He swore to a lie," will not sustain an action, unless the declaration contains a colloquium showing that the words referred to a trial or other legal proceeding. Cases cited in *Pike v. Van Wormer*, 5 How. Prac. 171. It was stated in this case that "the reason is that the words, standing alone, do not, as matter of law, impute a crime punishable in a temporal court. A man may swear false without having taken an oath in any court; and he may swear false in a court of record, in a point not material, without incurring the guilt of perjury." There is no hardship in requiring the plaintiff to state in his complaint those circumstances which point the meaning of the words and the intention of the speaker. As further illustrations: "She is sick (innuendo, she has had a child);" "She is a bad girl (innuendo, a prostitute);" "He had corn from B.'s farm (innuendo, that he had stolen corn from B.),"—were held to be unwarranted, there being no inducement to support them. *Townsh. Sland.* § 341. The innuendo cannot perform the office of the colloquium or inducement. *Id.* § 335. It is the office of the inducement to set forth the extrinsic circumstances which, coupled with the language uttered, affect its construction and make it actionable, where, standing alone, the language used would appear not to affect the plaintiff injuriously. As was said in *Taverner v. Little*, 5 Bing. N. C. 678, "Inducement is the statement of facts out of which the charge arises, or which are necessary or useful to make the charge intelligible." It has been frequently held that the inducement is necessary where the language does not naturally and per se convey the meaning which the plaintiff would attribute to it, and where reference to some extrinsic fact is necessary to explain it. For example, where the language is ironical it must be so alleged in the inducement. *Com. v. Kneeland*, 20 Pick. 206.

It is not material where the matters of inducement appear in the complaint,—whether before or after the statement of the language published,—although logically they should precede the words spoken. In the complaint before us no facts by way of inducement appear before the statement of the language used. The only allegations that cast any light upon the meaning intended to be conveyed are the following: "I have had many other occasions to have had him arrested." As to this language, none of the witnesses to whom defendant spoke testified to having heard it, and it may be dismissed from the case. The only other allegation is, "I will send him where he was another time (innuendo, state's prison)." We cannot regard this as in any sense explaining the situation of and circumstances surrounding the parties, or as explaining what the defendant meant by saying, "If he continues to sell my hogs." It is alleged that

the hearers understood defendant to mean "steal my hogs"; but does the complaint disclose enough extrinsic facts from which alone to warrant us in holding that the hearers had a right to put such construction on the language used, or that as matter of law his language had such meaning? We think not. It certainly cannot be the law that a defendant must answer to the charge of slander whenever, without reason, some bystander attributes to his language a meaning wholly different from the natural import of the language used. There should be sufficient inducement alleged somewhere in the complaint from which, when proven to be true, it would be fair and reasonable to say, as matter of law, that defendant intended, in using the language, to charge that the plaintiff was guilty of the crime, or the act giving rise to the alleged slander. The language, "I will send him where he was before," can by no possibility be held to mean, "I will send him to state's prison," except it be aided by the allegation of some extrinsic facts or circumstances, and it cannot be held to cast any light upon the meaning of the word "sell" without some such explanation. The complaint is wanting in allegations of any facts or circumstances which interpret the language used, except the innuendo alone. But, as we have seen, the innuendo cannot introduce a meaning broader than the words naturally bear, unless connected with proper averments. It is manifest from the evidence, as well as from the answer, that the language used grew out of the relation of mortgagor and mortgagee between the parties in respect of the hogs, and from plaintiff's having sold some of these hogs. The covert allusion to the state's prison had reference, no doubt, to plaintiff's previous commitment. But these facts and circumstances we are asked to import into the complaint by means of the innuendo alone, which we think the rules of pleading do not warrant. The witness Levy, to whom the words were spoken, testified as to defendant's meaning: "I understood that he should not sell any hogs any more. Q. What did you understand the words to mean, 'send him where he had been before'? A. It means Mr. Grand had the misfortune to be in state's prison, and he would send him there again. Q. What did you understand him to mean, 'selling the hogs'? A. I understand Dreyfus had a mortgage. I knew that." He also testified that he knew plaintiff had sold some of the mortgaged hogs. "He said, 'If he don't stop selling these hogs.' The language was addressed to me." "The object was to warn Mr. Grand to discontinue selling hogs. That is how I understood it. I have been a sort of adviser for both of the parties. When Mr. Dreyfus spoke to me about this,—made use of this language,—he expected me to repeat it to Mr. Grand." The witness Loustalot overheard some of the conversation. He testified that the word used was "sell," but he

said nothing about his knowledge of any mortgage. He had heard of plaintiff having been in state's prison before, and hence understood the language, "where he had been before," to mean state's prison. The only other witness, Daguerre, except plaintiff, testified to the language used, but was not asked as to its meaning, or how he understood it. Plaintiff heard the language, but immediately stepped out of hearing. He does not testify as to its meaning. I mention this evidence because it seems to me to show the wisdom of the rule as we have given it, and to show that, failing to set out some at least of the facts as inducement or averment or colloquium, the complaint does not state a cause of action. This view of the pleadings makes it unnecessary to pass upon other alleged errors. The judgment should be reversed, and the cause remanded.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded.

122 Cal. 103

McGINTY v. MORGAN. (S. F. 899.)

(Supreme Court of California. Sept. 14, 1898.)

MECHANICS' LIENS—SUFFICIENCY OF NOTICE—PLEADING—APPEAL.

1. Code Civ. Proc. § 1187, provides that notice of a claim to a mechanic's lien shall contain a statement of the "terms, time given, and conditions of the contract." A claimant to such a lien for the construction of a house filed his notice, stating "that said house was to be erected, to consist of five rooms, and to be finished in a workmanlike manner, for the agreed price of \$740." *Held* a sufficient compliance with the Code to entitle claimant to his lien.

2. A notice of a claim to a mechanic's lien recited that, in addition to the work required under the contract, extra work for the agreed price of five dollars was performed, which claim was set out in plaintiff's petition, and was not denied by the answer. *Held*, that such admission supported the statement in the notice of the claim for extra work.

3. In a suit to foreclose a mechanic's lien, a new trial was granted defendant on the ground of the insufficiency of the notice of his lien. *Held*, that defendant would be precluded from contending that the order may have been granted upon the ground that the evidence was insufficient to support the findings.

Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by one McGinty against one Morgan. From an order granting defendant a new trial, plaintiff appeals. Reversed.

Will M. Beggs and W. C. Kennedy, for appellant. Wm. P. Veuve, for respondent.

HARRISON J. The superior court rendered judgment in favor of the plaintiff for the foreclosure of a mechanic's lien upon certain property of the defendant, and afterwards, upon motion of the defendant, granted a new trial. From this order the plaintiff has ap-

pealed. The motion was made upon several statutory grounds, but in its order the court limited the ground upon which it was granted to the insufficiency of the notice of lien which was filed with the county recorder, in that it failed to contain a statement of the "terms, time given, and conditions of the contract." The plaintiff contracted directly with the defendant for the erection of a one-story, five-roomed cottage upon a lot of land belonging to the defendant, for the sum of \$740, of which \$500 was to be paid as the work progressed, and the balance when the house was finished. The defendant paid to the plaintiff \$250 during the progress of the work, and the further sum of \$300 at its close; and, upon his refusal to pay the remainder, the plaintiff, within 30 days after the completion of the building, filed with the county recorder his claim of lien, which contained the following statement of the terms, time given, and conditions of said contract: "That said house was to be erected, to consist of five rooms, and to be finished in a workmanlike manner, for the agreed price of \$740. That, in addition, extra work for the agreed price of five dollars was performed." The respondent contests the sufficiency of this notice, upon the ground that it does not state that the plaintiff agreed to furnish all material and labor for the house (except painting), and does not state that the contract price was to be paid in installments as the work progressed.

The provision of section 1187, Code Civ. Proc., that the notice of lien shall contain a statement of the "terms, time given, and conditions of the contract," is not to be construed as requiring a statement of all the details of the contract, but is to receive a reasonable construction, in view of the purpose for which it is manifestly required. The statute is a remedial statute, and, for the purpose of carrying into effect the object for which it was enacted, is to receive a liberal construction, and the notices which under its provisions are required to be given have regard to substance rather than to form. *Corbett v. Chambers*, 109 Cal. 184, 41 Pac. 873. In *Wagner v. Hansen*, 103 Cal. 104, 37 Pac. 195, it was said: "The purpose of the record and statement must be to inform the owner, in case of a contractor and laborers rendering services under such contract, as to the extent and nature of a lienor's claim, to facilitate investigation as to its merit." The present case is not one where the owner is brought into relation with the claimant by reason of labor performed for or materials furnished to another person, of which he has only such knowledge as is given by the notice of lien which is filed. Here the owner contracted for the improvement directly with the person claiming the lien, and therefore had full knowledge of the terms of the contract. It is not contended that the claimant made an erroneous statement of the terms of the contract in his no-



tice of lien, or that there was any time given, or condition thereto, other than as stated in the notice; the claim being that he did not set forth that the contract price was to be paid in installments as the work progressed. He did, however, state the correct amount of the contract price, and the amount that had been paid thereon, and this exceeded the amount of these installments. We are of the opinion that this was a substantial compliance with the above provision of section 1187, and entitled him to enforce the lien. See *Jewell v. McKay*, 82 Cal. 144, 23 Pac. 139.

It is alleged in the complaint that the plaintiff performed extra work for the agreed price of five dollars, and this allegation is not denied by the defendant in his answer. This admission supports the statement in the notice of the claim for extra work.

The express limitation of the ground upon which the order granting a new trial was made, to the insufficiency of the notice of lien, forecloses the defendant from contending that the order may have been granted upon the ground that the evidence was insufficient to support the findings. The errors of law presented by the respondent need no consideration. The order is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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122 Cal. 117

**CHRISTIAN v. SUPERIOR COURT OF  
SAN DIEGO COUNTY. (L. A. 309.)**

(Supreme Court of California. Sept. 15, 1898.)

**SUPERIOR COURTS — JURISDICTION — AMOUNT INVOLVED — INTEREST.**

Const. art. 6, § 5, giving the superior courts jurisdiction of cases in which the demand, exclusive of interest, amounts to \$300, does not give them jurisdiction of an action on a note originally for less than \$300, but which, by compounding the interest, has created a new principal, amounting to more than \$300.

In bank. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Proceeding on a writ of review by H. T. Christian against the superior court of San Diego county. Judgment of the superior court set aside for want of jurisdiction.

Gibson & Titus and J. C. Hizar, for appellant. J. B. Mannix, for respondent.

TEMPLE, J. This is a proceeding upon a writ of review, wherein it is contended by the petitioner that a certain judgment entered by the superior court of San Diego county is



void for want of jurisdiction. On the 4th day of April, 1895, an action was commenced in the superior court of the county of San Diego against the petitioner and one E. Dougherty to collect the amount due upon a promissory note in the words and figures following: "\$200. San Diego, Cal., Oct. 10, 1890. Six months after date, without grace, for value received, we promise to pay to the order of W. P. Walters the sum of two hundred dollars, with interest thereon from this date until payment at the rate of one and one-quarter per cent. per month, payable quarterly, and, if not so paid, then to become part of the principal of this note, and to bear like rate of interest till paid. Both principal and interest to be paid in United States gold coin. And we further agree that in the event of suit brought against —, then there shall be added to any judgment against us rendered in said suit, as counsel fees, an additional sum of twenty per centum in like gold coin, upon the amount of principal and interest hereof accrued at the time of the entry of said judgment; or, if paid before judgment, and after action commenced, then on the amount at the date of payment. E. Dougherty. H. T. Christian." In the complaint it was averred that the only payments which had been made upon the note were the following, on account of interest: May 12, 1891, \$15; November 7, 1891, \$15; and February 25, 1893, \$10. It was also alleged that there was due on the note as principal the sum of \$200, with interest, compounded monthly, from the 10th day of May, 1893, at the rate of  $1\frac{1}{4}$  per cent. per month. The amount due on the note when the action was commenced, for principal and interest which had been thus compounded, was \$309. In section 5 of article 6 of the constitution superior courts are given jurisdiction of cases in which the demand, exclusive of interest, amounts to \$300, and in section 11 of the same article it is provided that the powers and duties of justices of the peace shall not trench upon the jurisdiction of other courts, except as there specified, which exception does not affect this contention. The question, therefore, is whether the superior court or justice's court has jurisdiction in an action upon a note originally for less than \$300, but which, by compounding the interest, has created a new principal (if it can be so regarded), amounting to more than \$300. What induced those who framed the constitution to provide that interest shall not be considered for the purpose of determining jurisdiction? I can conceive of nothing except that those who loan such small sums may be more willing to do so if, upon default, they are afforded an expeditious and cheap means of collection; and it was intended that they would not lose this advantage if the loan were allowed to continue until the sum due should exceed \$300. Perhaps, too, it was deemed of some consequence that the jurisdiction should not depend upon a computation in regard to which

there might exist a difference. I can see no difference in principle whether the increase is by simple or compound interest. The amount sued for and in controversy in either case may exceed \$300. In each case, also, the excess of \$300 accrued on that contract as interest. The terms "principal" and "interest" are correlative. Each implies and excludes the other. That which is principal cannot be interest. Yet we contract for compound interest, and necessarily this is an agreement that the installment of interest which is compounded shall be made a principal, and bear interest. But the term "principal" applies to the new sum only in relation to the interest upon it. It is still true that this new principal itself accrued upon the contract sued upon as interest. If we were to speak of it with reference to the original principal, or in regard to the mode in which it accrued on the obligation,—became a part of the debt,—we should call it interest. So, too, if the lender were asked how much he received as compensation for his loan, he would necessarily include all except his original loan. This is interest. Civ. Code, § 1915. Within the purview of this constitutional provision, I think, when suit is brought to recover a debt, the question is, what portion of the debt became such—upon the obligation, contract, or liability sued upon—as interest? In regard to an express loan, this seems obvious, and the same rule must be extended to all cases. Counsel have not found any authority upon the precise point. *Howard v. Bates Co.*, 43 Fed. 276, is like this in some of its features. In that case the interest was not compounded, but coupons were attached to the bonds, representing the interest, and it was contended that the coupons bore interest after maturity. Suit was brought upon two bonds of \$1,000 each, and upon certain interest coupons which were attached to the bonds. The circuit court did not have jurisdiction unless the subject-matter of the suit "exceeded, exclusive of interest and costs, the sum or value of two thousand dollars." It was contended that, the coupon being a separate obligation, and itself bearing interest after maturity, the court had jurisdiction. The amount due on each coupon, it was said, made a new principal. But the court replied that it made no difference though the coupon bore interest, and could be detached, and separately sued upon. It represented the interest due on the bond, and, as to it, was interest, and should be so regarded, under the federal statute, in determining the jurisdiction of the court. The case is not exactly like the case in hand, but the principle is the same. The constitution evidently directs the court to regard the debt sued upon as divided into two parts, one of which, in reference to the other, is the principal; one represents the original debt, the other interest upon such debt. The jurisdiction must be determined by excluding all that portion which accrued as interest. The judgment of the superior court

is, therefore, without jurisdiction, and void, and the same is annulled and set aside.

We concur: BEATTY, C. J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; HENSHAW, J.

6 Cal. Unrep. 124

MAXSON et al. v. SUPERIOR COURT OF MADERA COUNTY. (L. A. 382.)

(Supreme Court of California. Sept. 15, 1898.)

JUSTICES OF THE PEACE—APPEALS—TRIAL DE NOVO—REMAND OF CAUSE.

1. On appeal from a default judgment of a justice of the peace, whether on questions of law or of fact, there cannot be a trial de novo.

2. On appeal from a justice court, the superior court has no jurisdiction, on reversing, to remand the case to the justice; the effect of an order vacating a justice's judgment being to dismiss the action without prejudice.

Commissioners' decision. Department 1. Petition by B. A. Maxson and another for a writ of review to review a judgment of the superior court of Madera county entered in an action appealed to that court from a justice court. Judgment annulled in part.

W. H. Larew, for petitioners. Francis A. Fee, for respondent.

CHIPMAN, C. An action was commenced in the justice's court by one Roberts against Maxson & Harris, petitioners in this proceeding. Defendants in that action appeared by general demurrer. A day was fixed for hearing the issue of law raised by the demurrer, and defendants duly notified. They failed to appear, and after waiting one hour the demurrer was overruled. Plaintiff thereupon demanded judgment for the sum specified in the summons, and the court entered judgment as prayed for in the complaint, after first entering the default of defendants. In due time defendants gave notice of and perfected their appeal from the judgment "on questions of law alone." Defendants filed a statement of the case setting forth the facts as above, and stating the grounds for the appeal, namely, that the complaint does not state facts sufficient to constitute a cause of action; that defendants had no notice of the overruling of the demurrer, nor of the trial of the case, other than the notice of the trial of the issue of law raised by said demurrer; that the justice had no jurisdiction to enter a judgment, and it is void. When the appeal came up for hearing, the superior court ordered "that the judgment of the lower court be, and the same is hereby, reversed, with directions to the said lower court to sustain the demurrer of the defendants to the complaint of plaintiff, with leave to the said plaintiff to amend his complaint, if so advised." To which ruling ordering any further proceedings in the lower court after the judgment was reversed, defendants excepted.

The justice had jurisdiction to enter judgment upon failure of defendants to answer. They were not entitled to previous notice of the overruling of the demurrer. Code Civ. Proc. § 872; *Stewart v. Justice's Court*, 109 Cal. 616, 42 Pac. 158. The question as to the sufficiency of the complaint was presented by the statement of the case, and could have been heard without a statement. *Rossi v. Superior Court*, 114 Cal. 374, 46 Pac. 177. The court had jurisdiction to hear and determine it. Section 980, Code Civ. Proc. But whether the complaint did or did not state a cause of action cannot be reviewed in this proceeding. *Sherer v. Superior Court*, 94 Cal. 354, 29 Pac. 716; *Id.* 96 Cal. 653, 31 Pac. 565. The superior court, however, did not sustain the demurrer, but manifestly grounded its order remanding the case to the justice upon the insufficiency of the complaint.

Petitioners contend (1) that there is no distinction between appeals on questions of law alone and appeals on questions of law and fact, and that the court ought to have ordered a new trial in the superior court; and (2) that the court had no jurisdiction to correct the rulings of the justice, and remand the case with instructions how to proceed. Respondent contends (1) that the appellate court has jurisdiction to try only such issues as were raised in the lower court, and that as no issue of fact was there raised the superior court could not try the case anew; and (2) that, having no authority to try the case, the superior court made the only order it could make, when it reversed the judgment, and remanded the case to the court of original jurisdiction.

The effect of an appeal from a justice's court is to set aside and vacate the judgment in that court, and only the superior court thereafter has jurisdiction. *Bullard v. McArdle*, 98 Cal. 855, 33 Pac. 193. And this is true, whether the appeal be on questions of law alone or of both law and fact. The appeal here was not from the order overruling the demurrer, as suggested by respondent, but was, and necessarily must have been, from the final judgment, and brought up all the proceedings of the justice. And that an appeal may be taken from a default judgment there can be no doubt. *Fabretti v. Superior Court*, 77 Cal. 305, 19 Pac. 481.

1. It is the settled law in this state that on appeal from a judgment properly entered in the justice's court by default to answer, there being no issue of fact raised in the justice's court, the appellate court cannot try the case de novo; and this is true whether the appeal is upon questions of law alone, or on questions of both law and fact. *People v. County Court*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328; *Rickey v. Superior Court*, 59 Cal. 661; *Southern Pac. R. Co. v. Superior Court*, *Id.* 471; *Curtis v. Superior Court*, 63 Cal. 435; *Myrick v. Superior Court*, 68 Cal. 98, 8 Pac. 648; *Fabretti v. Superior Court*, 77 Cal. 305, 19 Pac. 481; Code Civ. Proc. § 980.



In *Curtis v. Superior Court*, supra, defendant had answered, denying all the allegations of the complaint, but failed to appear at the trial. The appeal was on questions of law alone, and the superior court reversed the judgment, and ordered a new trial in that court. Held proper. But in the case here there was no answer and no issue of fact presented in the lower court.

2. If the appellate court cannot in such case order a new trial, what can it do? Respondent cites *Buckley v. Superior Court*, 96 Cal. 119, 31 Pac. 8, from which he quotes as follows: "When an appeal from a justice's court is regularly taken, the superior court not only has jurisdiction to try the case upon its merits, but it has entire and complete jurisdiction of the cause for any and all purposes." And it is hence claimed that the action of the superior court in the present case cannot be reviewed, because it had jurisdiction to make the order. That case has been often cited to the well-settled proposition that, however grave the error committed by the court, its judgment cannot be annulled by means of the writ of certiorari, if it had jurisdiction. But we do not think it was intended to hold that by merely assuming jurisdiction the court could acquire it, nor that, by perfecting an appeal from a justice's court to the superior court in a case where the record showed a default judgment in the lower court, the superior court could order a new trial in that court, and try the case de novo, or remand it to the lower court for trial. In *Buckley v. Superior Court* the appeal was dismissed on motion. It was held that the court had jurisdiction to do this, and its action could not be reviewed, however erroneous. If the court had jurisdiction in the present case to remand it with directions to the justice how to proceed, then *Buckley v. Superior Court* is undoubted authority, and we cannot review the error, if it was error only. But to hold that the court had such jurisdiction would be to ingraft upon our practice in justice courts a system unknown to the statutes, and would recognize a power never before exercised in this state in any reported case of which we have knowledge. It would practically inaugurate the system governing appeals to the supreme court, with all its complexity, to carry out which the law provides no machinery, and points out no procedure. The cases all treat an appeal duly perfected from the justice's court as finally and forever removing the case from that court, and vesting jurisdiction thereafter in the appellate court. In *Myrick v. Superior Court*, 68 Cal. 100, 8 Pac. 649, Commissioner Foote remarked: "The superior court should have reversed that judgment, and sent the case back for trial on the issues tendered by the pleadings." This expression is seized upon by respondent as authority for the order of the court in the present case remanding it to the justice with directions. In *Myrick v. Superior Court* there was a change of ven-

ue obtained, and defendant moved to dismiss, before the justice to whom the case was transferred, on the ground that the justice before whom the action was originally brought failed to mark the complaint "Filed," as required by law; and, although the defendant had answered and demurred, the motion was granted. Plaintiff duly appealed on "law and facts," and the superior court tried the case de novo, and gave judgment for plaintiff. It was here held, on writ of review, that the court had no power to try the issue of fact, because no such issue had been tried in the lower court, and that the action of the superior court was beyond its jurisdiction, and its judgment void, and it was ordered annulled. The suggestion of the commissioner that the case ought to have been sent back to the justice for trial was not necessary to the decision, and was not carried out in the order made by this court. That case decided but the one point, to wit, that, there having been no issue of fact tried in the lower court, no such issue could be tried in the superior court; and it is cited to that proposition in *Fabretti v. Superior Court*, supra. We have found in no case touching the practice in justices' courts, and appeals relating thereto, any intimation that the course suggested in *Myrick v. Superior Court* could be resorted to in a case like the present one; and it is because the superior court lacks jurisdiction to make such an order. It was said in *Sherer v. Superior Court*, supra: "The superior court can acquire appellate jurisdiction of a cause pending in a justice's court only in conformity with the steps prescribed by the statute for taking an appeal from that court; nor can it, after such appeal has been taken, exercise any other jurisdiction in the cause than has been authorized by statute." And it is only within the limits thus prescribed that the exercise of its jurisdiction, as the opinion aptly adds, "must be submitted to as a part of the sacrifice which every individual is compelled to yield to the infirmities of human government." In the case of *Southern Pac. R. Co. v. Superior Court*, supra, at the suit of Wells against the Southern Pacific Railroad Company, defendant was served with summons, but not with copy of the complaint. Defendant appeared specially by motion to set aside the service. The motion was granted, and judgment entered against plaintiff, who appealed. In the superior court defendant appeared specially to move the dismissal of the appeal. The court, without disposing of the appeal, ordered the defendant to answer and proceed to trial. It was held in this court, on application for writ of prohibition, that the superior court had jurisdiction only to affirm or reverse the justice's judgment, and that the order to try the case was in excess of the jurisdiction of the superior court. Our conclusion upon the point is that the court exceeded its jurisdiction in remanding the case to the justice's court. It had jurisdiction to annul and vacate the

judgment. It had not jurisdiction to try the case de novo, nor to remand the case to the lower court. The effect of the order vacating the judgment of the justice of the peace was to dismiss the case, leaving the plaintiff the right to begin another action in the justice court. This may seem a hardship, and it is; in some cases amounting to a denial of any remedy,—for example, where the statute of limitations has intervened. But plaintiff took judgment with the admonition that, if his complaint was insufficient, the superstructure built upon it might be torn down on appeal. So much of the judgment here upon review as directs the justice's court to sustain the demurrer or to take any further proceedings in the case is annulled.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion so much of the judgment as directs the justice's court to sustain the demurrer or to take any further proceedings in the case is annulled.

(122 Cal. 52)

SANGER v. RYAN et al. (L. A. 439.)

(Supreme Court of California. Sept. 2, 1898.)

ASSIGNMENTS FOR CREDITORS—RECOVERY OF PROPERTY BY ASSIGNEE—RIGHT OF DEFENDANT TO COUNSEL FEES.

Defendant accepted stock from a partnership without consideration, not in the usual course of business, and within 30 days prior to insolvency proceedings against it, but ignorant that the transfer was in fraud of creditors. When sued by the assignee for the stock, he denied the assignee's right to it, but did not set up the right of any one else except the partners, and he was not requested by them to defend their titles as partners or as individuals. *Held*, that he was not entitled to counsel fees, on rendition of a judgment for plaintiff, because of being in doubt whether it was individual or partnership property, nor because an individual creditor of one of the partners had attempted to attach that partner's interest in the stock.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Jud Sanger, assignee of J. B. Myer & Co., insolvent debtors, against Thomas C. Ryan and another. From so much of a judgment for plaintiff as awarded counsel fees to defendant Ryan, plaintiff appeals. Reversed in part.

Parsons & Sherer and S. J. Parsons, for appellant. Edwin A. Meserve, for respondent.

CHIPMAN, C. Action to have plaintiff declared to be entitled, as assignee in insolvency, to certain shares of defendant corporation. The court found that J. B. Myer & Co. were declared insolvents August 7, 1896, and plaintiff is the duly-elected assignee of said insolvents. The shares in question (of which there were 100) were of the value of \$100 each, and had been assigned by Myer

& Co., owners, on August 3, 1896, to defendant Ryan, within 30 days prior to insolvency proceedings. The assignment was without consideration, and not in the usual course of business, but Ryan then had no knowledge of Myer & Co.'s insolvency. He had no beneficial interest in the stock or its dividends. The court further found that "under the circumstances in which said stock was intrusted to the defendant Ryan, he had doubt whether it was partnership property of the said firm or the individual property of said Myer and Merrill, each being the owner of fifty shares," and that "an individual creditor of said Merrill, in an action against him, attached, or attempted to attach, fifty shares of said stock as the property of said Merrill, and said Ryan has in good faith made defense herein for the purpose of having the ownership of said stock judicially determined, and to relieve himself from liability as such trustee." As conclusion of law the court found plaintiff entitled to the shares and dividends, "less, however, the sum of one hundred and fifty dollars, hereby allowed to the said defendant Thomas C. Ryan for his reasonable expense incurred in the employment of counsel and otherwise in the litigation concerning said trust property." Judgment was accordingly rendered. The appeal is from so much of the judgment as awarded counsel fees to defendant Ryan, and comes here by bill of exceptions. It is claimed that the findings are not supported by the evidence, and the judgment is not supported by the findings.

It is contended that there is no evidence to sustain the finding that, under the circumstances in which the stock was intrusted to Ryan, he had doubt whether it was firm property or individual property of the firm's members; that an individual creditor of Merrill (one of the partners) attached, or attempted to attach, 50 shares, and that Ryan in good faith made defense in the present action to determine the ownership of the property. The only evidence submitted by defendant was that of his attorney, who testified that when Ryan was served with summons witness was employed by Ryan "to protect him as trustee, and to make such showing to the court as would reveal the fact that he held this stock as trustee for Mr. Myer and Mr. Merrill, and that he had no interest in it whatever other than as a trustee; and to put in such showing as would show that he held it in good faith, and to save him from the charge of having received it with any intent to defraud anybody; and to put in an answer in this case, and to make such showing as I thought was right and proper in order to protect the trust and to protect him from any claims against Mr. Myer and Mr. Merrill." The action was brought September 2, 1896, and summons was served October 27th. There was no evidence showing a trust further than as already stated by the witness, and there is no evidence showing "the cir-



cumstances in which said stock was intrusted to the defendant," as found by the court, other than as stated by the witness. There is no evidence tending to show upon what facts Ryan based his doubt as to whether the property, when assigned to him, was individual or partnership property. There is no evidence of any claims to the property, adverse to plaintiff, made upon Ryan, until some time after he was served with summons. We think it doubtful whether the findings challenged are sustained by the evidence; but, if they were, we do not think they justify the conclusion of law or judgment that defendant should recover attorney's fees. He was not a trustee in such sense as were the persons in the numerous cases cited by him, in some of which it was held that, "if the title to the property is assailed, he must defend it in court and out, as though it were his own, and may expend the trust funds in the employment of counsel for this purpose." *Glide v. Dwyer*, 83 Cal. 477, 23 Pac. 706, and *Floyd v. Davis*, 98 Cal. 591, 33 Pac. 746, are cited among other cases. The case in 83 Cal. 477, 23 Pac. 706, was that of foreclosure of mortgage by trustees holding the mortgage in trust to secure the holders of certain indebtedness. The case in 98 Cal. 591, 33 Pac. 746, related to the Lick trust. These cases are widely different from the one before us. Section 1021, Code Civ. Proc., provides as follows: "The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties. \* \* \* " The Code expressly provides for payment of attorney's fees in foreclosure and contested election cases, enforcing mechanics' liens, partition cases, and probate matters, and some others; and it was held in *Miller v. Kehoe*, 107 Cal. 340, 40 Pac. 485, that counsel fees may be allowed in equity in an action for the preservation or distribution of a fund, where all the parties have a common interest; but it was also said that the general rule is that even a successful party cannot recover counsel fees in an action either at law or equity except in enumerated instances where they are expressly authorized by statute,—citing *Williams v. McDougall*, 39 Cal. 85, and *Salmina v. Juri*, 96 Cal. 418, 31 Pac. 367. In the case we have here, defendant admitted that the property belonged to the insolvents, but denied the right of plaintiff to it. He did not set up any right in any one except the insolvents, and this he did in the face of the adjudication that they were insolvents, and in face of the fact that their property had been transferred to plaintiff. Defendant's ignorance of the fact that the assignment to him was in fraud of the creditor cannot, we think, avail him. When the complaint was served upon him he then knew, if not before, that under the insolvent act the assignee was entitled to the possession of the property if it belonged to the insolvents. He was not called upon by Myer and Merrill to

defend their title as the owners in their individual capacity or otherwise, and his doubts, if he had any, as to whether they owned the stock as partners or otherwise, cannot affect the question. He chose to act as volunteer in a wholly unnecessary litigation without instructions or authority from the alleged beneficiaries,—unnecessary, for he could have answered and deposited the property with the court without any breach of trust on his part, where he would have been fully protected, and where Myer and Merrill could have claimed it as their individual property if such it was. We do not see that the findings stand in the way of correcting the error without a new trial, and therefore advise that so much of the judgment as allows counsel fees to defendant Ryan be reversed, and otherwise the judgment stand as rendered.

We concur: BRITT, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment, so far it allows counsel fees to defendant Ryan, is reversed; and otherwise the judgment is affirmed.

(122 Cal. 84)

PEOPLE v. MILLER. (Cr. 394.)<sup>1</sup>

(Supreme Court of California. Sept. 10, 1898.)

CRIMINAL LIBEL—WHAT CONSTITUTES—CORPUS DELICTI—PROPRIETORSHIP OF PAPER—VENUE—EVIDENCE—CONFESSIONS—TRIAL—OBJECTIONS—APPEAL—REVIEW.

1. The corpus delicti of the crime of libel is not the editorship or proprietorship of the paper in which the libel was published, but the malicious publication.

2. Acts and admissions of one charged with criminal libel tending to show his proprietorship of the paper in which the libel was published are not confessions, in legal contemplation.

3. On an issue whether defendant was proprietor of the paper in which a criminal libel was published, a witness testified that he himself was the proprietor, and that defendant had nothing to do with it. The foreman of the paper testified to facts tending to the same effect, but the only way he knew the first witness was proprietor was because nothing had been told him to the contrary. Opposed to this were many acts and admissions of defendant tending to show ownership. *Held*, that the issue was for the jury.

4. In a prosecution for criminal libel, where venue is laid in a county other than that in which the article was issued for circulation it need not be shown that defendant took the article to the former county, or directed it to be sent there, and there circulated it or caused it to be circulated, since Pen. Code, § 252, makes it sufficient to show that accused knowingly parted with the immediate custody of the libel under circumstances which exposed it to be read or seen by others.

5. Defendant objected to a question, and his objection was overruled, and he excepted. The question, however, was not answered. Subsequently the same question was asked and answered without objection by defendant. *Held*, that an objection thereto could not be urged on appeal.

6. When the record fails to show that ex-

ceptions were taken to a ruling, the ruling will not be reviewed.

7. Under Pen. Code, § 252, making it sufficient to sustain a charge of libel to show that accused knowingly parted with the immediate custody of the libel under circumstances which exposed it to be read or seen by others, it is not necessary to show that defendant personally wrote or printed the libelous article, nor that he personally or by personal direction circulated it.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

W. W. Miller was convicted of libel, and he appeals. Affirmed.

H. V. Morehouse and F. J. Hamblar, for appellant. W. F. Fitzgerald, Atty. Gen., and C. N. Post, Dep. Atty. Gen., for the People.

CHIPMAN, C. Defendant was informed against in the county of Santa Clara for the crime of libel, alleged to have been committed December 5, 1896, and was by the jury convicted. Judgment was accordingly entered, and the defendant was sentenced to be imprisoned in the county jail for the term of one year. Defendant appeals from this judgment, and from the order denying motion for new trial. The charge was that defendant, being the "author, editor, and proprietor of a newspaper \* \* \* called \* \* \* the 'Illustrated World,' \* \* \* printed in the city and county of San Francisco, and published and circulated in said city and county, and circulated in said county of Santa Clara, upon Saturday of each week, \* \* \* in one of the regular weekly issues of said paper did willfully and maliciously print, \* \* \* publish, and circulate \* \* \* the following malicious defamation, \* \* \* to wit: 'If the conversations of Chas. W—t and Judge R. could be heard, how much crooked work would it reveal?' 'Would it not be well for those having cases before the judge to employ Attorney W—t?' " It was alleged that "the terms and names 'Judge R.' and 'the judge' meant, and were intended to mean, and were by the public understood to mean and refer to, Judge John Reynolds, who was \* \* \* superior judge of the superior court for Santa Clara county, and the terms 'Chas. W—t' and 'Attorney W—t' \* \* \* were intended by defendant to mean, and were by the public understood to mean and refer to, Charles Wright, who was then and there a reputable attorney at law, a practitioner in said county." It is averred that the language was intended to mean, and was understood by the public as charging that "said Superior Judge John Reynolds was dishonest and corrupt in his office as such superior judge, and that in concert with said attorney at law, Charles Wright, he, the said John Reynolds, as superior judge, did connive to defraud and cheat by dishonorable means those litigants that came before him in the trial of causes, and \* \* \* was led and guided, against the law and in conflict with justice, to decide

causes in his (said Reynolds') control in favor of said attorney, Charles Wright." Allegations follow that the publication was false and malicious, and tended to impeach the integrity of the judge, and thereby expose him to public contempt, etc. The sufficiency of the information is not questioned, nor that the language published was libelous, nor that it was published in Santa Clara county concerning the persons named at the time charged. Evidence upon these points need not, therefore, be noticed.

1. It is contended by defendant that the corpus delicti in this case was either that he was editor, proprietor, or publisher of the Illustrated World; that there is no proof of the corpus delicti, except the admissions of defendant; and that it cannot be established by extrajudicial admissions or statements. Counsel's position seems to be that a confession includes more than an admission, and that, if by the former the corpus delicti cannot be established, neither can it be by the latter. We cannot regard the editorship or proprietorship of the newspaper as the corpus delicti in this case. The essence of the crime is the malicious publication of the libelous language, and does not necessarily lie in the authorship of the article, or the ownership of the press that prints it. But, even if these facts enter into the question of guilt, it does not follow that an admission of ownership would be a confession of the crime. The acts and admissions of the defendant tending to show that he was the proprietor, either in himself or jointly with some other person, are not confessions, in legal contemplation. The law makes a wide distinction between confessions and admissions. This was pointed out in *People v. Strong*, 30 Cal. 151: "A confession, in criminal law, is the voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation he had in the same. The word 'confessions' is not the mere equivalent of the words 'statements or declarations.'" The term "confessions" is restricted to acknowledgments of guilt. 1 Greenl. Ev. 170. This court said in *People v. Parton*, 49 Cal. 632: "An admission of a fact not in itself involving criminal intent is not to be rejected as evidence (without the preliminary proof) merely because it may, when connected with other facts, tend to establish guilt." See *People v. Le Roy*, 65 Cal. 613, 4 Pac. 649.

The alleged libel was published December 5, 1896, in the Illustrated World. It appeared from the evidence that this was a weekly journal published at 623 Montgomery street, San Francisco, and was circulated in Santa Clara county. The article in question was read in Santa Clara county by several witnesses on the day of the issue, and soon thereafter. The heading of the article read, "What Our Country Friends Would Like to Know;" and under the subhead "San José" appeared the alleged libelous publication.



The witness Bishop, who had read the article, in reply to the question, "State what you understood by it in reference to any person," answered: "I understood by the use of the word 'crookedness' that, if anybody should have a case that was to come before Judge R., it would be to his interest to employ Mr. Chas. W—t, because he would probably get the best of it when it came to the trial. \* \* \* I understood by the language and the word 'crookedness' that if Mr. Wright, or the attorney mentioned in his paper, and some other attorney were to have a case on trial before the judge, that the opposite counsel would not get a fair shake; that, if there was any possible way for him to decide it in favor of Mr. C. D. W—t, why, he would do it. \* \* \* I understood the words, 'Would it not be well for those having cases before the judge to employ Attorney W—t?' to mean that, if a man wanted to win that had a case to come up before the judge mentioned, that he better employ the attorney mentioned. I gave it no other meaning." The witness Macaran testified to the same effect. Judge Reynolds testified: "I never had any conversation with Mr. Wright that I would not be perfectly willing to have anybody hear, while I was on the bench, in reference to any business matters. There was nothing venal or corrupt or crooked either contained in or alluded to in conversations, or existing in fact, between us."

The question of fact chiefly discussed by counsel is whether the evidence showed that defendant was the editor or proprietor or publisher of the paper; and it is insisted that he was not shown to have had any business connection whatever with the paper, but that the sole owner, editor, and proprietor was one A. S. Burroughs. A lease of the premises 623 Montgomery street, San Francisco, where the paper was published, executed by defendant and Burroughs July 23, 1896, and by the trustees of the Floyd estate, was in evidence. In it Burroughs and defendant were described as "proprietors of the Illustrated World Publishing Company, of the city and county of San Francisco, state of California, parties of the second part." The lease was "for the term of twelve months from the tenth day of August, 1896." It contained the following provision: "And said parties of the second part will use and employ said premises solely for the purpose of their business as publishers of the Illustrated World Publishing Company." The evidence is that Burroughs and defendant both signed the lease as the parties of the second part. John Duckel was pressman for Francis, Valentine, & Co., in San Francisco, December 5, 1896. He was shown a copy of the paper of that date. He testified: That either he or the assistant foreman did the work of printing it. It was done under witness' directions. He received the forms from the World office, on Montgomery street; delivered the edition, when printed, to the Bus-

well Company, binders. The Francis-Valentine Company printed the Illustrated World a couple of years for Bartlett, and about a year for Miller. Was printing it for defendant, Miller, on December 5, 1896. Sometimes received orders from defendant, and sometimes another person. On cross-examination he testified: "I should judge that I printed it for Miller, from the way he talked when he came down about the forms. He would come down and want to know why it wasn't printed in red this week. He would want it red one week, and then again he would want it in purple, and of course he talked about 'my paper.'" Witness did not see Burroughs at these times. "I have no knowledge that Miller was the proprietor of that paper, other than that he came down and said it was 'my paper.' \* \* \* I am positive I had a conversation with Mr. Miller in reference to his saying that this was his paper, prior to December 24, 1896. I cannot state the positive date of this conversation. It was both before and after the 5th day of December." Witness Buswell testified: That his business was that of binding and mailing newspapers. He bound the issue of December 5th. He delivered some papers to the news company December 5th. He first met defendant in July, August, or September, 1896. He was introduced to witness by some of the World people as the new proprietor, who said his orders were to be followed. He thought Mr. Burroughs introduced him. He was asked if he did not know that Burroughs was the editor and proprietor from July, 1896, to January, 1897: "A. As a positive fact, I always understood Mr. Miller was. Q. By what did you understand it? A. By what Miller told me. Q. What did Mr. Miller tell you? A. He told me he bought the paper. Q. When was that? A. In July, August, or September, 1896. I understood that Mr. Miller was the proprietor of the paper from July, 1896, to January, 1897. He told me he bought the paper. That was in July, August, or September, 1896." Witness Watson, of the San Francisco News Company, testified that his business was handling and distributing papers, weeklies and monthlies. He testified: "We handled the edition of the World of December 5, 1896. I know Byron Millard, of San José. He is one of our regular customers. Mr. Millard got ten copies of the Illustrated World of date December 5, 1896, from our company. These papers came from Buswell's bindery to our office. I understood that W. W. Miller did the business of the World with our company during December, 1896." Witness settled with the World January 7, 1897, and gave in evidence a receipt signed by Miller of that date for \$47.53, balance due Illustrated World at that time. Witness Walmer was bookkeeper of Francis, Valentine & Co., on December 5, 1896. He testified: That they commenced to print the Illustrated World on May 30, 1896, and ceased on April 6, 1897. There was an interval

of a month between December 24, 1896, and January 26, 1897. He never talked with defendant about printing the paper, but did talk with him about the payment of the bills. That he came about once a week,—sometimes not for two weeks. He was not positive as to the dates when Miller spoke to him, and could not fix a date before December 5th. Miller ordered some postal cards printed on December 17, 1896, and witness said he thought they related to the business of the World. Rosalio Salmon testified for defendant: That he was foreman of the Illustrated World from March, 1896. Burroughs became proprietor about July 6, 1896, and he continued his proprietorship the rest of the year. Witness said: "I only know from what he told me that he was proprietor of the paper on the 4th, 5th, and 6th days of December, 1896. He ran the paper up to the end of the year; Mr. Miller then appeared as proprietor about the first of the year 1897. I received all my orders from the beginning of the 6th of July, 1896, up to and including 5th day of December, for making up the paper—cuts and everything—from Mr. Burroughs. I received them from him alone, for I recognized him as the only person authorized to give me orders. \* \* \* Mr. Miller was at the office occasionally between July and December. I didn't know who he was. I knew him as Mr. Miller for about three months. He gave me no orders between July and December. He was not recognized by any of the employés of the paper as the manager, editor, or proprietor. I suppose he had a friendly interest towards Mr. Burroughs, and that is why he was around there." Witness A. S. Burroughs, for the defense, testified very positively that he was the sole and only proprietor, editor, and manager of the paper from July to January, and that defendant had no interest in or connection with it whatever. Upon cross-examination he testified that he was convicted in the federal court at Los Angeles in 1889 for mailing an improper letter, and was sentenced to two years in San Quentin, and served out his time. He also testified that he was convicted of the crime of forgery in Napa county, and that he had passed under the name of W. W. Wyman while there. No other witnesses were called for defendant.

We have given substantially all the evidence in the case, for the reason that it is earnestly contended that there is nothing in any way tending to establish defendant's guilt, except his own admissions, and that he cannot be convicted on these alone, and furthermore that the positive, undisputed evidence of Salmon and Burroughs is that defendant had no interest whatever in the paper on December 5th, and took no part in its management. It is manifest, we think, that the facts, in their nature admissions tending to show that defendant had an interest in the paper as proprietor or manager, do not come within the category of confessions, as understood in crim-

inal law. The lease is in itself strong evidence that defendant was a proprietor with Burroughs; for he therein so describes himself, and he agrees over his own signature that they "will use and employ said premises as publishers of the Illustrated World Publishing Company." The admission made by defendant in this lease was not of a fact in itself involving criminal intent. There was nothing in the admission which showed an intention to engage in the publication of a paper containing libelous charges against reputable citizens, and yet the admission was such as, connected with other facts, tended to establish guilt, and was admissible. *People v. Parton*, supra. And the same may be said of other admissions and conduct in the nature of admissions. They were not confessions of guilt. As to the lease, Burroughs explains why it was signed by defendant; and, if his evidence is to be received as conclusive, it would appear therefrom that defendant was wholly blameless for the crime committed, and punishment should fall upon Burroughs, and not upon defendant. But the jury did not believe Burroughs, and we cannot say they were wrong in rejecting his evidence. Salmon's evidence tended to show that defendant had no connection with the management of the paper. But he testified that the only way he knew that Burroughs was the editor and proprietor was because nothing was told him to the contrary, and that this was the only way he knew it. He does not appear to have known anything about the lease, nor does he state anything in any wise contradicting the evidence of witnesses as to what defendant did on the outside in the way of manifesting an interest in the paper. We think there was evidence sufficient to support the verdict, and, if the jury erred in accepting that which was incriminatory and rejecting that which was exculpatory, it was an error not within our province to correct.

2. It is claimed that the venue was not proved, although it is admitted that the article was published in Santa Clara county, because there is no evidence that defendant published it in Santa Clara county. Defendant concedes that a person may be prosecuted for libel in any county where the paper is circulated by him or through his agency, but it is claimed that it must be shown that he circulated or caused it to be circulated in the county where the prosecution is conducted; citing *Odgers, Lib. & Sland.* star pp. 580, 581, where it is said that "it is necessary to further prove, in a criminal case, that the prisoner published the libel in the county in which the venue is laid." If defendant means that it must be shown that he took the paper to Santa Clara county, and there circulated or caused it to be circulated, or that he must be shown to have directed the paper to be sent there, before he can be convicted, we think he mistakes the law. If defendant, being the proprietor, parted with the immediate custody of the paper in San Francisco under circum-



stances such as exposed it to be read by other persons, it matters not how it reached San José. When he parted with control of the libel, it was deemed to be published, so far as the defendant was concerned, wherever it found its way, unless it passed into the immediate possession and control of the person or persons affected by it. It was not necessary to show that defendant took the paper, or directed it to be taken, to the printers, and again directed it to be taken to the binders, and afterwards directed it to be sent to the news company, to be mailed to San José. It is sufficient if he is shown to have had control and management of the paper, and parted with control under circumstances such as implied an intent to give it circulation. Pen. Code, § 252. The jurisdiction to try the case in Santa Clara county, though the paper was published in the city and county of San Francisco, is given by article 1, § 9, of the constitution. See *In re Kowalsky*, 73 Cal. 120, 14 Pac. 399.

3. It is claimed that the court erred in overruling defendant's objection to the question: "Q. What did you understand by the language of the paper in relation to Judge Reynolds and Attorney Wright?" The court overruled the objection, and defendant excepted. The district attorney thereupon reframed his question, the answer to which was, on motion of defendant's attorney, stricken out. The record then shows: "Mr. Beasley [district attorney]: Don't state to whom you understood it to refer, but state what you understood by it in reference to any person. A. You are trying to get the word 'crookedness,'—what it means? Q. Yes; that is what I am trying to get at." The witness then gave what he understood by the word "crookedness." Defendant made no objection to the question or answer, and we think cannot now be heard to object.

4. The next errors assigned (paragraphs 4 and 5 of defendant's brief) cannot be considered, because the record fails to show that defendant took an exception to the ruling.

5. Finally, it is claimed that the evidence is insufficient to sustain the verdict, because there is no testimony whatever that the defendant wrote or printed or published the article, or was manager of the paper. We have already seen that there was evidence sufficient to justify the jury in finding that defendant was a proprietor of the paper at the time the libel was published. It was not necessary to prove that defendant personally wrote or printed the article, nor that he with his own hands or by his personal direction circulated it. It was sufficient upon these points to show that he knowingly parted with the immediate custody of the paper containing the libel, under circumstances which exposed it to be read or seen by any other person than himself. Pen. Code, § 252. It is implied by the verdict that the jury found defendant guilty of doing this, and, as there was evidence to support such finding, it cannot now

be disturbed. See *Odgers*, Lib. & Sland. pp. 157, 158; *Townsh. Sland. & L.* § 115. We advise that the judgment and order be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

122 Cal. 106

TODD v. BOARD OF EDUCATION OF CITY OF LOS ANGELES. (L. A. 446.)

(Supreme Court of California. Sept. 15, 1898.)

LIMITATION OF ACTIONS—WRITTEN OBLIGATIONS.

An entry in the minutes of a school board which merely shows that building plans submitted to it had been adopted expresses no contract, and hence an action for the value of the plans, brought two years after their acceptance, is barred by Code Civ. Proc. § 339, requiring an action not founded on a written obligation to be brought within two years.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by Hugh Todd against the board of education of City of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

John W. Kemp and Theodore Martin, for appellant. W. E. Dunn and Albert Crutcher, for respondent.

BRITT, C. On November 21, 1892, plaintiff submitted to the defendant board certain architectural plans and specifications for an addition to a school building in the city of Los Angeles. So far as appears, the only action taken by said board at any time concerning said plans, etc., was evidenced by the following entry in its minutes, made on the day aforesaid: "Dr. Barber [a member of the board] moved that the plans of H. Todd for the enlargement of the Spring street building be adopted. Carried." More than two years thereafter plaintiff commenced this action to recover the alleged reasonable value of said plans and specifications, stated at \$500. The court below held that his suit is barred by the provision of the statute of limitations, requiring an action upon a contract, etc., "not founded upon an instrument of writing," to be brought within two years after the cause of action accrues. Code Civ. Proc. § 339. Plaintiff contends, as we understand the argument, that said minute entry is an "instrument of writing," so that his case is not within said section of the statute. If said entry is in any legal sense an instrument of writing, it is yet one expressing no contract or obligation to pay plaintiff anything. Therefore it is not, and cannot be, of itself the foundation of an action to compel payment. We forbear discussion, which could hardly make the conclusion plainer. *McCarthy v. Water Co.*, 111 Cal. 340, 43 Pac. 956; *Thomas v. Pacific Beach Co.*, 115 Cal. 136, 46 Pac.

899; *Foorman v. Wallace*, 75 Cal. 555, 17 Pac. 680; *Hoag v. Howard*, 55 Cal. 564. The judgment should be affirmed.

We concur: CHIPMAN, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

122 Cal. 98

**SAN DIEGO LAND & TOWN CO. v. LA PRESA SCHOOL DIST. IN SAN DIEGO COUNTY. (L. A. 394.)**

(Supreme Court of California. Sept. 10, 1898.)

**VOLUNTARY PAYMENT OF TAX—RECOVERY—MISTAKE OF FACT.**

Where property was assessed in a district in which it was not situate, and the owner, having the means of discovering the mistake, voluntarily paid the tax, he could not recover it back, as being paid under a mistake of fact, under Civ. Code, § 1577, defining a mistake of fact as one not caused by the neglect of a legal duty.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the San Diego Land & Town Company against La Presa school district in San Diego county. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Affirmed.

Works & Works and Works, Works & Ingle, for appellant. Chas. Wellborn, for respondent.

CHIPMAN, C. Action to recover \$525, claimed to have been paid by plaintiff and received by defendant as special school tax under a mistake of fact. At the close of plaintiff's evidence the court gave judgment of nonsuit for defendant, from which, and from an order denying motion for new trial, plaintiff appeals.

It appeared from the evidence that "Sweetwater dam—that is, the masonry structure, the retaining wall—is not, nor has it ever been, within La Presa school district, \* \* \* and is not on tract G, Jamacha ranch." But it appeared that "a portion of tract G, Jamacha ranch, is in the lake formed by Sweetwater dam, and is covered by the water of the lake." The description of the property given in the receipt is as follows: "Sweetwater dam, on tract G, Jamacha ranch." Under the head of values is, "Improvements, \$75,000." The general manager of plaintiff company testified that when the tax was paid he believed the property described in the receipts was inside La Presa school district; that it was the custom of the company to hand a statement of the company property to the county assessor, and probably it did so in this instance, but he did not know. The appeal is urged on the ground that money paid under a mistake of fact is recoverable back; citing

*City of Indianapolis v. McAvoy*, 86 Ind. 587; *Strusburgh v. Mayor, etc.*, 87 N. Y. 452; *Woolley v. Staley*, 39 Ohio St. 354; *Diefenthaler v. Mayor, etc.*, 111 N. Y. 331, 19 N. E. 48. It is claimed by defendant that there was in fact no mistake because the description, "Sweetwater dam, on tract G, Jamacha ranch," had no reference to the masonry structure or retaining wall, but to that portion of tract G, Jamacha ranch, which the evidence showed "is in the lake formed by Sweetwater dam, and is covered by the lake," and which was owned by plaintiff. Plaintiff replies to this that the receipt shows that the tax was for improvements, and that it is absurd to think that the taxing authorities could have believed that the reservoir above the school-district line was an improvement to real estate in any sense of the term. We do not think it necessary to determine what the description includes or excludes. The evidence is that the payment was made voluntarily, and with full means of knowledge of the facts. The first payment was made in November, 1892, the next in April, 1893, the next in November, 1893, and the last in April, 1894, and it was after this last payment the manager of plaintiff company "was informed by a man in the employ of the company that the property was outside the district." The authorities are generally agreed that a tax voluntarily paid cannot be recovered back. Mr. Cooley says: "Every man is supposed to know the law, and, if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as the reason why the state should furnish him with remedies to recover it back. Especially is this the case when the officer receiving the money, who is chargeable with no more knowledge of the law than the party making payment, is not put on his guard by any warning or protest, and the money is paid over to the use of the public in apparent acquiescence in the justice of the exaction. Mistake of fact can scarcely exist in such a case except in connection with negligence, as the illegalities which render such a demand a nullity must appear from the records, and the taxpayer is just as much bound to inform himself what the records show, or do not show, as are the public authorities. The rule of law is a rule of sound policy also; it is a rule of quiet as well as of good faith, and precludes the courts being occupied in undoing the arrangements of parties which they have voluntarily made, and into which they have not been drawn by fraud or accident, or by any excusable ignorance of their legal rights and liabilities." Cooley, *Tax'n*, p. 809. Our Code defines mistake of fact to be one "not caused by the neglect of a legal duty on the part of the person making the mistake." Civ. Code, § 1577. It is the legal duty, we think, of the owner of property to see that it is properly assessed; and ample provision is made for correcting mistakes in the roll or list. The manager of the company



did not testify that he paid the tax under mistake of fact, but that when the tax was paid he believed the property was inside the district. Conceding, however, that plaintiff made a mistake of fact in paying when it was not liable, the mistake was caused by its own neglect of duty, and, the payment being voluntary, the law will furnish no relief.

In 1858 the legislature of this state passed an act imposing a stamp tax upon shipments of gold out of the state. Stamps were placed on sale with the county treasurers. In *Brumagim v. Tillinghast*, 18 Cal. 265, plaintiff sued the county treasurer of the city and county of San Francisco to recover back money paid in the purchase of these stamps. The act was held to be unconstitutional and void. Recovery depended upon the character of the payment—whether voluntary or under compulsion or coercion. It was held that “the rule is well settled that moneys voluntarily paid upon claim of right, with full knowledge of all the facts, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability. The illegality of the demand paid constitutes of itself no ground for relief. \* \* \* It is the compulsion or coercion under which the party is supposed to act which gives him a right to relief. \* \* \* If he voluntarily pay an illegal demand, knowing it to be illegal, he is entitled to no consideration; and if he voluntarily pay such demand in ignorance or misapprehension of the law respecting its validity, he is in no better position, for it would be against the highest policy to permit transactions to be opened upon grounds of this character.” This case has been many times cited with approval. We can see no reason why the rule should be different, and we do not understand that it is different, where the mistake is one of fact, if the mistake is such that with ordinary diligence it could have been discovered. The law imputes knowledge to one who has the means of knowledge. The assessment was notice to plaintiff as to how its property was described. It had the means of knowledge, and was put upon inquiry as to the facts. Civ. Code, § 19. It is not claimed that plaintiff owns no land in tract G, Jamacha ranch. The description at most is ambiguous, and we think is such that plaintiff might reasonably have made the mistake claimed. In such case the court will not relieve. *Kerr, Fraud & M.* p. 412. It was held in *Maxwell v. San Luis Obispo Co.*, 71 Cal. 466, 12 Pac. 484, in an action to recover back an illegal tax, that the complaint must show affirmatively that the payment was not made voluntarily; and the fact must be proved, or there can be no recovery, for it was said “all payments are supposed to be voluntary until the contrary appears.” In *Cooper v. Chamberlin*, 78 Cal. 450, 21 Pac. 14, the action was to recover back the money paid under protest upon an alleged assessment which failed to identify by proper description the plaintiff's property. It was conceded that the complaint

showed that plaintiff's property was not assessed because it was not described. It was held on demurrer that the proceedings of defendant in the premises were void, and his threat to sell constituted no duress, and the payment, under the circumstances, was not recoverable, because voluntary. It was held in the case of *City of Indianapolis v. McAvoy*, supra, cited by plaintiff, that money paid under mistake of fact may be recovered, notwithstanding a negligent failure to use the means of knowledge. The case overruled *Railroad Co. v. Pattison*, 41 Ind. 312, where it was held “that the appellee had the means of knowing the location of her lots in respect to the city boundaries, and consequently she was not entitled to relief”; but in examining the rule there laid down the court in the later case intimated that the rule would apply “if the means of knowledge are present, or so easily accessible and convenient that the failure to use them would constitute negligence, and such negligence as, under the circumstances, ought to preclude relief.” In the case of *Jackson v. City of Atlanta*, 61 Ga. 228, plaintiff sued to recover back certain taxes collected by the defendant upon lots supposed to be within the city, but on survey were found to be without its boundaries. The court said: “The plaintiff paid his tax to the city without objection or protest that his property was not subject to taxation by the city, and that, the tax having been paid into the city treasury, and expended for the common benefit and protection of those who were recognized as being within the limits of the city, including the plaintiff, he is not now entitled to recover it back from the city.” Whatever may be the differences of opinion existing upon the question, we think the better rule is to deny relief in such cases as this. The judgment and order should be affirmed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(122 Cal. 94)

**RISDON IRON & LOCOMOTIVE WORKS  
v. CITIZENS' TRACTION CO. OF  
SAN DIEGO. (L. A. 355.)**

(Supreme Court of California. Sept. 10, 1898.)

**APPEALABLE ORDERS—RAILROADS—ENFORCEMENT  
OF LIABILITIES AGAINST PROPERTY.**

1. Code Civ. Proc. § 963, allowing an appeal from an order “dissolving \* \* \* an attachment,” applies to an order releasing attached property on the ground of nonliability to seizure.

2. Movables of a street-railroad company, even though necessary to operation under the company's franchise, are not exempt from forced sale.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; J. W. Hughes, Judge.

Action by the Risdon Iron & Locomotive Works against the Citizens' Traction Company,

of San Diego. From an order discharging a writ of attachment issued against defendant's property, plaintiff appeals. Reversed.

Withington & Carter, for appellant. J. B. Mannix, for respondent.

BRITT, C. Respondent is a street-railroad corporation, organized under the laws of this state, and on January 9, 1897, in virtue of certain franchises to it granted by the city of San Diego, it was engaged in operating a line of street railway in said city for the transportation of passengers, electricity being used as the motive power. This is an action by appellant, which is also a corporation, on a promissory note of respondent. On the day aforesaid appellant caused a writ of attachment, issued in the action, to be levied on certain cars, trucks, electric goods, and supplies, fire-proof safes, etc., the property of respondent, then used and necessary to be used in and about the business of operating said line of street railway. Thereupon respondent moved the court to discharge the attachment on the ground (we state it generally) that, considering the nature of respondent's business as a carrier of passengers, and the uses of the attached property in that behalf, the same was not subject to attachment for respondent's debt. The court ordered that "said attachment be discharged in respect of said property." Plaintiff appealed from the order.

Respondent makes the point that no appeal lies from said order. Section 963, Code Civ. Proc., provides that an appeal may be taken from an order (among others mentioned) "dissolving or refusing to dissolve an attachment." It is argued that this applies only to orders made under section 556 of the Code, which provides for discharging the writ of attachment where "the same was improperly or irregularly issued." Respondent claims that an order for the release of attached property on the ground that it is not liable to seizure under the writ is not an order dissolving the attachment. To us, however, it seems that, as regards the property released, the attachment is as effectually dissolved by such an order as if the writ were quashed. The provision of section 963, giving the right of appeal, is in terms directed to an order dissolving an attachment. The words "an attachment" in this connection are quite broad enough to include seizure and custody under the writ as well as the writ itself. Thus, it is common to say that final judgment for defendant has the effect to dissolve a prior attachment; and this has no regard to any question whether the writ was properly or regularly issued. We think the order was appealable.

As to the merits of the order, in our opinion the quality of the exemption from execution which pertains, except when otherwise provided by statute, to the franchise of a corporation such as the respondent (Gregory v. Blanchard, 98 Cal. 311, 33 Pac. 199), does not extend also to property of the kind attached

in this action, although it may be proper, or even necessary, to operations under the franchise. Such property does not emanate, immediately or immediately, from the state, like the privileges embraced in a franchise; it has no character of personal trust, as in the case of the franchise; and, in our opinion, it is subject to attachment or execution in like manner as other property not exempt by statute. Code Civ. Proc. §§ 540, 688, 690; Lathrop v. Middleton, 23 Cal. 257; Humphreys v. Hopkins, 81 Cal. 551, 22 Pac. 892; 1 Freeman Ex'ns, § 146a; Coe v. Railroad Co., 10 Ohio St. 372; State v. Rives, 27 N. C. 297, 307. There are respectable authorities which hold a different doctrine, but we are disposed to think they are not supported by the better reason. See Hart v. Burnett, 15 Cal. 593. Whether the rule of liability to attachment or execution should extend to lines of railway, or to parts of other similar aggregation of property susceptible of use only as a unit, need not be decided. The cars, trucks, iron safes, and other movables seized under the writ in this action are not such property. The order appealed from should be reversed.

We concur: CHIPMAN, C.; BELCHER, C

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

(125 Cal. 444)

MAYBERRY v. ALHAMBRA ADDITION WATER CO. (L. A. 367.)

(Supreme Court of California. Sept. 10, 1898.)

WATER COURSES—ADVERSE USER—CONTRACTS—ARTIFICIAL WATERS—JUDGMENTS.

1. A contract between the owner of a cañon containing a natural stream and an adjoining landowner gave the landowner the right to use the "waters flowing in said glen" for irrigating his lands, and in consideration the waterowner was given a right of way across the lands for an irrigation ditch, subject to the landowner's right to use for irrigation the waters flowing in the ditch, "or in any water ditch, flume, or aqueduct used, dug, or erected" on the land. *Held*, that the contract gave the landowner no right to use the waters developed artificially after the making of the contract and turned into the stream.

2. In an action to determine rights under said contract, it was decreed that plaintiff landowner had the right to use the waters of the stream, and also any waters flowing out of it in any ditch across his land. *Held*, that the judgment conferred no right to use artificial waters added thereto after the commencement of the action.

3. A water right is not barred by acquiescence in an impairment thereof for less time than is required for adverse user.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by E. L. Mayberry against the Alhambra Addition Water Company. From a judgment for defendant, and from an order granting a new trial, plaintiff appeals. Reversed.



Van R. Paterson and Anderson & Anderson, for appellant. A. M. Stephens and Graves, O'Melveny & Shankland, for respondent.

**BRITT, C.** In the year 1860 one B. D. Wilson owned a considerable body of land, which included the source and upper portion of the channel of a stream of water flowing in a cañon or glen on said land, and called the "Mill Stream." Adjacent on the south to Wilson's land, and traversed by the lower course of said stream, was a tract of public land, 154 acres in extent, occupied by one E. J. C. Kewen, to which said Kewen afterwards acquired title. For the purpose of apportioning the flow of said stream between themselves for irrigation and other uses, the said Wilson and Kewen entered into a written contract, of date May 7, 1860, whereby Wilson granted to Kewen the right to enter on his (Wilson's) aforesaid land on the west side of said cañon, and take the water flowing therein through a certain "upper water ditch," and use the same for irrigating the land of him, the said Kewen, during Friday and Saturday of each week. Kewen on his part granted to Wilson the right of way over his said tract of 154 acres for the construction of ditches, flumes, and aqueducts, and to conduct water through the same to such outside points as Wilson might select, subject to the right of Kewen to use for irrigating his land, during two days in the week as aforesaid, the water flowing in said "upper ditch, or in any water ditch, flume, or aqueduct used, dug, or erected" by Wilson on Kewen's land. The contract in terms bound the assigns of the parties thereto. The Alhambra Addition Water Company, a corporation, defendant here, has succeeded by purchase to the lands of Wilson, including the upper part of said cañon, and to all his rights under said contract. In like manner, Mayberry, the plaintiff, has acquired the interests of Kewen in the contract, and the title to said 154-acre tract of land, together also with a certain parcel of 50 acres lying north of Kewen's original tract, and at the mouth of said cañon, which was conveyed by Wilson to Kewen by deed on November 29, 1871. This deed reserved to Wilson all water rights had by him in the 50-acre parcel.

Said contract of 1860, and a statement of the circumstances inducing the same, appear at length in the opinion of the Chief Justice rendered in a former action between the parties here, and reported in 88 Cal. 68, 25 Pac. 1101. That action was begun by the water company (defendant in the present case) on April 18, 1886, against Mayberry (the present plaintiff), and had for its principal object the determination of the rights of the parties in the water which was the subject of said contract. The judgment of the superior court therein was rendered on December 28, 1887, in favor of the water company. It contained the following provisions, among others: That Mayberry is en-

titled to divert and use, on Friday and Saturday of each week, all, or so much as may be necessary, of the waters of said cañon for the purpose of irrigating, on those days only, any or all of the tract of 154 acres formerly owned by Kewen. "Also the right to divert and use on said days, and for said purpose of irrigating said lands, any water flowing in any ditch, flume, or aqueduct made, constructed, or used by said Wilson \* \* \* or by the plaintiff \* \* \* over or across the said one hundred and fifty-four acre tract of land." That the water company is entitled to the exclusive use of the waters of said cañon, subject to the expressly specified rights of Mayberry; and that it has, and he has not, the right to develop water on that portion of the 50-acre tract lying in said cañon. On appeal taken by Mayberry this court affirmed the judgment, except in the particular last stated, as to which it was determined that Mayberry has the right to develop water on the 50-acre tract by digging wells, running tunnels, and the like, not interfering with the flow of the stream. 88 Cal. 68, 25 Pac. 1101.

Pending said former action, viz. in July, 1887, the water company began a series of explorations for water on its own land in the said cañon above the holdings of Mayberry, and continued the same during the period of some five years, and by means of wells, tunnels, etc., it tapped sources of subterranean supply, and conducted the same into the channel of said stream, thereby adding to the volume of the same a quantity of water which would not naturally flow therein at all. Speaking approximately, and not meaning to decide the fact, the flow of the stream was in this manner about doubled. All the water, when used by the water company, is conducted through a large pipe laid across the said 154-acre tract, the head of the pipe being above the northerly line of that tract and on the said 50-acre parcel.

1. The present action was instituted by Mayberry on July 17, 1894. The main question involved is whether he may use the water added to the stream as aforesaid in the same manner that he uses the natural flow. He claims that right both under the contract of 1860 and the judgment in said former action. The chief privilege secured to Kewen by said contract was the right to enter on Wilson's land, and take, on Fridays and Saturdays, "the water flowing in said glen." These words reasonably denote the then existing natural flow of the stream, and do not reasonably denote water to be in the future artificially developed or imported by Wilson or his assigns and turned into the channel. The right to the artificial increment is quite distinct from the title to the natural flow, and the owner thereof may reclaim it from the channel. *Ditch Co. v. Vaughn*, 11 Cal. 143; *Paige v. Irrigation Co.*, 83 Cal. 84, 21 Pac. 1102, and 23 Pac. 875. It is true that after the description in the contract of the

privileges accorded to Wilson of constructing conduits across the land of Kewen, and leading water through them, there followed a clause reaffirming the right of Kewen to use for irrigation the water flowing in the upper ditch, "or in any water ditch, flume, or aqueduct used, dug, or erected" on his land pursuant to the permission of the contract; but we understand this provision to mean that Kewen might use the water whether flowing in the "upper ditch" (which then existed) or in some other aqueduct which Wilson or his successor might thereafter provide for its transmission to lower levels across Kewen's land, and had no reference to an extension of the right of Kewen to water other than that of the stream. Whether the water company has the right to convey the developed water in the pipe across plaintiff's land is a question which does not arise in this case. Whether such use is rightful or not,—a matter on which we intimate no opinion,—the title to the water is not affected.

When said former action was begun the water now in controversy formed no part of the stream, but was as absolutely the property of the water company as were the solid strata through which it percolated or by which it was restrained from emerging in the channel. *Gould v. Eaton*, 111 Cal. 639, 44 Pac. 319, and cases cited. As we read the pleadings in that suit (which are brought up in the record here), they submitted for adjudication no issues concerning this water. There were some references in the complaint to the right to develop water, but, considered in their context, it is apparent that they were pointed to the acts of Mayberry on the 50-acre tract; the water company claiming in virtue of the reservation of water rights in the deed of November 29, 1871, that Mayberry had not the right to develop water on that tract,—a contention which was overruled in this court. Understanding said judgment in the light of the pleadings on which it rested and the facts then existing, we think it plain that it does not operate to enlarge the meaning of the contract of 1860 in Mayberry's favor. *Lillis v. Ditch Co.*, 95 Cal. 553, 30 Pac. 1108; *Caperton v. Schmidt*, 26 Cal. 479. We are mindful of the argument founded on what Mayberry appears to consider a cumulation of rights decreed to him in that judgment, it declaring that he is entitled to divert and use for two days of the week all the water of the cañon necessary to irrigate the described land, and "also the right to divert and use on said days and for said purpose \* \* \* any water flowing in any ditch, flume, etc., made, constructed, or used by Wilson or his successors in interest, \* \* \* over or across" the land of plaintiff. This provision can apply only to rights which were sub judice in that action; and, in our opinion, it has substantially the same effect as the corresponding clause of the contract of 1860,—which, no doubt, it was the purpose of the judgment to confirm,—viz. to es-

tablish the right of Mayberry, within the stated limits, to divert and use the natural water of the stream from whatever aqueduct may be used for conducting it across his land, but this includes no interest in the artificial flow.

2. Previous to November, 1892, plaintiff was accustomed to divert the water for irrigation on Fridays and Saturdays from the aqueducts of plaintiff into which it flowed from the stream. At that time defendant undertook to apportion to plaintiff the quantity of water which it assumed to be the natural flow, and thereafter measured the same by means of certain weirs into his diverting appliances, retaining in its own aqueducts the residue, which was assumed to be the added or developed water. The amount of water which defendant thus undertook to measure to plaintiff was 50 inches under 4-inch pressure, and the court found that the natural flow during the irrigating season does not exceed that amount. One of the objects of the action is to enjoin defendant from interfering with the use of the water to which plaintiff is entitled. The court found, in effect, that the said conduct of defendant respecting the measurement of the water constitutes no interference with plaintiff's rights, and that he will receive in that manner all the water he is entitled to.

These findings are not sustained by the evidence. There is nothing in the contract of 1860 which fixes the amount of water to be used by Kewen at any quantity less or greater than the whole natural flow on the two specified days, when necessary for the irrigation of his tract. The fact, if such fact there is, that plaintiff does not at present use or need all the natural flow to irrigate the land, as he now cultivates it, does not authorize a restriction of his privileges under the contract. His necessities for use of the water to irrigate his land may increase in the future. The flow doubtless varies with the annual rainfall and with the progress of the dry season. The evidence of defendant's own engineers of a measurement made with great care on June 24, 1887, just before defendant began the work of developing water, shows that 55 inches then flowed in the channel. We do not find that the force of this evidence is avoided by anything else in the record. It seems probable that at times during the irrigating season the natural volume was yet greater, and no doubt it was, at times, less. The mistake of the water company lay in taking charge of the natural flow on Fridays and Saturdays, and assuming to measure to plaintiff a fixed quantity thereof. It had the right to measure and retain for its own exclusive use the amount of added or developed water, but it was the right of plaintiff to take the residue, whether much or little, so far as was necessary to irrigate his land, without interference by defendant. See *Ditch Co. v. Vaughn*, 11 Cal. 143. Of course, if he should abuse that privilege, contrary to the contract



and the former judgment, he might be restrained. Defendant dwells somewhat on the fact asserted that Mayberry acquiesced in its apportionment of the water to him from November, 1892, to the commencement of this action. We do not see how this was material, unless as bearing on his claim for damages, which he does not urge on appeal. Such acquiescence could not impair his interest under the contract, unless continued for a time sufficient to bar his right by adverse user.

3. There were certain findings on which was founded a provision of the judgment that defendant is the owner (subject to qualifications not necessary to state) "of all the water rights in said mill stream, and of all the land through which the same flows, from its source to the point where it is conducted into defendant's main pipes." As the 50-acre tract of land conveyed by Wilson to Kewen in 1871 includes part of the channel, and as the flume through which the water is conducted to defendant's main pipes lies also on that tract, the findings and portion of the judgment just mentioned are broader than the facts warrant. They perhaps cast some cloud on the rights of plaintiff in said 50-acre parcel, and should be modified.

Some other points are made by appellant, but, considering the views above advanced, it is believed that they become immaterial. While we are satisfied that upon the main subject of dispute—the use of water developed by defendant—the decision of the court below was right, yet because of the errors in minor particulars we have indicated, and to the end that the same may be corrected, the judgment and order denying a new trial should be reversed.

We concur: CHIPMAN, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed.

122 Cal. 79

WEST COAST LUMBER CO. et al. v.  
KNAPP et al. (L. A. 453.)

(Supreme Court of California. Sept. 10, 1898.)

MECHANICS' LIENS—RIGHT TO LIEN—VALIDITY OF  
BUILDING CONTRACT—PAYMENT—PLANS  
AND SPECIFICATIONS—ESTOPPEL.

1. Under Code Civ. Proc. § 1184, providing that 25 per cent. of a builder's contract price shall be made payable at least 35 days after completion of the contract, and that no payment made before it is due under the contract shall be valid to defeat liens, a contract providing that the last payment shall be made "within 36 days" after completion of the contract is not void.

2. Code Civ. Proc. § 1183, relating to mechanics' liens, and requiring a builder's contract to be in writing and filed in the recorder's office, is not complied with by a contract reciting that the drawings and specifications are identified by the signatures of the parties thereto, where the drawings and specifications are not so signed, since parol evidence would be necessary to identify them.

3. In a proceeding to foreclose their liens, material men are not estopped to attack the validity of a builder's contract for failure to identify the plans and specifications because they contracted to furnish material and made out bills with reference to them.

Department 2. Appeal from superior court, San Diego county; J. W. Hughes, Judge.

Action by the West Coast Lumber Company and others against Hannah Knapp and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. Affirmed.

Haines & Ward, for appellants. Trippett & McNeale, for respondents.

TEMPLE, J. Defendants appeal from the judgment and from an order denying a new trial in an action brought to foreclose the liens of material men. Two points are made, based upon the following allegations in the complaint: "That said contract does not provide that at least twenty-five per cent. of the whole contract price shall be payable at least thirty-five days after the final completion of the contract, as by statute in such cases made and provided; that the drawings and specifications referred to in said contract were never identified by the signatures of the parties to said contract, as provided in said contract should be done." The contract provides that the last payment "shall be made within thirty-six days after this contract is fulfilled." It is said that under this provision the payment is due at any time within the period of 36 days that the owners may be willing to make the payment, although by the terms of the contract payment could not have been compelled. The materiality of the point arises from provisions in sections 1183, 1184, Code Civ. Proc., requiring the contract to be in writing, and filed in the recorder's office before the work is commenced, and that 25 per cent. of the contract price shall be made payable at least 35 days after the final completion of the contract, and which contain the following: "No payment made prior to the time when the same is due under the terms and conditions of the contract shall be valid for the purpose of defeating or diminishing any lien," etc. Therefore it is contended, according to the terms of the contract, the payments may become due before the lapse of 35 days after the completion of the contract; that such payment would not then be valid, under the provision above quoted; and that the contract, therefore, does not comply with the statute, and is void, and the material men are let in to the full amount of their demands, regardless of the contract price.

So far as the statute has the effect of compelling the owner to pay more than he has agreed to pay, or to pay his debt twice, it is highly penal, and should be strictly construed in his favor. Those who seek to inflict upon him a penalty for his failure to comply with the terms of the law must show clearly that the dereliction has occurred.

The law must be construed against the exaction of the penalty, if in reason it can be. I think a debt cannot be said to be due until the creditor can rightfully demand and insist upon payment. This is the usual and conventional meaning of the language, as applied to deferred payments. Unless the money is put out upon interest, and the creditor is making a profit by having it kept out, it will be presumed that he will accept payment whenever it is tendered. The extended credit in such a case is wholly for the benefit of the payor. The contractor, laborers, and material men in a building contract are presumed to be willing to receive their pay at the earliest possible moment; and, aside from the statute, it would be lawful and proper that the owner should pay at once. Regarding the contract without reference to the statute, therefore, one would say the postponement of payments is solely for the benefit of the owner. Although the Code requires this particular contract to be made that lienors may be protected, still it must be construed as the voluntary undertaking of the parties, and interpreted in the same way. When money is due suit may be brought to recover it, and the statute of limitations begins to run against it. Important consequences also follow in regard to its transference. In regard to these consequences, the money is not due in this contract until after the expiration of the 36 days. In short, when the debtor is allowed a certain period within which to make payment, the debt is not due until the expiration of that period. The words of the statute must be understood in their popular sense, and, so understood, the contract does not violate the statute. See, upon the general question, *Helmer v. Krollick*, 36 Mich. 371; *Mattison v. Marks*, 31 Mich. 421; *Daniel*, Neg. Inst. § 626; also, *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, and 27 Pac. 426; *Yancy v. Morton*, 94 Cal. 558, 29 Pac. 1111.

By the terms of the contract the contractor was to furnish the material and do the work mentioned in the specifications and shown on the drawings, "which drawings and specifications," it is recited, "are identified by the signatures of the parties hereto." The material which the contractor was to furnish, and the work he was to do, are shown only in the specifications and drawings. In *Worden v. Hammond*, 37 Cal. 64, it was held that in such a case the plans and specifications are part and parcel of the builder's contract, which by the Code are required to be reduced to writing and filed in the recorder's office before the work is commenced. They may be made such by reference, but the reference must be such that they can be identified by it. No plans or specifications which do not correspond with the reference can be shown to be those intended by the parties. If the writing which is signed by the parties does not of itself determine what constitutes the contract, then it is not wholly

in writing, as required, and cannot, as a whole, be filed in the recorder's office. On the other hand, to permit the parties to prove that plans and specifications which do not correspond with the reference are the plans and specifications referred to, is to make a different contract, or at least to open the door for doing so. *Worden v. Hammond* was approved in *Willamette v. College*, 94 Cal. 229, 29 Pac. 629, and in *Donnelly v. Adams*, 115 Cal. 129, 46 Pac. 916. In the last case the subject is fully considered. What occurred after the contract was signed, by way of putting it beyond doubt as to what plans and specifications were intended, such as by attaching them together, and filing them as one document, and building a house upon the lots indicated according to the plans and specifications, can have no bearing upon the question whether the whole contract was reduced to writing and signed by the parties. The reference is to specifications signed by the parties. Such specifications were not produced, but certain specifications were produced and circumstances shown, which, we will assume, conclusively proved that the parties referred to as the specifications. Certainly a most material portion had not been reduced to writing. Suppose, in addition to what was shown, other specifications had been produced, actually signed by the parties, as stated in the reference. Then the evidence would not have been conclusive, but would perhaps have shown that the parties had changed their minds, and agreed upon a different building. The trouble is in the making of the contract, and not in its interpretation, as in the case of latent ambiguities. Was the contract entered into as the statute requires? is the question. It must be kept in mind that this is a question as to the compliance with a statute. Under general rules pertaining to contracts, one could make a builder's contract so referring to plans and specifications as to give very little information as to what the contractor had agreed to do, unless the plans and specifications can be found. The material part of the contract may really be in them. Independently of the statute, one might agree to build in San Diego a house which should in all respects be a duplicate of a designated house in London. Such a contract would not help persons who proposed to furnish material or perform labor upon the house. Not much more satisfaction would be afforded by placing on file plans and specifications which, when found, do not accord with the reference made in the written contract. And certainly it cannot be contended that in such case the plans and specifications have been so referred to as to become part and parcel of the contract signed by the parties. I cannot see how any of the material men would be estopped from claiming that the contract was void from the fact that they contracted to furnish lumber and made out bills with express reference to the plans and specifica-



tions. They probably did not then know that the contract was void. They have not misled defendants, or induced them to change their position, and it does not appear that they have suppressed knowledge of the invalidity while dealing with the contractor. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

122 Cal. 111

**CUNHA v. HUGHES. (S. F. 866.)**

(Supreme Court of California. Sept. 14, 1898.)

ADMINISTRATION—DECREE OF DISTRIBUTION—CONCLUSIVENESS—HUSBAND AND WIFE—COMMUNITY PROPERTY—PARTITION—HOMESTEAD—DECLARATION.

1. A husband devised a life estate in community property to his wife, and a decree of distribution was entered pursuant thereto giving her a life estate only. *Held*, that she was estopped from claiming one-half of the land in fee, as her share of community property, under Code Civ. Proc. § 1666, making a decree of distribution conclusive on persons interested in the estate.

2. A partition decree allotting lands previously purchased by the husband to him and his wife jointly does not change the community character of the property.

3. Under Civ. Code, § 1263, requiring a married woman's declaration of homestead to state that it is made for the joint benefit of herself and her husband, who has not made such declaration, a wife's declaration, which merely states the value of the land, and that she resides thereon with her husband, is insufficient.

Department 1. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by one Cunha against one Hughes to quiet title. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

J. C. Black, for appellant. Jackson Hatch and E. M. Rosenthal, for respondent.

**HARRISON, J.** The plaintiff seeks by this action to quiet his title to an undivided half of a certain tract of land against the claim of the defendant. Judgment was rendered in his favor, and the defendant has appealed therefrom, and from an order denying a new trial. The land in question is a part of the Milpitas rancho, and was conveyed in 1855 and 1856 to Michael Hughes, the father of the defendant, and husband of Ellen Hughes. Upon the conveyance of the land to him, he and his said wife entered thereon, and continued in possession until his death. By his last will and testament he gave to his wife, Ellen Hughes, all of his property for her use during life, with a remainder in fee in the lands described in the complaint herein to two of his grandchildren. February 25, 1887, the superior court of Santa Clara county made its decree of distribution of his estate, by which it distributed the land in question to Ellen Hughes, his surviving widow, for the term of and during her life, with remainder in fee to Willie Hughes and Allie

Hughes, the grandchildren of Michael, named in his will. Thereafter Willie Hughes conveyed his interest in the land to the plaintiff, and subsequently the defendant received a conveyance of the same land from Ellen Hughes, the surviving widow, and the two grandchildren, Willie and Allie. The court finds that the land was the community property of Michael and Ellen Hughes, and it is contended by the defendant that for that reason one-half of it descended to Ellen immediately upon the death of her husband, without power in the husband to make any testamentary disposition of the same.

As the surviving widow took her share of the community property by "succession" from her husband (In re Burdick's Estate, 112 Cal. 387, 44 Pac. 734), whatever right she may have in the estate of which he died seised is to be ascertained by the same means as is the right of any claimant to his estate, whether by succession or by will. Upon an application for the distribution of an estate, the entire world is notified to be present at the hearing, and to make known their claims, if any they have, to the estate of the decedent, or any portion thereof; and the decree of distribution becomes a judicial determination of their claim, which, unless reversed, set aside, or modified upon appeal, is conclusive of their rights, the same as is a final judgment in any other action or proceeding. By giving the notice in the manner prescribed by the statute, the court acquires jurisdiction over all persons entitled to assert any claim to the estate; and, whether they appear and present their claim for adjudication, or fail to appear, and suffer default, the judgment is conclusive upon them. The decree of distribution becomes the measure of the rights of all claimants to the estate, and their rights are to be determined by the terms of this decree. *William Hill Co. v. Lawler*, 116 Cal. 362, 48 Pac. 323; *In re Trescony*, 119 Cal. 568, 51 Pac. 951; *Jewell v. Pierce* (Cal.) 52 Pac. 132, 658. Upon the hearing before the superior court on the application for distribution of the estate of Michael Hughes, his surviving widow could have presented her claim for an undivided half of his estate; and, if the court had erroneously refused to allow the claim, she could have appealed from the decree, and had the error corrected upon appeal. Her failure to do so renders the decree "conclusive" as to her right now to assert such claim. Code Civ. Proc. § 1666. It was within her privilege to elect to take in accordance with the will, rather than to claim her right as surviving widow to the one-half of the estate; and, for the purpose of sustaining the decree of distribution, it may be assumed that she made such election. See *Noe v. Splivalo*, 54 Cal. 207. The cases cited by the appellant in support of his contention were direct appeals from the decree of distribution.

The community character of the property

was not changed by reason of the decree in the suit in partition brought after its purchase by the husband, wherein the land in question was allotted to Michael Hughes and Ellen Hughes jointly. That judgment conferred no new or additional title, but merely ascertained and allotted to the parties to the suit their respective interests in the land. *Wade v. Deray*, 50 Cal. 376; *McBrown v. Dalton*, 70 Cal. 89, 11 Pac. 583.

August 31, 1874, while Michael and his wife, Ellen, were residing upon the land, she filed in the recorder's office a declaration of homestead thereon, in which she stated that she was married to, and the wife of, Michael Hughes, and at the time of making the declaration resided with her family upon the land (describing it), and also stated its cash value, and that she selected and claimed the same as a homestead. Section 1263, Civ. Code, which was in force at that time, declares that, when the declaration of homestead is made by the wife, it must contain a statement "showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit." The declaration of Mrs. Hughes did not contain this statement, and it was therefore ineffective to impress the land with the incidents of a homestead, so as to give to her the right of survivorship. *Booth v. Galt*, 58 Cal. 254. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

122 Cal, 114

POLK et al. v. BOGGS et al. (S. F. 874.)

(Supreme Court of California. Sept. 14, 1898.)

FRAUDULENT CONVEYANCES — CONSIDERATION — TRUSTS—ESTABLISHMENT BY PAROL—NEW TRIAL—NOTICE OF MOTION—APPEAL.

1. Where a conveyance of two parcels was one transaction, and in an action wherein it was attacked as in fraud of creditors the grantor and one grantee testified that the consideration paid was for the property, without being questioned whether they meant both parcels, a finding that both parcels were conveyed for a valuable consideration will not be disturbed.

2. Parol evidence is admissible to prove a resulting trust in favor of one who furnished the consideration for a conveyance to a third person, under Civ. Code, § 853.

3. The provision requiring an express trust in lands to be in writing has no application after the trust has been executed.

4. Under a notice of motion for a new trial because "the evidence is against the law," the failure to make material findings cannot be considered.

Department 1. Appeal from superior court, Lake county; R. McGarvey, Judge.

Action by one Polk and another against one Boggs and others. There was a judgment for plaintiffs, and from an order denying a new trial defendants appeal. Affirmed.

M. S. Sayre and T. B. Bond, for appellants. T. J. Sheridan, for respondents.

HARRISON, J. The plaintiffs brought this action to restrain a sale by the sheriff of certain lands in satisfaction of a judgment against their grantor. Judgment was rendered in their favor, and the present appeal is by the defendants from an order denying their motion for a new trial, and is presented upon the ground that the evidence was insufficient to justify certain findings of fact made by the court.

The land involved in the action consists of two parcels of about 320 acres, called the "Home Place," and another tract of swamp land of about 29 acres, which Thomas W. Polk, the father of the plaintiffs, conveyed to them on the 18th of June, 1891, making to each a conveyance of an undivided half thereof for the expressed sum of \$5,000. The court found that the above conveyances by Polk were for a valuable consideration, and the appellants contend that, so far as the 29-acre tract is concerned, this finding is not sustained by the evidence. In the statement of the case upon which the motion for a new trial was heard, they do not specify the consideration for this parcel of land as one of the "particulars" in which the evidence was insufficient to justify the decision, but state that the evidence is insufficient to show that Polk "sold his interest in said lands to plaintiffs for a valuable consideration." See *De Molera v. Martin* (Cal.) 52 Pac. 825. It is not necessary, however, to rest our decision upon this point, since the record shows that the conveyances of the lands constituted a single transaction, and were made upon a valuable consideration. Polk testified that he gave \$12,000 for the home place, and \$150 for the swamp land. Of the purchase money for the home place, \$6,000 was paid by his wife out of her separate property, and the title to one-half thereof was held by him in trust for the plaintiffs. The conveyances by him to the children of one-half of the home place were made in execution of this trust, and he sold and conveyed to them the other half of the home place and his interest in the swamp land for the sum of \$5,000. He says: "I sold my property to my children. I got five thousand dollars for it. I told them, if they would assume a mortgage of four thousand one hundred dollars, which was then on the property, and pay me nine hundred dollars, I would make them a deed to all of it." It was shown by the plaintiffs that they did assume this mortgage, and had paid the \$900. One of the plaintiffs testified: "My sister and I bought the property in controversy from my father for five thousand dollars." In the absence of any evidence to the contrary, and in weighing the circumstances attending the transaction, the court was authorized to find that the consideration for the conveyances included the swamp land as well as the home place. If the defendants would have had the court find otherwise, it was incumbent upon them, after this testimony had been given, to call the attention of the



witnesses to the point, and make it clear to the court that they did not intend to include the swamp land in their testimony concerning the consideration.

The evidence was sufficient to authorize the court to find that Thomas W. Polk held the title to an undivided half of the home place in trust for the plaintiffs. It was not necessary to show that the trust was created by a writing. The admission by him that one-half of the consideration for the purchase was paid by his wife, and that to that extent the purchase was made for her, showed a resulting trust in her favor. Civ. Code, § 853. Such a trust may be shown by parol evidence, and the subsequent conveyance to the plaintiffs in accordance with her request cannot be impeached by proof that the request was verbal. The provision that an express trust in lands can be created only by writing may be invoked by one who is sought to be charged as a trustee, in order to prevent the establishment of a trust, but has no application after he has executed the trust.

The court finds that, in making the conveyance, Thomas W. Polk did not have any intent to conceal his property from his creditors, or to hinder or delay or defeat them in the collection of their demands, and that he did not make the conveyances to the plaintiffs with any fraudulent intent. Under section 3442, Civ. Code, the question of fraudulent intent is one of fact; and the above finding frees the transaction from the claim of invalidity and deprives the defendants of their right to impeach it.

The objection of the appellants to the failure of the court to make findings of fact upon certain averments in the cross complaint cannot be considered. Such failure, when the findings are material, is held to be a "decision against law" (*Brison v. Brison*, 90 Cal. 328, 27 Pac. 186); but, in order that this objection may be considered, it must be designated as one of the grounds in the notice of intention to move for a new trial. The notice in the present case, "that the evidence is against law," precludes a consideration of this objection. *Martin v. Matfield*, 49 Cal. 42. The order is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

122 Cal. 107

BANK OF WOODLAND v. HERON et al.  
(Sac. 349.)

(Supreme Court of California. Sept. 14, 1898.)

PLEADING—AMENDMENTS—MORTGAGES—FORECLOSURE.

An answer in a foreclosure action admitted the due execution and acknowledgment of the mortgage, and on the trial evidence of the invalidity of the acknowledgment was received without objection. Defendant then asked leave to amend so as to deny the proper acknowledgment, which was denied. *Held* not an abuse of

discretion, under Code Civ. Proc. § 473, permitting the allowance of amendments in furtherance of justice.

Department 2. Appeal from superior court, Yolo county; W. H. Grant Judge.

Action by the Bank of Woodland against Sophia Heron and others to foreclose a mortgage. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Walter H. Linforth (Reece Clark and Johnson, Linforth & Whitaker, of counsel), for appellants. N. A. Hawkins and Craig & Hawkins, for respondent.

HENSHAW, J. This is an appeal from the judgment. David Heron executed to the plaintiff bank his promissory note for \$9,000, secured by mortgage upon realty. Afterwards he conveyed the land affected by the mortgage to Sophia Heron, his wife. The bank brought this action to foreclose the mortgage. By verified complaint it pleaded its execution, acknowledgment, and certification so as to entitle it to recordation, and alleged that it was forthwith recorded in the records of Yolo county. The verified answer and cross complaint of defendants admitted all of these allegations, but averred payment by defendant Sophia Heron. At the trial it appeared that the certificate of recordation on its face was regular in form, and that the mortgage had been regularly recorded. But, notwithstanding that no issue was joined upon the question of the legality and sufficiency of the acknowledgment, the cashier, while on the witness stand, was permitted to testify that the acknowledgment was taken before him, and that at the time he took it he was a stockholder of the bank, holding 10 shares out of 9,621. Upon this showing, defendants' attorneys moved to strike out the mortgage and the acknowledgment upon the ground that the mortgage, having been acknowledged before a stockholder of the mortgagee, was not entitled to record. The motion was denied. The defendant Sophia Heron then filed a declaration of homestead upon the property, and sought leave of court to amend by setting up this fact, and also by denying the averments of the complaint in regard to the due acknowledgment of the mortgage. The court permitted the first, and refused the second, amendment. The obvious effect of the rejected amendment was to raise on the trial a fresh issue upon a matter which had never been in controversy, and to compel plaintiff to meet it by an entirely new line of proof. The very obvious purpose of the two amendments was to defer plaintiff's lien to the homestead claim, which would result in the impairment of plaintiff's security, and perhaps in the loss of a large part of its debt. It should be added that defendant's plea of payment of the mortgage debt amounted to no more than this: that the bank had accepted her unsecured and unpaid note for \$9,000 in payment of the secured mortgage debt. This the bank officers denied, and the court found against the plea.

Appellant complains of the ruling of the court in refusing to allow the amendment. Great liberality, it is true, should be exercised in allowing amendments to pleadings; but that liberality should only be displayed in furtherance of justice. Code Civ. Proc. § 473. This is always the controlling consideration before the trial court. *Cooke v. Spears*, 2 Cal. 409; *Daley v. Russ*, 86 Cal. 118, 24 Pac. 867. Plaintiff had parted with its money upon the security of the mortgage. Defendant had acquired the property by deed of gift. No issue upon the question was tendered before trial. The evidence by which the disclosure at the trial was made was entirely irrelevant to any point in controversy. Taking advantage of it, defendant files a homestead declaration, and then asks the court to allow her to amend to impair plaintiff's security, and perhaps to defeat the collection of a just debt. Amendments are within the sound discretion of the court (*Sharon v. Sharon*, 77 Cal. 105, 19 Pac. 230), but, so far from it having been an abuse of discretion in this case to refuse the one proposed, we should be more inclined to hold that it would have been an abuse to have allowed it. For it is not sufficient that the new defense proposed be a legal defense. It should also be an equitable defense. *Harding v. Minear*, 54 Cal. 502. This defense, under the circumstances, was highly inequitable. In *Cooke v. Spears*, 2 Cal. 409, the trial court refused to allow the plea of the statute of limitations by way of amendment, and this court upheld the ruling upon the ground that the amendment was not in furtherance of justice. "It was claimed solely as a legal advantage, to which at one time he would have been entitled; but it is a wise conservation that it should have but its day in pleading, and no grace of right after, beyond the extent of justice." Such is precisely the present case. The same ruling was again upheld in *Stuart v. Lander*, 16 Cal. 373. In *Spanagel v. Reay*, 47 Cal. 608, defendant, having admitted in his verified answer a deposit of money with the sheriff, by amendment before trial sought to deny it. Said this court: "The application to amend was correctly denied under the circumstances." In *Page v. Williams*, 54 Cal. 562, defendant to a suit upon a promissory note pleaded payment, and at the trial sought to amend by pleading lack of consideration. Leave was refused, since the plea would raise new issues, and the ruling was sustained. In *Harney v. Corcoran*, 60 Cal. 314, defendant in an action to foreclose a lien for street work admitted ownership of the property, and afterwards sought by amendment to deny it. Leave to amend in this particular was denied, and this court upheld the ruling as being within the exercise of a fair discretion. To like effect are the cases of *Edgar v. Stevenson*, 70 Cal. 286, 11 Pac. 704; *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Dorn v. Baker*, 96 Cal. 206, 31 Pac. 37; *Siskiyou Co. v. Gamlich*, 110 Cal. 94, 42 Pac. 468; *Pacific Rolling-Mill Co.*

*v. Bear Valley Irr. Co.* (Cal.) 52 Pac. 136. Indeed, so well settled is the proposition that it has been declared to be the rule that a party will not be permitted upon the trial to amend by denying a fact admitted in the answer. Bliss, Code Pl. § 430. Nothing in what has been said is to be construed as an expression of opinion upon the legal sufficiency of the proposed amendment as a defense. As to the evidence itself, being addressed to no issue in the case it is without weight or value. The judgment appealed from is affirmed.

We concur: MCFARLAND, J.; TEMPLE, J.

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(6 Cal. Unrep. 129)

STANTON v. SINGLETON et al. (L. A. 406.)

(Supreme Court of California. Sept. 23, 1898.)

MINING CONTRACTS—PARTIES—DELIVERY—OP-  
TIONS—MUTUALITY—SPECIFIC PER-  
FORMANCE—TENDER.

1. Where a contract granting an option to purchase a mine was signed by two of three co-owners, and an action to enforce it was brought against the signers, the burden was on them to show, as claimed, that the contract was not to be operative unless signed also by the other owner, who was named therein.

2. An allegation that defendants "made and entered into" the agreement sufficiently imports delivery as against a general demurrer. in an action for specific performance.

3. A contract whereby plaintiff was given an option to purchase an interest in a mine for a certain price on performing certain conditions is not void for want of mutuality, so that it cannot be specifically enforced, where plaintiff notified the other parties thereto of his election to perform his part thereof.

4. Under Civ. Code, § 1440, allowing a party to an obligation which the other party repudiates before a default has occurred to enforce the obligation without performing or offering

to perform the conditions in favor of the other, the refusal to allow a party to an option contract to perform the conditions of it, together with a repudiation of the contract prior to the expiration of the option, releases the holder of the option from tendering the price to be paid under it prior to suing for specific performance.

5. A mine owner who did not sign an option contract executed by his two co-owners is not a necessary party to an action to enforce the contract, where there is nothing to show that he is not willing to carry out the agreement, and no relief is sought against him.

Department 1. Appeal from superior court, Kern county; Walter Van Dyke, Judge.

Action by O. B. Stanton against John Singleton and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Rothchild & Ach, J. W. Ahern, J. A. Haralson, and Lloyd & Wood, for appellant. Reddy, Campbell & Metson, for respondents.

HARRISON, J. The plaintiff seeks by this action to compel a performance by the defendants of the following contract, which he alleges was made and entered into between him and them on the 22d day of June, 1895: "Agreement made and entered into this 22nd day of June, 1895, between John Singleton, F. M. Mooers, and C. A. Burcham, of Kern county, state of California, parties of the first part, and O. B. Stanton, of Bakersfield, state of California, party of the second part: Whereas, the parties of the first part are owners by location of a certain mineral tract located in the Summit mining district, Kern county, California, and designated and described as follows [giving description], and, being desirous of obtaining capital to work the same, hereby agree with party of the second part that, for and in consideration of one dollar, in hand to them paid, the receipt of which is hereby acknowledged, agree to give party of the second part thirty days' option of a one-half interest of the above enumerated claims, now owned by them, in consideration of the party of the second part agreeing to spend—First, ten thousand (\$10,000) dollars in opening and developing said property; second, in erecting a ten-stamp quartz mill, modern in every particular, the stamps to weigh not less than seven hundred pounds, or the equivalent, as may be found the most desirous to work the ores. \* \* \* The parties of the first part hereby agree that the party of the second part shall have the privilege any time within six months from the date of this instrument to purchase the aforesaid property for the sum of five hundred thousand (\$500,000) dollars. The essence of this contract being time, it is mutually agreed that, should the party of the second part not commence active operations within thirty days, this contract shall be null and void. The party of the second part hereby agrees that, if he should fail to fully carry out this contract, all moneys paid or expended by him shall be forfeited, and the full properties returned to the parties of the first part." This contract was signed

by the defendants Singleton and Mooers, and by the plaintiff. It is alleged in the complaint that at the time of its execution the defendants represented to him that they were the owners of an undivided two-thirds interest in said mining claims, and that C. A. Burcham was the owner of the other undivided third interest, and that they had authority from Burcham to act for him in selling said claims, or to make any other contract for working and developing them. The plaintiff also alleges that immediately after the execution of the contract he notified the defendants that he elected to perform his part of said contract, and to thereby acquire the undivided half interest in said mining claims, and that the defendants placed him in possession of said mining claims for the purpose of performing his part of the contract, and that, under the belief that they had the right to act for Burcham, he proceeded to work and develop them, as required under the conditions of the contract, and for that purpose expended about \$2,000 as a part performance of his portion of said contract; that on the 9th day of July, 1895, the defendants notified him that they would not be bound by the terms of the contract, and repudiated the same, and refused to permit him to continue the performance of labor on said property, or the expenditure of any more money thereon, and refused to permit him or his employés to enter upon said claims, or either of them, for the purpose of performing his contract, and refused, and still refuse, to execute to him a deed of the one-half interest in said property. It is further alleged that the consideration expressed in the contract for the acquirement of said one-half interest is adequate and reasonable, and that on the day of the execution of said contract, and ever since, the plaintiff has been, and is now, ready, able, and willing to perform all of the conditions on his part to be performed for the acquirement of said one-half interest. He therefore asks judgment that he be let into possession of said premises for the purpose of performing the labor and otherwise carrying out the provisions of said contract to be performed by him, and for general relief. The defendants demurred to this complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and also on the ground that Burcham should have been made a party defendant, and, their demurrer having been sustained, judgment was rendered dismissing the complaint, from which the plaintiff has appealed.

The point chiefly urged in support of the demurrer is that inasmuch as Burcham is named in the contract as a party thereto, and as one of the owners of the mining claims, and as he did not join in its execution, the contract is incomplete, and cannot be enforced against those who did sign it. Whether it was the intention of the parties who signed the contract that it should not be operative until it should be also signed by Burcham is a matter extraneous to the written in-



strument, and is to be shown by evidence outside of the instrument itself. Upon the face of the instrument, the contract on the part of the defendants is complete, and the burden is upon them to show that they were not to be bound by their execution of it until it was also executed by Burcham. There is nothing on its face to prevent it from being operative upon them without his signature, and it is consistent with its language to assume that such was their intention. Prima facie they are bound by its terms, and, if they would be relieved from this apparent obligation by reason of any facts or circumstances extrinsic to the instrument, they must allege such defense in their answer, and sustain it by evidence. Mr. Bishop, in his treatise on Contracts, says (section 348): "If by parol stipulation, or, a fortiori, if by the writing itself, the contract was not to be deemed complete until other signatures should be added, it without such addition will not bind those who have signed; but, if nothing of this appears, the parties signing will be holden, though even on the face of it the signatures of others were contemplated by the draftsman." "It rests upon the party who has signed and delivered the instrument to establish that the delivery was intended to be in escrow." *Chouteau v. Suydam*, 21 N. Y. 179. See, also, *Haskins v. Lombard*, 16 Me. 140; *Parker v. Bradley*, 2 Hill, 584; *Dillon v. Anderson*, 43 N. Y. 231; *Cochran v. Blout*, 161 U. S. 350, 16 Sup. Ct. 454; *City of Los Angeles v. Melus*, 59 Cal. 444; *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515. The allegation in the complaint that the defendants represented to the plaintiff that they were authorized to act for Burcham in making the contract, which for the purpose of the demurrer must be taken as an admission of this fact, tends to refute the proposition that it was the intention of the parties that he should sign the contract before it should become operative. It does not appear that they did not in fact have such authority, or that he is unwilling to abide by its terms.

The allegation that the defendants "made and entered into" the agreement sufficiently imports a delivery. *Russell v. Whipple*, 2 Cow. 536; *Peets v. Bratt*, 6 Barb. 662; *Smith v. Waite*, 103 Cal. 372, 37 Pac. 232.

Under the terms of the contract, the plaintiff had the right to enter upon the mining claims for the purpose of working and developing them. It is evident that the ultimate object of the contract was to give him the right at any time within six months after its date to acquire an undivided half interest in the property for the sum of \$500,000. In order that he might intelligently determine whether to exercise this option, he was to have an opportunity of testing the value of the property by an expenditure of money thereon, which, in case he failed to make the purchase, would inure to the benefit of the defendants. The consideration for the de-

fendants' agreement to give him this option was his agreement to expend the sum of \$10,000 in opening and developing the property, and building a quartz mill thereon; and for this purpose the right to enter upon the mining claims was necessarily implied. The allegation in the complaint that he was placed in possession of the mining claims by the defendants "for the purpose of performing his part of the contract," was a contemporary construction by them of its meaning; and the further allegation that immediately after its execution he notified them of his election to perform his part of the contract, and thereby acquire the undivided one-half interest in the mining claims, "as in said contract mentioned," was an acceptance by him of what was previously a offer, and created an enforceable obligation on his part to expend the said sum of \$10,000. Whatever want of mutuality of obligation existed at the execution of the contract was thus removed, and the contract to this extent became binding upon all parties thereto. *Hall v. Center*, 40 Cal. 63; *Thurber v. Meves*, 119 Cal. 35, 50 Pac. 1063, and 51 Pac. 536; *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853, and 52 Pac. 44.

The subsequent refusal by the defendants to permit the plaintiff to perform this obligation is a sufficient excuse for its nonperformance, and their repudiation of the contract prior to the expiration of the period of six months, and declaration that they would not execute him a deed for the one-half interest, released him from the necessity of tendering the \$500,000 as a condition of maintaining the action. Civ. Code, § 1440; *Sheplar v. Green*, 96 Cal. 218, 31 Pac. 42.

It was not necessary to make Burcham a defendant in the action. It does not appear that he participated in preventing the plaintiff from entering upon the property or performing his part of the contract. No relief is sought against him, and there is nothing in the complaint to show that he is not willing to carry out the agreement of the defendants. The judgment is reversed, and the superior court is directed to overrule the demurrer to the complaint.

We concur: GAROUTTE, J.; VAN FLEET, J.

122 Cal. 186

#### PEOPLE v. COLLUM. (Cr. 384.)

(Supreme Court of California. Sept. 27, 1898.)

#### CRIMINAL LAW—ACCOMPLICES—EVIDENCE—CONSPIRATORS—WITNESSES—IMPEACHMENT.

1. One not connected with accused in any way until after the deed is not an accomplice.

2. Confession by a conspirator made after the deed is not competent against co-conspirator.

3. A witness for one charged with arson testified that he and accused were a mile away at the time of alarm, and ran to the fire, and helped to put it out, and talked about it next day. Held, that a statement of witness after

the fire that "he had never committed a crime in his life, but accused put him into this, and, when they found accused, he would furnish facts that would send him to hell," did not directly contradict his testimony, and was not admissible to impeach him.

Department 1. Appeal from superior court, Yolo county; E. C. Hart, Judge.

Phillip Collum was convicted of arson, and he appeals. Reversed.

R. Clark, for appellant. F. W. Fitzgerald, Atty. Gen., and O. N. Post, Dep. Atty. Gen., for the People.

GAROUTTE, J. Defendant and one Shephard were jointly informed against for the crime of arson. Defendant had a separate trial, which resulted in a verdict of guilty of an attempt to commit the crime of arson in the second degree, and now appeals from the judgment and order denying his motion for a new trial.

It is contended that the evidence does not justify the verdict, because it rested upon "the uncorroborated testimony of one Shirley, an accomplice in the commission of the crime." If Shirley was an accomplice, there are strong reasons to be urged in support of this contention of defendant. If Shirley was not an accomplice, and the jury believed his testimony, then, when taken in connection with the other evidence in the case, we are not prepared to say that we would disturb the verdict upon the ground of insufficient evidence. Upon examination of the record, we find nothing therein even tending to establish the fact that Shirley was an accomplice. An accomplice is one who aids, abets, and assists in the commission of the crime, or, not being present, has advised and encouraged its commission. Shirley did none of these things. He was not connected with the defendant in any way until after the crime was committed. Conceding that, under section 32 of the Penal Code, he was an accessory, still an accessory is not an accomplice, under the law of this state. An accomplice at common law may be said to be an accessory before the fact, but in this state an accessory before the fact is not recognized. The law declares such a one a principal.

Shephard, who was jointly charged with the defendant, had been tried and acquitted at the time of the trial of this case. He took the stand, and testified as a witness in defendant's interest. He testified that he and Collum, immediately prior to the alarm of fire, were upon the streets of the city of Woodland, and, upon such alarm being given, ran to the fire (a distance of about one mile), and assisted in extinguishing it. He further declared that upon the succeeding day he and defendant talked to Shirley about the fire. The remaining portion of his testimony was directed to the stock of wool on hand in the mill at the time of the fire, the profits and losses of the business, and mat-

ters of insurance. Upon cross-examination, under objection, he was asked this question by the district attorney: "Did you say to me: \* \* \* 'I have always been a good man. I lived in San Jose, and I could have brought many people from there showing that I was a good man, including the district attorney and other people,' and did you not further say that 'this man [meaning Phillip Collum] dragged me into this thing, and that he has now run away and left the whole matter upon me, \* \* \* and when you find him I will furnish you facts that will send him to hell?'" The objection was overruled, and the witness answered that he had made no such statement. In rebuttal the district attorney testified that the witness did make such a statement to him. That this evidence was most injurious to the defendant is apparent. In effect, it is a confession of Shephard that he and the defendant committed the crime.

Even conceding Shephard to have been a co-conspirator, still the evidence was the purest hearsay, for the conspiracy had ended at the time this confession was made. The crime was a thing of the past. *People v. Dillwood*, 94 Cal. 89, 29 Pac. 420. It follows that its admission can only be supported upon the single theory that it was introduced to impeach the witness. This character of impeachment is allowed when the witness has made previous statements inconsistent with his present testimony. The principles upon which this provision of the statute is grounded, and the occasions when it may be invoked, are considered in the case of *People v. Conkling*, 111 Cal. 623, 44 Pac. 314. Comparing the evidence given by the witness with the evidence given by the district attorney detailing the statement made to him by the witness, the impeaching evidence fails to reach the mark. As already suggested, this evidence was hearsay, entirely inadmissible for the purpose of proving a fact, and was of a most damaging character to the defendant. Under such circumstances, its admission for the purpose of impeaching the witness must find plain and solid support in the law. Applying the test, we fail to find such support. The vicious part of the statement made by Shephard is: "I had never committed a crime in my life, but Phillip put me into this. \* \* \* I will furnish you with facts that will send him to hell." These general and vague statements do not comprise that direct and contradictory evidence demanded by the statute that is necessary for impeachment purposes. To justify the admission of such evidence, the two statements must be directly contradictory and inconsistent with each other. In order that one shall form the basis for the admission of the other, this inconsistency must appear upon their face by a comparison of them. If the inconsistency only appears by inference, and another inference may be drawn in favor of their consistency,



then the second statement is not admissible for impeachment purposes. The only line of evidence testified to by Shephard in his examination, which even looks towards supporting the admissibility of the evidence of the district attorney, is his statement as to what he and Collum were doing upon the night of the fire. His impeachment could only extend to the blotting out of this evidence. Yet his evidence in this regard may all have been true, and still his statement have been equally true that "Phillip pulled me into this. \* \* \* I will furnish you with facts that will send him to hell." For these reasons the evidence was not of that character to justify its admission for the purpose of impeachment.

We have examined many other assignments of error relied upon by defendant. The references in his brief to these assignments are made in a somewhat desultory and skeleton manner. Our examination of them has disclosed nothing of a prejudicial character to defendant. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

122 Cal. 121

PEOPLE v. ARRIGHINI. (Cr. 324.)

(Supreme Court of California. Sept. 15, 1898.)

HOMICIDE—EVIDENCE—WITNESSES—CROSS-EXAMINATION—IMPEACHMENT—TRIAL.

1. In a murder trial, evidence of the manner and appearance of accused shortly after the deed is competent against him.

2. Error in permitting the prosecution to anticipate the defense and put in evidence out of order will not ordinarily justify reversal.

3. Where the only testimony of accused was that he did not intend to kill deceased, it was incompetent, in cross-examining him, for the purpose of impeachment, to question him as to his deposition before the coroner's jury, in which he stated he was drunk, and did not remember about the shooting, and to get him to admit that he then perjured himself, and to go into the details of the killing, since such testimony did not contradict his testimony.

4. Under Const. art. 1, § 13, providing that an accused shall not be compelled to be a witness against himself; and Pen. Code, § 1323, providing the same, but that, if he offer himself, he may be cross-examined as to all matters testified to in chief,—one on trial for murder, whose only testimony in chief was that he did not intend to kill deceased, cannot be asked as to the details of the killing.

In bank. Appeal from superior court, Nevada county; F. T. Nilon, Judge.

Jack Arrighini was convicted of manslaughter and he appeals. Reversed.

Thos. J. Ford, for appellant. W. F. Fitzgerald, Atty. Gen., and C. N. Post, Dep. Atty. Gen., for the People.

TEMPLE, J. The defendant was tried upon a charge of murder, and convicted of manslaughter. The appeal is from the judg-

ment and a denial of a new trial. January 10, 1897, defendant, his brother Dominique, and their uncle Angelo Arrighini dined with one Romori, at the latter's cabin in Truckee. After dinner, at about 6 o'clock p.m., he started to go "uptown." There was some difficulty in finding the key to the cabin, and defendant went off alone towards his cabin, which was about 200 feet away. Soon after, his brother went in the same direction. It seems that defendant went to the cabin occupied by his uncle, his brother, one Rogantini, and himself. In that vicinity, without cause or apparent purpose, he fired two shots from his revolver, and then, meeting his brother, he fired the remaining three shots at him, killing him almost instantly. After the shooting, the defendant exhibited signs of great grief and sorrow, protesting that he thought—in the feeble light—that a tramp was approaching him in an attitude which indicated that he was about to spring upon him. Defendant had been ill for several days, and on that day had taken a large quantity of quinine; according to his testimony, about forty grains. At the dinner the defendant had eaten no food, because of his illness. Dr. Shoemaker testified at the trial that from 40 to 60 grains would be an overdose to one unaccustomed to take quinine; that its effect was greater when taken upon an empty stomach; that it would produce dizziness, indistinct vision, and sometimes blindness, also severe headache, staggering, and vomiting. There was evidence that, shortly after the homicide, defendant staggered, and fell down upon his face, in a severe fit of vomiting. There had been no quarrel between the defendant and the deceased, and there was no evidence of ill feeling or motive shown for the homicide. The uncle testified that there had been occasional misunderstandings about trifling matters, but, on the whole, they had been friendly.

The first point raised by the appellant is that the court erred in permitting the prosecution to ask certain witnesses as to appearance and manner of the defendant shortly after the homicide. They were asked if they saw anything strange or peculiar in his manner. It is contended that this is in conflict with the final conclusion of this court in *Holland v. Zollner*, 102 Cal. 636, 36 Pac. 930, and 37 Pac. 231, and with *Estate of Carpenter*, 94 Cal. 406, 29 Pac. 1101; also with the case of *Marceau v. Insurance Co.*, 101 Cal. 338, 35 Pac. 856, and 36 Pac. 813. In *Estate of Carpenter*, to which the other cases refer, an attempt was made to avoid the rule which allows only intimate acquaintances to testify, by asking witnesses how he appeared mentally, not calling for a description of the manner or conduct of the person concerning whom the inquiry was being made, nor whether he acted rationally or irrationally at any particular time. Their opinions were asked as to his sanity, and it was said that it did not obviate the objection by asking if he

appeared to be sane, or how he appeared mentally. In *Holland v. Zollner* it is said that this is not so much a matter of judgment as of observation. Undoubtedly it is both, and no one disputes that, apart from our statute, witnesses might be asked such questions in regard to other matters, mentioned in the opinion in that case, concerning which opinion evidence is held admissible. In that case, in denying a rehearing, the court reasserted the doctrine in *Estate of Carpenter*. In *People v. McCarthy*, 115 Cal. 255, 46 Pac. 1073, the court held that it was proper to ask a witness whether the defendant acted rationally, or appeared "rational" at a particular time. So, I think any witness may testify to the demeanor of the defendant, whether he was intoxicated, appeared to be excited, was angry, or timid. Nor need such testimony always be confined to a special occasion. A witness may state whether the person was habitually melancholy, morose, peevish, irritable, or the opposite. And, no doubt, other mental habits may be testified to; such as whether he was incoherent, forgetful, or irrational. Any one could tell if a person is totally lacking in mentality, or is a raving maniac. These are not therefore considered matters of judgment. But, where a reasonable doubt can exist as to sanity, and it is made an issue or subject of controversy in a case, the Code prohibits the courts from receiving as evidence the opinions of those who are not intimate acquaintances. I see no objection to the evidence in question here, except that it was put in at the wrong time. The prosecution should not have anticipated the defense, but such error will not ordinarily justify a reversal.

The defendant was a witness for himself. He testified that he and his brother were friendly; that he sent money to Italy to bring his brother to this country; that he had been ill for two or three weeks before the homicide; had taken large quantities of quinine; was sick and dizzy, and his sight obscured; and that on the next morning after the shooting, upon waking, he thought his brother was in bed with him, and tried to call him. On the examination, his counsel questioned him as follows: "State whether you intended to kill him. Ans. No, sir." This was all the testimony given by the defendant for himself. On cross-examination the district attorney produced his testimony before the coroner's jury, and, showing his deposition, proceeded as follows: "Is this what you said (reading): 'My occupation is laborer. I don't remember nothing about the shooting, as I was very drunk?'" Objection was here interposed that it was not cross-examination as to anything concerning which he had testified in his direct examination. He had not testified in regard to the circumstances of the shooting. The objection was overruled, and the witness testified that he did so testify. He was then asked if his testimony before the coroner was true. He ad-

mitted in answer to questions that it was not, and proceeded to testify, in effect, that he had deliberately perjured himself, because he was advised that it was necessary to his defense that he should do so. He also, in response to questions, gave a full account of the homicide. He testified: "When I was walking down the street, I see some one coming out just like that (witness staggers forward, bent down, with hands stretched out). He said, 'Ho! Ho! Ho!' (witness imitates peculiar groan); and I pulled out the pistol, and started to shoot like that (turning head away). Then I see it was my brother, and then I picked him up, and kissed him," etc. He further said: "Somebody came out between the two houses, and I have no time to walk back, because I thought he was trying to kill me, and didn't know who it was," etc. He further related what he did after the killing,—what he did with his pistol, and many other circumstances. None of this testimony had any connection with any matter concerning which defendant had been examined in chief, except that all may be said to have been relevant to the issues. The killing was not denied by the defendant. The defense was that the homicide was committed in self-defense, under the doctrine of apparent danger. This position had been already taken, and evidence tending to support it had been introduced, although the defendant had not offered himself as a witness upon the subject. He had simply said that he did not intend to kill his brother. His defense was an admission that he did purposely fire the fatal shot, and the only possible effect of his testimony was that he did not know that the person killed, and who he contended he thought was about to attack him, was his brother, and perhaps, by implication, that he had no malice or ill will towards his brother. There was no attempt to prove express malice, and the jury did not find that there was malice. The verdict was evidently founded upon the proposition that the shooting was reckless, and I think that there was evidence to sustain such conclusion.

I think it obvious that the evidence given at the coroner's inquest did not tend to contradict the testimony of the defendant given at the trial, and therefore was not admissible, conceding that he can be impeached in that mode. Whether he was drunk or not had no bearing upon the question as to whether he knew it was his brother. The obvious purpose was not to contradict his testimony, but to make the witness admit that he had willfully given false evidence upon another matter before the coroner, and to make that fact an excuse for examining him as to all the facts in the case. In *People v. Devine*, 44 Cal. 452, it was held that, for the purpose of impeaching a witness, only those portions of the evidence given before the coroner could be read which showed that the witness had stated as a fact at one time what he denied at another, or had made statements materially



different. Now, was it competent to introduce evidence showing that upon another trial, upon a matter concerning which defendant had not testified upon his examination in chief, he had committed willful perjury, for the purpose of impeachment? The answer must be in the negative. Specific bad acts, or specific instances of untruthfulness, cannot be shown for the purpose of impeaching a witness. *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45; Underh. Cr. Ev. § 236. After putting in the evidence given by defendant before the coroner, if that was competent, then it was proper to ask him further if his statement was true. If the evidence had stopped upon simply proving the statement made before the coroner, the ruling, though erroneous, would not, perhaps, have necessitated a reversal, because that statement by itself was so utterly immaterial that no harm could ensue. But, when it was used as the means of the further cross-examination, it became very harmful; and the harm, I think, came legitimately from the erroneous ruling permitting the cross-examination in regard to the testimony before the coroner.

The limitation contained in our Code (section 1323, Pen. Code) was doubtless intended to preserve to defendants the right secured by section 13, art. 1, Const. So limited, confessions which are not voluntary are not obtained, although as to the matter of the direct examination the cross-examination may be full and searching. Other states from which cases are cited do not contain such a limitation. In Massachusetts the provision is that he "shall at his own request, and not otherwise, be deemed a competent witness." It has been held that when, under this statute, the accused offers himself as a witness, he waives all protection guaranteed by the constitution, and becomes a competent witness in the whole case. Under this ruling, confessions are forced from him, under the sanction of law. So, the inquisition of torture is restored, only without the rack and thumb screw. It has been well said that the rule has been reached by silent approaches. I think the constitution prohibits the obtaining of evidence by torture, even when the accused has been induced by the offer of some advantage to consent. Under our statute, there can be no doubt. Here, surely, no evidence can be wrung from him. He can only be examined in regard to the matters concerning which he has voluntarily testified. *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45; *People v. Gallagher*, 100 Cal. 466, 35 Pac. 80; *People v. McGungill*, 41 Cal. 429. Missouri and Oregon are the only other states which have this statute. In both, the decisions accord with ours. *State v. McLaughlin*, 76 Mo. 320; *State v. Patterson*, 88 Mo. 88; *State v. Lurch*, 12 Or. 99, 6 Pac. 408; *State v. Saunders*, 14 Or. 300, 12 Pac. 441. It is not always easy to determine what is cross-examination as to the matters testified in the direct examination. It was practically held in *Peo-*

*ple v. Mullings*, 83 Cal. 138, 23 Pac. 229, that, when a defendant testified simply that he was not guilty, he could be cross-examined as to the whole case. No other witness could have given such evidence. When defendant testifies to facts which simply have a bearing upon the question of innocence or guilt, the cross-examination must be confined to such facts; otherwise, he is compelled to give evidence against himself. Doubtless the prosecution may seek upon a cross-examination to bring out evidence which tends directly to explain, qualify, or contradict his testimony. I say "directly," because it has been sometimes contended that, when the defendant testifies to a fact which is inconsistent with his guilt, proof of his guilt disproves his statements, and therefore he may be cross-examined as to all matters relevant to that issue. This would, of course, do away with statutory limitations entirely, for such would always be the case when he testified to anything relevant and material. It would always tend to refute the charge.

Witnesses do not testify to guilt or innocence, but to facts from which either may be inferred. These facts, and not the guilt or innocence they tend to prove or disprove, are the "matters about which he was examined in chief." For instance, suppose he testified to an alibi; proof of guilt would tend indirectly to disprove the alibi,—simply because the alibi, if proven, disproves guilt. But this is not the matter concerning which the defendant was examined in chief. Any matter which tends directly to prove that he was not where he said he was may be inquired of, but not, for instance, the possession of stolen goods, though that would tend to prove guilt and therefore, indirectly, would disprove the alibi. The possession of the goods may have been acquired in some other way; and, if the question were allowable, it might open up another part of the case, concerning which the defendant has not volunteered any testimony. Judge Cooley was of the opinion that the privilege could not be so waived as to authorize a court to compel a defendant to testify against himself; that his testimony must be voluntary when given, and no previous waiver or agreement to waive this privilege can be held against him. Cooley, Const. Lim. (5th Ed.) 386. He cannot, then, be cross-examined as to other matters for the purpose of discrediting him by an attack upon his character. Surely, this does not concern the matter about which he testified in chief. A different view was taken in *People v. Johnson*, 57 Cal. 571. There, however, the constitutional provision was not considered. This plainly appears. It is said that *People v. Brown*, 72 N. Y. 571, was not in conflict: "Whether the question had any bearing on the credibility of the witness was not determined, but the objection to it was sustained on another ground, which was distinctly taken,—that of privilege." The privilege was the constitutional provisions referred to, and

Chief Justice Church and the court held, with Cooley, that the witness could not be compelled to answer if he claimed his privilege. Under such circumstances, I do not think the authorities sufficient to practically repeal the statute, which, read with the constitutional provision, is capable of but one construction.

It is said a defendant may waive his constitutional right, and does so when he takes the stand. Suppose he may waive the privilege; he cannot bind himself in advance to do so. He may claim his right when the occasion arises. It may be here noted, however, that, until this line of decisions, it was always held that to administer an oath to a defendant was a species of compulsion, which of itself would render his statements inadmissible against him. I think the ruling erroneous, and the judgment is therefore reversed, and a new trial ordered.

We concur: GAROUTTE, J.; HARRISON, J.; McFARLAND, J.; VAN FLEET, J.; HENSHAW, J.

122 Cal. 129

**BARRELL v. LAKE VIEW LAND CO.**  
(L. A. 364.)

(Supreme Court of California. Sept. 20, 1898.)

CORPORATIONS—OFFICERS—ESTOPPEL—MEETINGS—RECORDS—EVIDENCE—BILLS AND NOTES—BONA FIDE HOLDERS—APPEAL—RECORD—REVIEW.

1. After allowing a person to act as its secretary, and causing its records to be authenticated by him as such, a corporation cannot object to the regularity of his appointment, or repudiate its obligations, signed by him under the direction of its board of directors.

2. A party cannot urge an objection to evidence which he failed to make in the court below, especially where it could have been obviated by the party introducing the evidence.

3. Where it is not shown whether a meeting of the board of directors of a corporation was regular or special, there is no presumption that it was special.

4. A corporation claiming that all of its directors were not notified to attend a meeting has the burden of proof.

5. Evidence which is excluded must be incorporated into the record in order to be considered on appeal.

6. It is presumed that the board of directors of a corporation consists of at least five, since the Code requires at least that number.

7. Acts of de facto directors of a corporation cannot be impeached by showing irregularity in their election.

8. In the absence of an issue for that purpose, a corporation cannot show that its records, on the faith of which parties have contracted with it, and which it has not attempted to correct, are false.

9. In a suit on a note by a bona fide holder, it is immaterial what a member of the board of directors of the maker stated to the payee with reference to its execution or the consideration therefor.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by James Barrell against the Lake View Land Company. From a judgment in

favor of plaintiff, an order denying a new trial, and an order refusing to discharge a writ of attachment, defendant appealed. Affirmed.

Knight & Harpham and G. E. Harpham, for appellant. Mulford & Pollard, for respondent.

**HARRISON, J.** The plaintiff brought this action upon the following promissory note of the defendant, which had been transferred to him before its maturity: "\$2,250. Los Angeles, March 22, 1894. Six months after date (without grace) I promise to pay to the order of Thomas F. Mitchell Co. twenty-two hundred fifty dollars, for value received, with interest at — per cent. per — until paid, both principal and interest payable only in United States gold coin. [Seal.] Lake View Land Co., by F. E. Brown, President. W. A. Main, Secretary." The defendant denied the execution of the note, and alleged that the signatures thereto were without authority from the board of directors of the corporation. The court found in accordance with the averments of the complaint and against the allegations of the answer. The defendant has appealed from the judgment and from an order denying a new trial.

At the trial, when the plaintiff offered the note in evidence, the defendant objected thereto upon the ground that it had not been shown that Main was the secretary of the corporation. It was admitted that at the date of the note Brown was president of the corporation, and he testified that he signed and delivered the note to the payee, and that Main signed the note, and affixed the seal of the company thereto. It was also shown from the records of the meetings of the board of directors, which were produced by the secretary of the defendant, that at a meeting of said board held at Redlands, March 17, 1894, the following resolution was adopted: "On motion of W. A. Main, seconded by E. C. Webster, resolved that this corporation, by its president and secretary, execute its note to Thomas F. Mitchell & Company for twenty-two hundred and fifty (\$2,250) dollars, dated March 22, 1894, due July 22, 1894, with interest." It appeared from these records of the board that Main acted as secretary from February 12, 1894, when Fish, the former secretary, resigned, until April 26, 1894, and that the record of the proceedings of March 17th was authenticated by the signature of Main as secretary. Upon this evidence the court was authorized to find that Main was the secretary of the corporation at the time when the note was executed, and that the board of directors had given authority to execute the note in the name of the corporation, and that it was duly executed. The defendant will not be permitted, after allowing Main to act as its secretary, and causing its records to be authenticated by him as its secretary, to object to the regularity of his ap-



pointment, or to repudiate its obligations signed by him under the direction of its board of directors.

In its brief herein the appellant presents, as another objection to the above resolution, that the meeting of the board of directors at which it was adopted was held at Redlands, whereas it is alleged in the complaint that the principal place of business of the corporation is Pasadena, and that the directors had no power to act at any other place than at its principal place of business. This objection was not made at the trial in the superior court. When the plaintiff offered in evidence these minutes of the board, the defendant objected thereto on the ground "that it is incompetent. It don't purport to be a regular meeting of the board, and only three directors are present, and it is incompetent until it is shown that it is a regular meeting of the board, or that the other directors were notified and were not present, and until it is shown that W. A. Main was a regularly elected secretary, because until the minutes are signed by the secretary of the company they are incompetent." And in the statement of the case it specifies the insufficiency of the evidence to justify the finding, "for the reason that there was no valid resolution of the board of directors of the defendant corporation introduced in evidence authorizing the execution of the note sued upon, because there was no competent proof to show that W. A. Main was the secretary of the corporation on March 22, 1894, or at any other time."

If the defendant had made this objection at the trial, the plaintiff would have had an opportunity to obviate it, either by showing that the entry in the minutes was an error, or that the allegation in the complaint was incorrect. At another stage of the trial the defendant sought to show that its principal place of business was at Redlands, and, as it must be assumed that this offer was made in good faith, it is evident that, if this objection to the minutes had been pointed out when they were offered in evidence, the plaintiff would have caused the complaint to be amended to conform therewith. The defendant cannot avail itself here of an objection which it failed to make in the superior court, especially when it appears that the ground of the objection could have been removed if it had then been made. Whether the meeting of March 17th was a regular or stated meeting of the directors, or was a special meeting, was not shown. There is no presumption that it was a special meeting. *Granger v. Mining Co.*, 59 Cal. 678; *Agricultural Works v. Houser*, 109 Cal. 9, 41 Pac. 809. If the defendant would claim that it was a special meeting, or that all of the directors were not notified thereof, it was incumbent upon it to introduce evidence to that effect. *Thomp. Corp.* §§ 707, 789. When the defendant subsequently offered in evidence the by-laws of the corporation, its

counsel did not claim that it would appear therefrom that March 17th was not the day for a regular meeting, but stated that the purpose of offering them was to show that the by-laws had not provided for the waiving of the notice of regular meetings of the board of directors. None of the by-laws are set forth in the record, and therefore it does not appear, nor can it be said, that the court erred in refusing to receive them as evidence. Error must be shown by the appellant, and unless evidence which is excluded is incorporated in the record it cannot be determined that there was error in its exclusion.

For the same reason the refusal of the court to admit in evidence the copy of the articles of incorporation of the defendant is not available to the appellant. It may be said, in reference to this offer, that, upon the defendant's statement that it was offered for the purpose of showing "that the number of directors are five," it was immaterial, inasmuch as the Code requires that there shall be at least five directors for a corporation. So far as the purpose as stated by counsel was to show "who were the first directors, and perhaps to follow that up, showing continuously who were the directors; to show that Mr. Webster, who purports to act here as one of the members who authorized the execution of this note, was not a director,"—the evidence was irrelevant, since the act of persons who were at the time of the authorization of the note in suit the de facto directors of the corporation cannot be impeached by showing any irregularity in their election.

The offer of the defendant to show that no meeting of the directors was had on the 17th of March was properly refused. In the absence of an issue for that purpose, the corporation will not be permitted to show that its records, upon the faith of which parties have contracted with it, and which it has itself taken no steps to correct, are false.

The court also properly excluded the offer to show by Webster what he had stated to Mitchell with reference to the execution of the note or the consideration for it. Such testimony would not affect the rights of the plaintiff, even if it had appeared that Mitchell had assented to the statements or agreed with the proposition of Webster.

The defendant has also appealed from an order refusing to discharge a writ of attachment issued in the action. The application for the discharge was made upon the ground that the note sued upon had been secured by a pledge of personal property. At the hearing the evidence upon this point was conflicting, and, as the court denied the motion, it must have determined the ground urged therefor against the claim of the defendant, and its decision thereon is not open to review here. The defendant presented evidence tending to show that certain stock

had been delivered with the note as collateral security therefor, but there was also evidence presented that it was not so intended. The note itself does not purport to be so secured, and there was no direct evidence of any agreement between the parties to the note that it should be secured. The judgment and order denying a new trial, and also the order refusing to discharge the attachment, are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

122 Cal. 134

PEOPLE v. CHAVES. (Cr. 381.)

(Supreme Court of California. Sept. 20, 1898.)

JUSTICES OF THE PEACE—APPOINTMENT—ELECTION—TERM OF OFFICE—RIGHT TO JURY TRIAL—HOMICIDE—DEGREES—MANSLAUGHTER—MALICE—THREATS—EVIDENCE—INSTRUCTIONS—REASONABLE DOUBT—VERDICT—MOTION IN ARREST.

1. Under St. 1893, p. 346, § 25, subds. 2, 21, authorizing supervisors to create townships and to fill vacancies in township offices for unexpired terms, and section 58, providing for justices of the peace in townships, and that supervisors shall divide the counties into townships for the purpose of electing justices of the peace, and Code Civ. Proc. § 111, requiring supervisors to fill vacancies in the office of justice of the peace, the creation of a township creates the office of justice of the peace, which is then vacant, and must be filled by the supervisors.

2. St. 1893, p. 346, § 25, subd. 21, and Code Civ. Proc. § 111, authorizing supervisors to fill vacancies in the office of justice of the peace for unexpired terms, do not violate constitutional provisions making that office elective.

3. Under Pol. Code, § 879, providing that every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified, the fact that no justice of the peace was elected at the first general election following the creation of a township does not invalidate a commitment subsequently made by a justice originally appointed by the supervisors.

4. Pen. Code, § 1121, authorizing the court, in its discretion, to permit separation of the jury pending trial, does not violate Const. art. 1, § 7, providing that the right of trial by jury shall be secured to all and remain inviolate.

5. Instructions are properly refused where all the law stated therein, as far as applicable and correctly stated, has been given in the court's charge.

6. Where the evidence clearly shows that accused, if guilty, is guilty of murder, a charge on manslaughter should not be given.

7. Introductory statements in a charge commended the jurors for their careful and patient attention to the testimony and arguments, which was said to be an assurance that their remaining duties would be discharged with conscientious fidelity, and were to the effect that no man accused of felony could be tried without counsel, or be convicted except by a verdict of 12 disinterested men chosen from the people; and that no man is denied a fair trial, whether native or foreign; and that the court had the fullest confidence that the deliberations of the jury would be conducted with decorum and propriety. *Held* proper.

8. A charge defining the degrees of murder in the language of the statute is not improper, though there is no evidence of poison, lying in wait, arson, etc.

9. As used in a charge that the jury might convict of murder of the first or of the second degree, or acquit, "as in your judgment the evidence may warrant," the words quoted are not misleading, as being unrestricted in their application.

10. A charge that accused is presumed to be innocent until the contrary is proved, and, in case of reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, is not confused and contradictory.

11. It is not error for the court to read forms of verdict to the jury, nor in a murder trial to read first the form for murder in the first degree.

12. Accused and deceased, a woman, lived together. They quarreled, and deceased took refuge with a neighbor, accused following, and attempting to stab her with a large pocket knife. He left, threatening to return and take her. He stated to several that he would return and kill her. Several days later he returned, and tried to get her to go home with him, and, on her refusing, drew a knife 13 inches long, and started after her, she screaming and running out of the door, where she fell. Accused cut at her, and she turned over face downwards, whereupon he placed his foot on her, and stabbed her to death, and fled. He afterwards acknowledged the crime to several. His only defense was certificates of good character. *Held* to justify a verdict of murder, with infliction of the death penalty.

13. Evidence that accused and deceased, a woman, who lived together, had quarreled, the latter fleeing to a neighbor, where accused followed her, and attempted to make a murderous assault on her, and made threats against her, is competent, as showing malice and a motive for the murder, committed a few days later.

14. Evidence of threats by accused against the life of deceased prior to the murder is competent as tending to show malice.

15. Proper foundation being laid, questions put to elicit evidence of confessions by accused are proper.

16. Under Pen. Code, § 1185, permitting motion in arrest of judgment founded on defects appearing on the face of the indictment, such a motion, based on illegality of the commitment, was properly overruled.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Manuel Chaves was convicted of murder, and was sentenced to be hanged, and he appeals. Affirmed.

Omar Bushnell, for appellant. W. F. Fitzgerald, Atty. Gen., and W. H. Anderson, Asst. Atty. Gen., for the People.

BELCHER, C. The defendant was charged by information with the crime of murder, committed on the 14th day of May, 1897, in the county of San Diego, by willfully, unlawfully, and feloniously killing a woman named Gregoria Rodrigues. When arraigned, he moved the court to set aside the information upon the ground that before the filing thereof he had not been legally committed by a magistrate, and the motion was denied. He then demurred to the information and his demurrer was overruled, and thereupon he pleaded not guilty. He was afterwards tried, and the verdict returned was: "We, the jury in the above-entitled cause, do find the defendant guilty of murder of the first degree, as charged



in the information, and in our judgment he should be punished by the infliction of the death penalty." He moved for a new trial and in arrest of judgment, and, both of these motions being denied, judgment was entered that he be hanged at San Quentin. From that judgment and the order denying his motion for a new trial this appeal is prosecuted.

1. It appears from the bill of exceptions that the preliminary examination of defendant was had before one Walter B. Ferguson, who styled himself "justice of the peace, Picacho township, county of San Diego." The order of commitment was signed by Ferguson as such justice of the peace, and dated May 25, 1897. It further appears that on February 4, 1896, the board of supervisors of San Diego county, upon petition of certain citizens, and by proceedings regularly taken, formed or created the "Picacho judicial township" in said county, and appointed Walter B. Ferguson justice of the peace of said township; that thereafter the said appointee duly qualified as such magistrate; that no election for justice of the peace has ever been held in said township; and that said Ferguson was not at the date of his appointment a justice of the peace, elected or appointed to the office in any other township or city in said county, and had not since been elected or appointed a justice of the peace in any other township. Upon these facts it is earnestly contended by counsel for appellant that the action of the board of supervisors in appointing Ferguson to the office of justice of the peace was wholly void; that he was not a justice of the peace either de jure or de facto; and therefore defendant had not been legally committed, and his motion to set aside the information should have been granted. The county government act of 1893 (St. 1893, p. 346) contains the following provisions:

"Sec. 25. The boards of supervisors, in their respective counties, have jurisdiction and power under such limitations and restrictions as are prescribed by law: \* \* \*

"Subd. 2. To divide the counties into townships, election, school, road, supervisor, sanitary, and other districts required by law, change the same, and create others, as convenience requires."

"Subd. 21. To fill by appointment all vacancies that may occur in any office filled by the appointment of the board of supervisors and elective county or township officers \* \* \* the appointee to hold office for the unexpired term."

"Sec. 58. The officers of a township are two justices of the peace, two constables, and such inferior and subordinate officers as may be provided by law or by the board of supervisors: provided, that in townships containing cities in which city justices are elected, there shall be but one justice of the peace. The board of supervisors of each county, on or before the first Monday in

September, eighteen hundred and ninety-one, and thereafter as public convenience shall require, shall divide their respective counties into townships for the purpose of electing justices of the peace and constables: provided, that the board of supervisors shall have power, whenever they may deem it for the good of their county, to allow only one justice of the peace and one constable in any judicial township having a population of less than three thousand inhabitants."

Under these provisions of the statute it is clear that the board of supervisors was empowered to divide the county into townships for the election of justices of the peace,—that is, into judicial townships,—and that each of such townships was entitled to have at least one justice of the peace. And it is also clear that when a township was created the office of justice of the peace for the township was created, and was then vacant, and to be thereafter filled by appointment or election, as provided by law. "An office is vacant, in the eye of the law, whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event. A newly-created office, which is not filled by the tribunal which created it, becomes vacant on the instant of its creation, an existing office without an incumbent being vacant whether it be a new or an old one." 19 Am. & Eng. Enc. Law, p. 431, and see cases cited.

The office being thus created, with no incumbent to discharge its duties, the question is, how could the vacancy be filled? This question is clearly answered by subdivision 21, § 25, of the county government act, above quoted, and by section 111 of the Code of Civil Procedure, which declares: "If a vacancy occurs in the office of a justice of the peace, the board of supervisors of the county shall appoint an eligible person to hold the office for the remainder of the unexpired term." *People v. Sands*, 102 Cal. 12, 36 Pac. 404. The claim that these provisions of the statutes authorizing boards of supervisors to fill by appointment the office of a justice of the peace are unconstitutional, because in conflict with those provisions of the constitution which make that office an elective one, cannot be sustained. "A statute allowing a particular officer or board to fill a vacancy in an office until the next election is not in conflict with a constitutional provision that such office shall be filled by a popular election." *Throop*, Pub. Off. § 433, and cases cited. Nor did the fact that no justice of the peace was elected to succeed Ferguson at the first general election following his appointment in any way deprive him of his right to act as such officer. Having been legally appointed to fill that office, it was incumbent upon him to continue to discharge its duties until his successor was elected and had qualified. *Pol. Code*, § 879. Without stating the facts or considering the matter further, we

think it sufficiently appears from what has already been said that Ferguson, at the time the defendant was examined and held to answer by him, was not only a *de facto*, but a *de jure*, justice of the peace in and for the judicial township for which he was appointed; and, this being so, it follows that the court properly denied the motion to set aside the information.

2. While the jury was being impaneled, and during the progress of the trial, the court took a recess several times, and at each of such times, after properly admonishing the jurors, permitted them to separate, without the consent of defendant or his counsel. No objection to the separation was made, but it is now claimed for appellant that it was error for the court to permit the jurors to separate; and that section 1121 of the Penal Code, which authorized the court in its discretion to permit the separations, is unconstitutional because it is inconsistent with that provision of the constitution which declares that "the right of a trial by jury shall be secured to all, and remain inviolate." Article 1, § 7. The section of the Code referred to is not unconstitutional. It in no way violates or interferes with the right that every one has to a fair trial by jury. The matter rested in the discretion of the court, and, as no abuse of that discretion appears, its action was justified and proper. *People v. Ebanks*, 117 Cal. 657, 49 Pac. 1049.

3. The court charged the jury very fully, clearly, and correctly upon all the points of law applicable to the facts of the case, and refused to give six instructions requested by defendant. It is claimed for appellant that the court should have given each of the instructions requested by him, and that its refusal to do so was prejudicial error. But all the law stated in the said instructions, in so far as it was applicable and correctly stated, was given in the court's charge; and the rule is settled beyond controversy, by numerous decisions of this court, that the trial court is not bound to repeat itself, and it is not error to refuse to give an instruction which has already been substantially given in its charge or in other instructions.

One of the instructions requested related to the crime of manslaughter. That instruction was properly refused, because, as clearly shown by the evidence, the defendant, if guilty at all, was guilty of murder of the first or second degree, and when such is the case an instruction upon manslaughter should not be given. *People v. Turley*, 50 Cal. 469; *People v. Lee Gam*, 69 Cal. 552, 11 Pac. 183; *People v. Chavez*, 103 Cal. 408, 37 Pac. 389.

Counsel for appellant complains of certain parts of the charge, and says "it is difficult to perceive" what they had to do with the case. The part first referred to is found in an introductory statement in which the court commended the jurors for the careful and patient attention which they had given to the testimony of the witnesses and the argu-

ments of counsel, and said that this was an assurance that their remaining duties would be discharged with conscientious fidelity. The court then said that in this country no man accused of a felony could be put upon his trial without the aid of counsel, or could be convicted, except by the verdict of a jury of 12 disinterested men, chosen from the body of the people of the county; that the law makes ample provision for the selection of jurors who are strictly fair and impartial to try the issue of the guilt or innocence of the accused; that it can never be justly said that under the judicial system of this country a man is denied a fair and impartial trial, whether he be native born or of foreign birth; and that the court had the fullest confidence that the deliberations of the jury in the jury room would be conducted with decorum and propriety, and the result thereof would be a just and righteous verdict, under the law and evidence in the case. Similar preliminary statements in charges are not uncommon, and in all that was said by the court in this way we see nothing which could have operated to prejudice the defendant in the minds of the jurors, or which was at all improper.

The next part of the charge objected to is that in regard to the different degrees of murder. In defining the crime of murder, and the two degrees into which it is divided, the court followed the language of Pen. Code, §§ 187-189. It is objected that "there is no evidence of poison, lying in wait, torture, arson, rape, robbery, burglary, or mayhem in the case, nor anything that required explanation why the legislature referred to those matters, or why it had fixed tests for such homicides as occur in connection with such things or those crimes." This criticism has no merit and deserves no particular notice. Obviously it was the right and duty of the court to state the law in regard to the offense, and the degrees into which it is divided as declared by the statute, and such statement did not and could not have prejudiced the defendant.

The court charged the jury that, "under the information in this case, the jury may convict the defendant of murder of the first degree, murder of the second degree, or acquit him altogether, as in your judgment the evidence may warrant, in view of the law to be given you by the court." Counsel quotes only the words, "as in your judgment the evidence may warrant," and claims that they were such as to mislead the jury, being almost unrestricted in their application to the case. The words quoted, when read in connection with the balance of the instruction, are not misleading, and are free from any valid objection.

The court also charged the jury, in the language of Pen. Code, § 1096, that "a defendant in a criminal action is presumed to be innocent until the contrary is proved, and, in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal." To this the court added that the



presumption of innocence goes with the defendant all through the case, and operates in his favor until a verdict is arrived at. The court then proceeded to state what is a reasonable doubt in the language many times quoted and approved by this court. Counsel say, "The presumption of innocence is not fully and clearly stated in the words" above quoted; and that, "although those portions of the charge may be in the words of the statute, they are contradictory and confused, and should not have been given." Obviously, there is nothing in this point, and it may be passed without further notice.

Finally, at the conclusion of its charge, the court read and handed to the jury five forms of verdict, any one of which they might render, stating that they were sufficient to cover every phase of the case, under the law and the evidence; the first form finding the defendant guilty of murder of the first degree, and that he should be punished by the infliction of the death penalty, and the last form finding the defendant not guilty. It is objected that there was not "anything in the case that made it necessary for the court to read to the jury forms of a verdict, with such forms so arranged and read as to bring the one for murder in the first degree, and fixing the death penalty, first to be read; nor should they be read at all, because such reading might convey to the minds of jurors the idea that the court favored a verdict as expressed in the form first read." We see nothing in this point. It must be presumed that the jurors were men of ordinary intelligence, and, if so, the mere order in which the forms of verdict were read could not have conveyed to their minds the idea suggested.

4. Appellant contends that the evidence was insufficient to justify the verdict finding him guilty of murder of the first degree, and for this reason his motion for a new trial should have been granted. The facts proved were, in substance, as follows: Defendant and the deceased, Gregoria Rodrigues, had been living together in a mining town or camp in San Diego county. On the night of May 9, 1897, they quarreled, and deceased left him, and sought refuge in the house of a near neighbor, Refugio Ynanes. Defendant followed her, and made an attempt to stab her with a large pocket knife. This attempt was frustrated by Ynanes, who kept defendant back with a dagger, and made him desist. Defendant left, saying: "Now, you will see I will be back shortly. I will take this woman out. I am a man, wherever you find me." He came again the next morning, and tried to persuade deceased to return home with him, but she refused to do so, and he went away, remarking that he would get even with her some time. He returned again about noon of the same day, and conversed with Mrs. Ynanes, and then left, saying he was going to Yuma. About the same time he stated to several other persons that he was going to Yuma, but that he would re-

turn in a few days for the purpose of killing deceased. Defendant returned on May 14th, and went to the home of Ynanes, where deceased had been staying since she left him. He found there Mrs. Ynanes and deceased, and, after talking with Mrs. Ynanes for a few moments, he turned to deceased, and handed her a letter, saying, "Answer it promptly." She read the letter, which was to the effect that he wished her to return to him. She asked for paper and ink with which to answer it. He said: "No, no; you don't want ink. I want the word of mouth. What do you say? Are you going to come together with me?" She replied: "Well, sir; the only reply that I can make to you is that I cannot remain with you one moment longer." Then he said, "All right;" and stuck his hand in his breast, and pulled out a knife about 13 inches long, and started towards deceased. She retreated, taking refuge behind Mrs. Ynanes, who tried to reason with and restrain him. He struck at deceased over Mrs. Ynanes, cutting her right hand across the wrist. She then screamed, and ran, and defendant, although Mrs. Ynanes was trying to keep him back, pursued and overtook her just outside the door of the house, where she had stumbled and fallen. There he cut at her, wounding her superficially at first, and she turned over face downwards. He then placed his foot upon her, stabbed her to death, and fled. Subsequently defendant acknowledged his crime to several persons. The only evidence offered in defense consisted of two certificates, made by officials in the Mexican town in which defendant was born and brought up, certifying to his previous good character. The above statement, we think, shows clearly and beyond controversy that the evidence introduced was amply sufficient to justify the verdict of the jury.

5. Appellant also contends that the court erred in admitting certain evidence against his objections that it was immaterial, incompetent, and irrelevant. All the questions objected to which were propounded to Mrs. Ynanes, and the first question objected to which was propounded to Mr. Ynanes, related to what occurred at their house on the night of May 9th. It is said: "The subject of the testimony had nothing to do with the killing on the 14th of May, 1897, and did not relate to the crime charged in the information." In our opinion, the evidence elicited in answer to these questions was clearly material and competent. It showed that defendant and deceased while living together had quarreled, resulting in her leaving him and fleeing to a neighbor's house for protection, in his following her, and attempting to make a murderous assault upon her, and in his making threats against her when his assault was frustrated. This tended to show malice and ill will on his part and a motive for the murder committed a few days later. Such evidence was admissible. *People v. Kern*, 61 Cal. 244; *People v. Brown*, 76 Cal. 573,

18 Pac. 678. The question objected to which was propounded to the witness Downey was entirely proper. It elicited evidence of threats made by defendant against the life of deceased prior to the murder. Such evidence was admissible as tending to show malice. *People v. Scoggins*, 37 Cal. 676; *People v. Hong Ah Duck*, 61 Cal. 387. The questions objected to which were propounded to Mr. Hodges, Mr. Jones, and Mr. Ynanes, except the first, were for the purpose of eliciting evidence of confessions made by defendant. Proper foundation for the introduction of such evidence was laid, and there was no error, therefore, in admitting it.

6. The last point made is that the court erred in overruling appellant's motion in arrest of judgment. The contention is "that, as there was no legal commitment before the filing of the information, the trial court had no jurisdiction." This matter has already been considered and decided against appellant's contention. Besides, the motion in arrest of judgment can only be founded on defects appearing upon the face of the information or indictment, and not on the ground here urged. Pen. Code, § 1185. We conclude that the record discloses no ground for reversal, and advise that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

122 Cal. 144

WIGMORE v. BUELL. (L. A. 381.)

(Supreme Court of California. Sept. 21, 1898.)

STATUTES—GENERAL LAWS—UNIFORMITY OF OPERATION—EXEMPTIONS—TRESPASSING ANIMALS—ATTACHMENT—COMPLAINT—BOND—WRIT.

1. St. 1877-78, p. 176, concerning damages done by animals trespassing on private lands, is not in violation of Const. art. 1, § 11, providing that "all laws of a general nature shall have a uniform operation," because the act applies to certain counties only.

2. St. 1877-78, p. 176, concerning damages done by trespassing animals, and allowing an attachment to issue in actions thereunder on the filing of a verified complaint without the statutory affidavit, does not violate Const. art. 1, § 11, requiring laws of a general nature to have a uniform operation, in that it allows an attachment for a trespass and without an affidavit, thus introducing a remedy different from that pointed out in the Code, since the power to pass special laws includes the power to make them apply to special objects, without their trenching on the operation or resulting in the repeal of previously existing laws.

3. The fact that St. 1877-78, p. 176, concerning damages by trespassing animals, and allowing attachments to be issued in suits thereunder, denies the exemption under the general laws, does not render it unconstitutional.

4. St. 1877-78, p. 176, § 3, gives a right to attach trespassing animals to better secure any judgment which the landowner may recover for the trespass, and makes all provisions of

the Code of Civil Procedure relative to attachment, except sections 538 and 866, applicable to proceedings under the statute. Code Civ. Proc. § 537, denies an attachment as against property of a resident debtor, where the creditor holds a lien. St. 1877-78, § 13, gives an option to distrain for two days without instituting legal proceedings, in order to determine which remedy must be pursued; and section 15 gives the right to compensation for feed and care of animals "lawfully distrained \* \* \* during the time of such lawful distraint." *Held*, that since the right to distrain continues only for two days, and the lien for feed and care for a like time, the statute is not in conflict with section 537 of the Code.

5. Under Code Civ. Proc. § 539, providing that, before issuing a writ of attachment, the clerk must require an undertaking in a sum not less than \$200, and not exceeding the amount claimed by plaintiff, the fact that the undertaking recited that the claim of plaintiff was \$500, whereas the complaint prayed for \$500 damages, besides \$153 for costs and expenses of plaintiff for keeping certain distrained animals, and further costs at the rate of \$76 per day, is immaterial, where the undertaking was for the sum of \$1,000.

6. Where a writ of attachment of trespassing animals states the amount in suit to be \$653, and the complaint prays for \$500 damages and \$153 for certain costs and expenses incurred, besides costs incurred for feed and care of the animals after they were attached, the writ substantially conforms to Code Civ. Proc. § 540, requiring the writ to direct the sheriff to satisfy plaintiff's demand, "the amount of which must be stated in conformity with the complaint," since the last-named charge is part of the costs and not of plaintiff's claim.

Commissioners' decision. Department 1. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.

Action by John Wigmore against R. T. Buell. From an order refusing to dissolve an attachment, defendant appeals. Affirmed.

Richards & Carrier, for appellant. Boyce, Taggart & Kellogg, for respondent.

CHIPMAN, C. Appeal from an order refusing to dissolve an attachment issued in favor of plaintiff in an action brought under the act entitled "An act concerning trespassing animals upon private lands in certain counties of the state of California," approved March 7, 1878 (St. 1877-78, p. 176). The appeal is here by bill of exceptions, which contains the complaint, writ of attachment, undertaking on attachment, motion to dissolve attachment, order of refusal, and notice of appeal. The complaint avers that plaintiff is the owner and was in the lawful possession of certain land in Santa Barbara county; that defendant is the owner of certain live stock (describing it); that prior to November 24, 1895, said animals, without plaintiff's consent, entered and trespassed upon the said lands of plaintiff, to his injury in the sum of \$500; that the value of said animals is \$2,500; that, pursuant to the act above referred to, plaintiff "did distrain and take into his possession said trespassing animals, and has kept the same since November 24, 1895, and in pursuance of said act plaintiff has now sought legal proceedings under said act to recover damages," etc.; that "upon taking up said



animals \* \* \* plaintiff made the necessary inquiries as to the ownership of said animals, and \* \* \* that said animals are the property of \* \* \* defendant"; avers the cost of keeping to be \$76.50 per day, and that they are now in plaintiff's possession; and prays judgment for damages and cost of keeping and of suit. The complaint was verified, and filed November 26, 1895. On the same day, an undertaking was filed, and a writ of attachment was sued out and was served by the sheriff on the 27th by levying on the animals mentioned in the complaint. No affidavit in attachment was filed.

The act of 1878 declares it to be unlawful for any animal, the property of any person, to enter upon the land of another. Section 1. The person entitled to possession of the land, trespassed upon in violation of the act, may recover from the owner of the trespassing animals "all damage sustained by reason of such trespass, together with costs of suit." Section 2. "For the purpose of allowing the plaintiff a better security for the payment of any judgment he may recover in actions brought under the first two sections of this act, all the provisions of the Code of Civil Procedure of this state relating to attachment process shall apply to such actions, subject only to the modifications herein contained, to wit: Instead of filing the affidavit required by sections 538 and 866 of said Code, the plaintiff is entitled to the issuance of a writ of attachment against the property of the defendant upon filing his complaint stating a cause of action, verified according to the law concerning the verification of pleadings." Section 3. The act declares that no trespassing animal shall be exempt from attachment or sale, etc. Section 4. If the ownership is unknown, "then in that case the trespassing animals shall also be liable for all damage done by such trespass," and points out how the right may be enforced by an action in rem. Sections 5-9. "The plaintiff may procure an attachment against the property defendant in an action in rem under this act, in the same manner as in cases where the owner is sued, and the undertaking on attachment shall enure to the benefit of the owner of the property defendant if the plaintiff fail to recover in the action." Section 10. "Any person injured by a violation of section one of this act may, at his option, distrain and take into his possession any trespassing animal, \* \* \* and keep the same two days without instituting legal proceedings under this act, so that he may have proper time in which to make the necessary inquiries as to the ownership of the animals and determine which remedy given herein he is entitled to;" and provision is made for the owner of the distrained animals to take the property upon giving a bond upon certain conditions. Section 13. "In all other matters than those in which a different rule is herein prescribed" the Code of Civil Procedure shall govern. Section 14. It is provided

by section 15 that "whenever any animal is distrained under section thirteen \* \* \* the distrainer shall be entitled to recover reasonable compensation for care and feed of such animal \* \* \*; and in actions brought under provisions of this act, when the plaintiff recovers, then a reasonable sum for keeping any animal levied upon by attachment process or under execution shall be allowed as costs of suit." Section 15. The act is made to apply to certain counties only, among them Santa Barbara.

1. Appellant contends that the act is unconstitutional, as violative of article 1, § 11, Old and New Const., which declares that "all laws of a general nature shall have a uniform operation." The contention is that the act is special legislation, in that "it seeks to amend the Codes, which do and must, to be constitutional, act uniformly as to all territory and all persons or classes of persons.

There is nothing in the old constitution which forbids the legislature from passing either local or special laws, except in respect of the formation of corporations other than municipal. *Brooks v. Hyde*, 37 Cal. 366. The eleventh section of article 1, referred to by appellant, was held in *Brooks v. Hyde* to mean that every law shall have a uniform operation upon all citizens or persons or things of any class upon which it purports to take effect, and that it shall not grant to any citizen or class of citizens privileges which, upon the same terms, shall not equally belong to all citizens. In *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604, we find nothing to support appellant's contention; for it was there said that a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, and the case of *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413, was referred to, where it was said: "In order to constitute the uniformity of operation specified in the constitution, it is not necessary that the general law must operate alike upon all the subjects or persons to which it applies, independent of all other considerations, but that it shall operate uniformly upon all persons standing in the same category, and upon rights and things in the same relation." Our statutes are full of instances of the exercise of the power of the legislature to enact special laws under the old constitution.

The act is not unconstitutional because it gives an attachment for a trespass and without an affidavit, thus introducing a remedy different from that pointed out in the Code of Civil Procedure subjecting animals, also exempt by general law from execution, to the attachment. The power to pass special laws must necessarily include the power to make them apply to special objects without their trenching upon the operation or resulting in the repeal of previously existing laws. *Brodhead v. City of Milwaukee*, 19 Wis. 624. The fact that the act disregards the exemptions

claimed under the general law we do not think renders it unconstitutional. The remedy given by the act would in some cases be of little value if the animals could be reclaimed as exempt. We know of no reason why the legislature could not, nor why it should not, have given the remedy against the trespass of animals exempt from execution as well as those not so exempt. *Wilcox v. Hemming*, 58 Wis. 144, 15 N. W. 435.

2. Appellant contends that the complaint does not state such cause of action as entitles plaintiff to the process of attachment. The point made, as we understand appellant, is that, except as to the provisions of sections 538, 866, Code Civ. Proc., all the other provisions of the Code relating to attachment are expressly made applicable by section 3 of the act. For example, section 537, Code Civ. Proc., provides in the case of a resident debtor that it is a condition to the existence of the cause of action which will support the attachment that the demand be not secured by any mortgage or lien upon real or personal property, or pledge of personal property, etc. It is contended that, at most, the act of 1878 "simply added another character of action to that of contract for the direct payment of money (to wit, for trespass), but in no way dispensed with the condition that the demand should not be secured by another lien." We are cited to *Hill v. Grigsby*, 32 Cal. 56, to show that the lien referred to in section 537 is any valid lien, and that the courts are unauthorized to discriminate in favor of or against any particular kind of lien. It is contended that the lien continues beyond two days under section 13; and can only be discharged by tendering the amount claimed as damage or by an undertaking; and that no fair construction of the law gives both the lien by distraint and the attachment also.

Appellant's construction of the statute is that the act gives the right to sue either the owner of the animals in personam or the animals in rem, and gives as a collateral remedy the process of attachment as provided in the Code of Civil Procedure. In addition to these actions, any person injured may distrain the animals and take them into possession, and within two days must elect whether to proceed in personam if he knows the owner, and if not he must proceed in rem. If he acquires a lien by distress, he may enforce this lien in whichever action he is entitled to bring, whether in personam or in rem, and may recover in addition to his damages the expense and cost of his distraint. If he does not distrain, then, and only then, is he entitled to invoke the statutory process of attachment, and in such case he may recover the expense of keeping the animals as part of the costs.

Respondent claims that the act gives the landowner a right to distrain animals taken damage feasant, and detain them two days only, at the expiration of which time he must commence his action. He can then attach

the animals in whichever form of action he brings, and thereafter his right of detention by distraint expires, and the animals are in the custody of the law under the attachment only.

The obvious purpose of the act is to afford the owner of land trespassed upon a speedy and somewhat summary remedy by giving an action both against the owner, if known, and against the animals, if he is not known, and the attachment against the property may be given in both cases. Sections 3, 10. An act should be given a construction, if it can be done within the rules of law, to carry out this obvious purpose. The right to distrain is an option given to the landowner which he may exercise for two days without instituting any legal proceedings whatever, the declared purpose being to enable the landowner during that period to ascertain the owner of the animals, and to determine which remedy given by the act the landowner will resort to. We cannot find any authority in the act for distraining the animals beyond the two days; nor can we find any lien given upon the animals by the distraint to secure any claim of damage except as given in section 15, under the provisions of which "reasonable compensation for care and feed" may be recovered "whenever any animal is lawfully distrained under section 13, \* \* \* during the time of such lawful distraintment." This lawful distraintment, we think, is confined to two days. It seems to us that if the legislature had intended to give the landowner authority to hold under distraint for an indefinite time, and until he could obtain judgment in his action, there would have been no occasion for introducing the attachment feature of the act, and the limit of two days would seem to exclude the idea that any greater time was to be given for distraining the animals. The purpose of the attachment was to give the "plaintiff a better security for the payment of any judgment he may recover in actions brought under the first two sections of this act"; and we must presume that the same purpose was in the minds of the legislature in enacting section 10, and that the attachment in actions in rem was to better secure any judgment obtained under section 5 et seq. It may not be always convenient for the landowner to take upon himself the care and custody of the animals pending suit in personam or in rem; and the statute would seem to afford him the opportunity in both forms of action to relieve himself of that responsibility by resorting to attachment, in which case the animals would then pass into the custody of the law. There is in this state no common-law right in the owners of land to recover for the trespassing of animals on their land. *Merritt v. Hill*, 104 Cal. 184, 37 Pac. 893. The owner of land may ignore the trespass, and turn the animals out upon the highway, or return them to the owner without distraining or attaching, but he is not bound to do this in order



to avoid the care and custody of the animals. When, however, he seeks the relief of the act, he must keep within its provisions, and cannot be given any relief beyond them. Having no continuing lien by the distraint, the act in no wise conflicts with the Code provision referred to by appellant, denying an attachment when there is a lien. Appellant's contention would compel the landowner, where the owner of the animal is known as well as where not, to personally hold in his possession the trespassing animals under the distraint or lose his lien, which we do not think comports with the purpose or language of the act.

Appellant urges that it is oppressive and unjust to give an attachment with its attendant costs as auxiliary to the lien of distraint. We cannot see that there would be much more cost to the owner of the animals in the one case than in the other. But the difficulty with the argument is that the statute does not give a continuing lien by distraint and does give the attachment. We think the more just and reasonable construction of the statute, keeping in mind its object and purpose, is as we have given it.

3. It is claimed by appellant that the undertaking is not in conformity with the provisions of section 539, Code Civ. Proc., for the reason that the claim recited therein is different from the amount claimed in the complaint. The bond recites that the plaintiff is about to commence an action for damages, costs of keeping, and costs of suit, etc., claiming that the sum of \$500 is due from defendant. It then proceeds: "Now, therefore, we \* \* \* do \* \* \* undertake, in the sum of one thousand dollars, \* \* \* that, if the said defendant \* \* \* recover judgment in said action, the said plaintiff will pay all costs that may be awarded the said defendant, and all damages he may sustain by reason of the said attachment, not exceeding one thousand dollars." The complaint prays for \$500 damages, \$153 costs and expenses of keeping the animals (for two days), and for \$76.50 per day for keeping the same hereafter. We are referred to *Hisler v. Carr*, 34 Cal. 641, which holds that when the penalty is too small it is a fatal objection to the issuance of the writ. But this objection would not hold good if the bond is for a greater sum than required by law.

4. The objection that the writ states a different amount than that claimed in the bond we do not think well taken. Section 540, Code Civ. Proc., requires the writ to direct the sheriff to attach sufficient property to satisfy plaintiff's demand, "the amount of which must be stated in conformity with the complaint," etc. The writ states the amount to be \$653, besides costs of suit, which is the amount of damage claimed (\$500), and two days' expense of keeping (\$153). Whatever claim plaintiff would recover beyond this would be as costs of suit, for the sheriff, and not the plaintiff, has the legal custody of

the animals. The amount of these costs is to be ascertained by the court. We think there is a substantial compliance with the statute in the bond and writ. If plaintiff continues his possession of the animals after the statutory two days, it must be as keeper for the sheriff, who has served the writ and has taken the property, as appears in the record. The order refusing to dissolve the attachment was correct, and should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the order refusing to dissolve the attachment is correct and is affirmed.





represented that he was the owner of and in the possession of certain land, and, by reason of such ownership and possession, had full authority to let the same, and that, at the time defendant made such representations, he was not the owner of and in the possession of such land, and had no authority to let the same, etc., is insufficient, as it does not deny that defendant owned the land in question, nor that he was in possession thereof, but avers that he was not the owner "and" in possession.

2. Where the representations on which a prosecution was based were made in letters transmitted by mail, and there was no evidence as to where any of them had been mailed or received, jurisdiction did not appear for want of proof of venue.

3. Defendant was guilty of no crime, if he acted in good faith, according to what he believed was his right, in representing that he was the owner of and in possession of land which he had conveyed to a trustee, where the question whether the beneficiaries under the conveyance had agreed to take the land in payment of a debt or as security was in controversy.

Department 2. Appeal from superior court, Sonoma county; Albert G. Burnett, Judge.

F. W. Sawyer, for appellant. Atty. Gen. Fitzgerald, for the People.

TEMPLE, J. The defendant, W. G. Griffith, was convicted of the offense of obtaining money by false and fraudulent representations, and appeals from the judgment and from an order refusing a new trial.

The indictment was demurred to, and, among other points made, it is contended that it does not charge an offense because, after stating what the representations were, it does not contain a sufficient allegation that such representations were false. The representations are stated to have been: "That he, the said W. G. Griffith, was the owner of and in the possession of a certain tract of land situate, lying, and being in the county of Sonoma, known as the 'Robert Miller Mountain or Hill Ranch'; that he, W. G. Griffith, by reason of his said ownership and possession of said Robert Miller Mountain or Hill ranch, had full authority and right to let, lease, and demise the said Robert Miller Mountain or Hill ranch to the said C. B. Petray." The falsity of the representation is alleged as follows: "At the time that the said W. G. Griffith represented and pretended to the said Petray that he was the owner of said Robert Miller Mountain or Hill ranch, and had full authority and right to let, lease, and demise the same to C. B. Petray, he, the said W. G. Griffith, in fact and in truth, was not the owner of and in the possession of the said Robert Miller Mountain or Hill ranch, and had no authority or right to let, lease, and demise the same to the said C. B. Petray, all of which was then and there well known," etc.

The representation that defendant had a right to lease the land is not only a conclusion of law, but was represented to depend upon the fact that he was the owner and in possession. Now, the denial of the truth of the representation is a negative pregnant. It does not deny that defendant owned the land,

nor does it deny that he was in possession, but it avers that in truth the defendant was not the owner and in possession. This might be so, and yet the defendant might have been the owner, and as owner have the right to lease the land, although not in possession. In such case possession would be immaterial. Or the defendant may have been rightfully in possession, and entitled to the possession, in which case the matter of ownership would be immaterial. The indictment must negative the presumption of innocence. If the allegations can be true, and the defendant still be innocent, the presumption still prevails, and a verdict of guilty as charged would not constitute a conviction of a crime. This indictment must therefore be held insufficient.

It is also contended that there is no proof of venue. The offense, if committed at all, was accomplished by representations made in certain letters written by defendant in response to letters written by one C. B. Petray. The note which constitutes the property—which, according to the charge, defendant obtained by fraud—was sent through the United States mail. The evidence is positive that all these letters were sent and received through the United States mail, but there is no evidence in the record as to where any of them were mailed, or were received. On their face, defendant's letters are dated at San Francisco, and addressed to Petray, at Geyserville, Sonoma county. The directions upon the envelopes do not appear. It is assumed that the letters written by defendant were mailed in San Francisco, and that Petray received them from the post office at Geyserville, Sonoma county; but the record makes no showing upon that subject. A motion for a new trial was made on the ground that the verdict was contrary to the evidence. This seems to be the only specification required, and makes it incumbent upon the people to see that the bill of exceptions contains all the evidence, or at least some evidence tending to prove every material fact for the prosecution. The venue may have been conceded at the trial, or there may have been proof, but, if either supposition be true, the record should have shown it. The presumption here is that the record contains all material evidence, but oversights such as suggested often exist. See *People v. McGregor*, 88 Cal. 140, 26 Pac. 97. However reluctant we may be to reverse a case for an apparent lack of jurisdiction which may result from the fact that that question was conceded, and therefore overlooked in making up the record, we are helpless in the matter. We cannot say the defendant was not injured, for apparently he was convicted of a felony in a case which the court had no jurisdiction to try.

It is contended that Griffith, on the evidence, must be considered as the owner of the property leased, and as such was authorized to execute the lease. It is admitted that

he was not the legal owner, but it is contended that the conveyance to Mrs. Cook was a mortgage only, and that the beneficial owner was Griffith. Mrs. Cook testified that she claimed no beneficial interest in the land, but thought she held the title as trustee for the Etchells heirs. The Santa Clara property which was exchanged for the Miller ranch was incumbered by a mortgage to secure a debt due to the Etchells estate. Whether the heirs had agreed to take the Mountain ranch in payment of their debt, or as security, seems to have been a matter in controversy. But, even if Griffith was entitled to the property after the payment of the debt, his right to possession of the land prior to that time is not made to appear. The deed was absolute on its face, and, though intended as security, still, under the circumstances, the title must have passed to Mrs. Cook. Presumptively she would take the rents, as well as the title, for the security of the Etchells heirs. Still, if Griffith was acting in good faith, according to what he believed was his right, he was guilty of no crime. This was a matter, however, for the jury to determine. Other points are made, but, even in case of a new indictment, I do not think they will be material. The judgment and order are reversed.

We concur: McFARLAND, J.; HENSHAW, J.

122 Cal. 152

WOOD et al. v. ETIWANDA WATER CO.  
et al. (L. A. 37.)

(Supreme Court of California. Sept. 22, 1898.)

APPEAL—REVIEW OF EVIDENCE—APPROPRIATION  
OF WATER—LIMITATIONS—JUDGMENT  
AND PLEADING.

1. Under Code Civ. Proc. § 939, making the time to appeal from a judgment run from "entry" thereof, but declaring that an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on appeal from the judgment, unless appeal is taken within 60 days after "rendition" thereof, where the entry is more than 60 days after the rendition (the filing of the findings and order for judgment), the sufficiency of the evidence cannot be reviewed or looked at to explain or make clear the findings.

2. The right to appropriate water as against the state and United States being given by Rev. St. U. S. §§ 2339, 2340, and Civ. Code Cal. § 1410 et seq., the right of the appropriator depends on the statute of limitations, as against a purchaser of land from the government, only as to acts subsequent to such purchase.

3. The judgment in a suit to enjoin the diversion of water is not authorized by the pleadings, in so far as, after enjoining the diversion of water through a pipe line on plaintiff's land, which it is found was constructed without right on the line of a flume previously used by defendant, but abandoned and destroyed on the construction of the pipe line, it adjudges that defendant has the right to maintain a dam and flume, the flume to be on the line of the pipe line; no reference being made in the pleadings to the reconstruction of the flume, while the answer alleges a right to maintain the pipe line, and prays judgment to that effect.



Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; W. B. Cope, Judge.

Action by F. W. Wood and others against the Etiwanda Water Company and others. From part of the judgment in favor of said company, plaintiffs appeal. Reversed in part.

Curtis & Curtis and J. S. Chapman, for appellants. Goodsell & Leonard and R. E. Houghton, for respondent.

HAYNES, C. Plaintiffs are the owners, as tenants in common, of several parcels of land described in the complaint, through which a stream known as "East Canyon Creek" flowed in its natural course. The Etiwanda Water Company is a corporation, and for convenience will be treated as the sole defendant, inasmuch as the court found and decreed that the other defendant had no interest in the litigation, and no question is made upon that part of the judgment. In the year 1882 the defendant diverted water from said stream upon one of the parcels of land now owned by plaintiffs, but which was then public land of the United States, by means of a dam and flume, and conveyed it over other parcels of plaintiffs' land, and used it for irrigating purposes upon lands owned by the stockholders in the defendant corporation. Plaintiffs afterwards diverted water from the same stream below defendant's dam, and used it for irrigating their lands. In June, 1892, the defendant removed the flume, and laid a pipe line over plaintiffs' lands, through which the water was conducted to defendant's stockholders. It was claimed by plaintiffs that the quantity of water diverted through the flume did not exceed 50 inches, leaving a large quantity for their use, and that the pipe line diverted the whole of it in the ordinary stages of water during the irrigating season; and the relief sought is that plaintiffs are entitled to have the water of said stream flow undiminished in its natural channel, that defendant be adjudged to have no rights therein as against the plaintiffs, and no right to divert the water through the pipe line, and that it be enjoined perpetually from diverting the water of said stream or any part thereof from flowing through the lands of plaintiffs, and from using said pipe line.

The foregoing will be sufficient to make the findings intelligible, while the findings will sufficiently disclose the line of defense, aided, if found necessary, by reference to the pleadings during the discussion of the questions presented for decision. The findings are very long, and in some respects not entirely clear, but in substance the court finds that plaintiffs are the owners as tenants in common of the lands described in the complaint, and the dates at which the government title was acquired; that plaintiffs have diverted below defendant's dam all the surplus water over and above the amount di-

verted and carried away from the stream by defendant; that the amount diverted and used by defendant and its grantors for more than 20 years before the commencement of the action was 125 inches, measured under a 4-inch pressure; that the pipe line was constructed substantially upon the line of the flume, and without right, and diverted all the water, and thereby deprived the plaintiffs of the whole and every part of the water, but that "said defendant has not diverted the water of the East Canyon creek in excess of its right thereto"; that in the year 1882 the flume was constructed by the defendant, and the ditch was discontinued, and has never since been used; that "in June, 1892, the pipe line was constructed and the flume abandoned, and ever since disused, and was for the most part destroyed; that a few feet of the old flume is still used immediately at the point of connection to divert the waters from the stream into the head of the pipe line, and by means of the said pipe line, and the dam and portion of the flume aforesaid no greater amount of water during the irrigating season is diverted from the said stream, and carried off, than was formerly done by said flume"; that plaintiffs' cause of action, so far as it relates to the said pipe line, is not barred by the statute of limitations, but, so far as it relates to the right of the defendant to divert the waters of said stream to the extent above stated it is barred.

The judgment perpetually enjoins the water company from using the pipe line, adjudges that plaintiffs own and are entitled to divert all the water of said stream in excess of 125 inches; and, as to the defendant, the judgment is as follows: "It is further ordered, adjudged, and decreed that the Etiwanda Water Company, one of the defendants herein, is the owner of the right to maintain the dam and flume described in the pleadings, and referred to in the findings of fact filed herein, and to divert the waters of East Canyon creek thereby, to the extent of one hundred and twenty-five inches, measured under a four-inch pressure; said flume to be maintained substantially upon and along the line on which said pipe line was constructed, and in place of said pipe line; and said dam be maintained at the head of said flume." The appeal is from this part of the judgment. The transcript contains a bill of exceptions setting out the evidence touching the date at which title to the several parcels of land owned by the plaintiffs was acquired from the government, the diversion of the water, and change of place of diversion, etc., as affecting respondent's right to maintain the flume and dam by which the judgment authorizes the water to be diverted. There was no motion for a new trial, and this appeal is from the judgment, which was not entered until more than seven months after the findings were filed; and it is now contended by respondent that the evidence contained in the bill of exceptions cannot be looked to

upon this appeal, inasmuch as the appeal was not taken within 60 days after the rendition of the judgment.

Under section 336 of the former practice act, the time for appeal ran from "the rendition of the judgment"; and the "rendition" of the judgment is held to be its announcement by the court, and entry upon the minutes of the clerk, or the filing of the findings and order for judgment. *Thomas v. Anderson*, 55 Cal. 45; *Schurtz v. Romer*, 81 Cal. 247, 22 Pac. 657; *Painter v. Painter*, 113 Cal. 375, 45 Pac. 689. Section 939, Code Civ. Proc., changed the time for appeal from the judgment so as to run from the entry of the judgment; and, under this provision, it is held that an appeal from a judgment will not lie until after the judgment is entered, and, if taken before, will be dismissed. *Lorenz v. Jacobs*, 53 Cal. 25; *McLaughlin v. Doherty*, 54 Cal. 519; *Home of Inebriates v. Kaplan*, 84 Cal. 488, 24 Pac. 119; and many other cases. The same section (939) provides, however, as follows: "But an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment." And it is held that the word "rendition," as here used, must be given the same meaning that was given to it under the practice act, and that, therefore, the evidence could not be reviewed on appeal from the judgment, unless the appeal is taken within 60 days after the findings are filed. *Schurtz v. Romer*, 81 Cal. 247, 22 Pac. 657; *Painter v. Painter*, 113 Cal. 374, 375, 45 Pac. 689. The result is that a party in whose favor the judgment is "rendered" (by the filing of findings and order for judgment) may effectually prevent a review of the facts upon an appeal from the judgment by delaying its entry for 60 days. These rulings are not inconsistent, as might appear at first glance, but necessarily result from the construction given to the word "rendition" in the former practice act, and retaining that word in the Code provision relating to the review of questions of fact, while changing it to "entry" in other appeals. The amendment of said section (St. 1897, p. 55) has not changed it in this respect. We see no reason for the distinction made by the statute, and commend it to the consideration of the legislature. Appellants suggest that the evidence contained in the bill of exceptions may be looked at to explain or make clear the findings, but we think the findings must speak for themselves. Other questions are made, however, which must be considered.

1. Appellants contend that the findings show that their right to contest defendant's title to the waters of East Canyon creek is not barred by the provisions of sections 316, 318, and 319 of the Code of Civil Procedure, notwithstanding the express finding (No. 26) that it is so barred. This contention is based

upon another finding (No. 15), setting out their source of title to the different parcels of land owned by them, and the dates of the patents therefor issued by the state and the United States, some of which were issued within five years before the commencement of this action, and before said pipe line was constructed, said lands being also riparian. Some of these lands were embraced in the grant made by congress to the Southern Pacific Railroad Company, and as to these the statute began to run from the date of the grant if the water was appropriated before the grant was made, or from the date of the appropriation if it was made afterwards, and not from the date of the patent issued many years later. *Jatunn v. Smith*, 95 Cal. 154, 30 Pac. 200. As to the lands owned by the plaintiffs which were not within the grant to the railroad, and which were public lands of the United States at the date of the appropriation under which defendant claims the water, the act of congress of 1866 (Rev. St. U. S. § 2339) operated as a grant by the United States of the water so appropriated and diverted, and of the right of way for ditches and canals by which the water is conveyed; and by the next section (2340): "All patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section;" so that, as to plaintiffs' lands acquired from the United States after the water now claimed by the defendant was appropriated, defendant's right rests upon the statute, and not upon adverse possession. As to plaintiffs' lands in section 16, which were acquired from the state of California, the answer admits that said stream, in its natural course, runs through them; and the court finds that two parcels in that section were granted by the state to plaintiffs' grantor on September 19, 1889, which was less than five years before the commencement of this action. Said section 16 was granted to the state by the United States long before the act of 1866 was passed, granting to settlers upon the public domain the right of appropriating and diverting water, and hence the right of the state as a riparian proprietor was not affected by said act. It is also true that title by prescription or adverse possession cannot be acquired against the state unless it consents to become subject to some statute of limitation. Whether there is such a statute need not be considered, inasmuch as the Civil Code (section 1410 et seq.) confers the right to acquire the use of water flowing in a river or stream, or down a cañon or ravine, by appropriation, without any reservation protecting the riparian rights of the state attached to its lands then remaining unsold; so that, at least from the time the Civil Code took effect, a prior appropriator acquired a good right to the water, to the extent of the appropria-



tion, as against a subsequent purchaser from the state of lands lying upon the stream below the point of diversion. *Lux v. Haggin*, 69 Cal. 255, 374, 376, 10 Pac. 674. As the state could not object to an appropriation made by its permission, it is obvious that a subsequent purchaser from the state could not; and hence the statute of limitations can only have application to acts of the appropriator performed after plaintiffs' title was acquired, whether from the state or the United States.

2. Appellants' second point cannot be sustained. The court found that the flume was constructed in 1882, and used in lieu of an open ditch which had been used long before, and until the construction of the flume, and was not a new or original diversion; while appellants contend that in 1882 the place of diversion was changed so materially as to constitute a new diversion. But such change appears only from the bill of exceptions, and not from the findings, and therefore cannot be considered. Besides, if it were a new diversion lawfully made, as it might be, it would not affect the defense of the statute of limitations.

3. It is further contended by appellants that the flume having been voluntarily abandoned and destroyed by the defendant, and the court having perpetually enjoined the defendant from using the pipe line which it had without right substituted for the flume, the court erred in its conclusion of law and judgment that defendant has the right to maintain said dam and flume, "said flume to be maintained substantially upon and along the line upon which said pipe line was constructed, and in place of said pipe line." It was found by the court that the pipe line was laid "substantially along the course of the old flume"; that it was constructed against the wishes and without the consent of plaintiffs, and without right; and that the defendant claims the right to maintain the dam and pipe line. The pleadings make no reference to the reconstruction of the flume in any event, while the answer alleges that defendant claims the right to maintain the dam and pipe line, and prays judgment that it has the right to do so. Appellant contends that this judgment is outside of the issues, and, if sustained, concludes the parties upon a matter that was not litigated; that the destruction of the old flume and the construction of the pipe line was an abandonment of the flume, and, now that the defendant is enjoined from using the pipe line, it has no right to a judgment that it can go back upon the premises, and reconstruct that which it had voluntarily destroyed. The finding upon this point is as follows: "In the year 1882 the said flume was constructed, connecting with said stream, and the waters were diverted by means of the said dam and flume, and the old ditch was discontinued, and has never since been used; and subsequently, in June, 1892, the pipe line was constructed, and the flume abandoned, and

ever since disused, and was for the most part destroyed. A few feet of the old flume is still used immediately at the point of connection, to divert the water from the stream into the head of the pipe line." In respondent's brief it is said: "The respondent, accepting the judgment as a whole, removed the pipe and restored the flume before the appeal was taken. Having no right to the pipe under the decree, its right to maintain the flume is of vital importance." The fact that the "right to maintain the flume is of vital importance" would seem to be a cogent reason why it should not be determined unless it was litigated; nor do we see how it could be litigated unless the question as to that right was in some sufficient way presented by the pleadings. Was it so presented? It is argued by respondent that it is not alleged that the maintenance of the flume from 1882 to 1892 was without right, or that such right had been waived or lost or abandoned; that, therefore, there was nothing for respondent to deny as to the flume, and no right to be asserted. But the flume had been abandoned and destroyed, and the right of respondent to maintain and use the pipe line was assailed by the plaintiff, and issue was joined thereon, the defendant alleging its right to maintain and use it. The plaintiff was not bound to anticipate that the defendant, if defeated as to its right to use the pipe line, would desire to restore or construct a flume, and deny a claim or right that had not been and might not be asserted. The defendant, by its failure to appeal, has acquiesced in the finding and judgment that the pipe line was constructed without right, and that it be perpetually enjoined from using it,—a contingency that might have been anticipated by the defendant, and the question made as to its right to construct a flume to take its place. Besides, it may well be questioned whether there is any finding that will support that part of the judgment appealed from. The court found that the flume had been used from 1882 to 1892; that it was then "abandoned" and destroyed, except a few feet next the dam; and unless it can be said as a conclusion of law that the flume, having once existed, and having been voluntarily destroyed and abandoned, may be rebuilt, and the servitude upon plaintiffs' lands be re-created or renewed at defendant's will, there would seem to be no basis for the judgment appealed from.

In *McGuire v. Brown*, 106 Cal. 660, 672, 39 Pac. 1060, the plaintiff had a prior right to the water of a certain stream, and to convey it in a ditch across defendant's land. The plaintiff changed the point of diversion some distance up stream, and a new ditch was dug across defendant's land. This, it was held, he had no right to do. The question as to his right to use the old ditch upon being prohibited from using the new one did not appear to have been litigated. This court said: "Whether he abandoned his property in the

former ditch, and the right to lead water through the same, is a question which has not been argued here or apparently litigated below, and ought not to be now decided; but the parties should be allowed, if they so desire, to amend or supplement their pleadings, and to have determined in the trial court the issue just suggested, and any other necessary to the adjustment of their relative rights." In the case at bar the question of defendant's right to reconstruct the flume has been argued in the briefs, but as the question was not raised upon the pleadings, and the judgment in that regard being outside of the issues, and apparently not litigated upon the trial, that part of the judgment appealed from should be reversed, with leave to both parties to amend or supplement the pleadings as they may be advised.

We concur: SEARLS, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, that portion of the judgment appealed from is reversed, with leave to both parties to amend or supplement the pleadings as they may be advised.

122 Cal. 209

PAGE v. SUPERIOR COURT OF CITY  
AND COUNTY OF SAN FRANCISCO  
CO. et al. (S. F. 1,495.)

(Supreme Court of California. Oct. 1, 1898.)

CRIMINAL LAW — BILL OF EXCEPTIONS — SETTLEMENT — WRITTEN NOTICE — SERVICE — ATTORNEY'S CLERK — WAIVER.

1. Under Pen. Code, § 1171, requiring an accused to serve a two-days notice on the district attorney of an intention to apply for a settlement of a bill of exceptions, and Code Civ. Proc. § 1010, declaring that "notices must be in writing," and Pol. Code, § 4480, requiring the Codes to be construed together, the judge is justified in refusing to settle a bill of exceptions, where no written notice was served on the district attorney.

2. Code Civ. Proc. § 1010, authorizing the service of a written notice on an attorney's clerk, does not enable the clerk to bind the attorney by a waiver of the notice.

In bank. Appeal from superior court, city and county of San Francisco.

Application for a writ of mandate, on the petition of James D. Page, against the superior court of city and county of San Francisco and W. T. Wallace, judge thereof, to compel the settlement of a bill of exceptions. Denied.

J. N. E. Wilson, for petitioner. A. P. Black, for respondents.

HARRISON, J. Application for a writ of mandate. The petitioner, having been convicted in the superior court of San Francisco of the crime of embezzlement, was on April 15, 1898, sentenced to imprisonment in the state prison for eight years, and on the 23d of April appealed from this judgment and an order denying him a new trial. April 25, 1898, his attorney presented to the judge,

Hon. W. T. Wallace, one of the respondents herein, who had presided at the trial, a proposed bill of exceptions, which he subsequently asked to have settled, and, the judge having refused to comply with his request, the petitioner has applied to this court for a writ of mandate commanding him to settle and sign said bill. In answer to the application the respondent avers as a reason for not having settled the bill, and why the writ should not issue, that the petitioner did not give to the district attorney the notice required by section 1171 of the Penal Code. It was shown by an affidavit of the clerk of the petitioner's attorney that on the 23d day of April, when he served the notice of appeal upon the district attorney, he gave a verbal notice to the clerk of the district attorney, who admitted service of the notice of appeal, that "upon the Monday following, to wit, April 25, 1898, he would on behalf of the defendant present the proposed bill of exceptions to the judge." It was also shown by the affidavit of the assistant district attorney, who had conducted the trial of the petitioner, that no notice was ever given to the district attorney, by or on behalf of the petitioner, that he would present the bill of exceptions for settlement, either on the 25th of April or at any other time, and that it was not known by him, or in the office of the district attorney, that a bill of exceptions would be presented or had been presented to the judge for settlement until several days after the 25th of April, when he was informed of that fact by the judge, and that he then objected to its settlement upon the ground that no notice thereof had been given on behalf of the petitioner; and it is contended on behalf of the respondent that upon this showing the judge of the superior court was not authorized to settle the bill, and that the application for the writ should be denied.

Section 1171 of the Penal Code declares: "When a party desires to have the exceptions taken at the trial settled in a bill of exceptions, the draft of a bill must be prepared by him and presented, upon notice of at least two days to the district attorney, to the judge for settlement, within ten days after judgment has been rendered against him, unless further time is granted by the judge or by a justice of the supreme court, or within that time the draft must be delivered to the clerk of the court for the judge." Section 1010, Code Civ. Proc., declares that "notices must be in writing"; and section 4480 of the Political Code declares that "the provisions of the four Codes must be construed as though all of such Codes were parts of the same statute." Under these legislative declarations it must be held that the objection of the district attorney to the settlement of the bill of exceptions was well taken, and that the judge of the superior court was authorized to refuse to settle the bill. *People v. Sprague*, 53 Cal. 422; *People v. Hill*, 78 Cal. 405, 20 Pac. 862. See, also, *Witter v. Andrews* (Cal.) 54 Pac. 276.



The case of *Van Eman v. Superior Court*, 106 Cal. 643, 40 Pac. 14, has no application to the facts of the present case. It was there held that the facts before the court showed a waiver by the people of any notice of the proposed settlement of the bill. The draft of the bill had been presented to the counsel for the people several days before the day proposed for its presentation to the judge for settlement, and while it was in his possession he was engaged in preparing amendments thereto, and at his request the hearing upon its settlement was continued several times. In the present case, however, the district attorney did not receive the proposed bill, or know of its preparation or existence, until several days after the day upon which it was presented to the judge. It is not claimed that the clerk of the district attorney to whom the verbal notice was given assumed to accept it as equivalent to a written notice, or that he had any special authority to bind his principal in this mode, and, although the statute authorizes the service of a written notice to be made upon an adverse party by leaving it with the clerk of the attorney at his office, or with a person having charge thereof (Code Civ. Proc. § 1011), such person has no implied authority to bind his principal by any agreement in reference to the case. The application for the writ is denied.

We concur: GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.; McFARLAND, J.

122 Cal. 219

FOX v. HALE & NORCROSS SILVER-MIN. CO. et al. (S. F. 683.)

(Supreme Court of California. Sept. 2, 1898.)

APPEAL—DECISION—RIGHT TO COSTS.

1. A judgment based on two causes of action was reversed as to one, and the case remanded for a new trial as to that cause, with instructions to enter judgment as to the other. A new trial was had, and judgment entered as directed, and also on the other cause, and the same parties again appealed. After the hearing of the appeal, respondent moved in the supreme court to dismiss as to the cause previously reversed, and to affirm as to the other. *Held*, that the motion should be granted.

2. Under Code Civ. Proc. § 1022, entitling the prevailing party to costs, whether his recovery be for the whole or a part of his claim, appellant is not entitled to costs, where respondent dismisses as to the part of his claim contested in the supreme court, and takes judgment as to the balance.

In bank. Appeal from superior court, city and county of San Francisco.

Action by M. W. Fox against the Hale & Norcross Silver-Mining Company and others. There was a judgment for plaintiff, and defendants appeal. Modified.

W. F. Herrin, for appellants. W. T. Baggett, for respondent.

HARRISON, J. The facts in this case were fully recited in the opinion given upon a

former appeal (106 Cal. 369, 41 Pac. 308), and need not be repeated. Under the complaint a recovery is sought from the appellants in behalf of the corporation upon two distinct claims or causes of action,—one for the difference between the amount paid by the corporation for the milling of the ores and the actual cost thereof, and the other for damages sustained by reason of imperfect and fraudulent milling of the ores. At the former trial of the cause, the superior court found that upon the first of these claims the corporation had paid \$210,197.50 for milling the ores in excess of the actual cost thereof, and that upon the other cause of action it had sustained damage to the amount of \$789,618, and rendered judgment against the appellants for these amounts. Upon the appeal therefrom this court affirmed the decision of the superior court upon the first issue, but reversed its decision upon the second, and remanded the cause, with directions to the superior court to enter a judgment against the appellants herein, as of the date of its former judgment, for the amount of \$210,197.50, with interest from that date. Upon the issue presented by the claim for damages sustained by reason of the imperfect and fraudulent milling of the ores, the order denying a new trial was set aside, and the superior court was directed to retry that issue, and make its findings of fact in accordance with the views expressed in the opinion of this court. After the cause had been remanded to the superior court, that court, in obedience to these directions, proceeded to take evidence upon the second of the above issues, and made its findings of fact thereon, in which it found that the corporation had sustained damage in the sum of \$417,683 from the fraudulent and imperfect milling of the ores, and thereupon entered judgment against the appellants herein that the plaintiff have and recover from them, for the use and benefit of the corporation, the sum of \$210,197.50, with interest thereon from the 11th day of June, 1892, at the legal rate, upon the issue presented by the claim for having paid an excessive price for milling the ores, and the further sum of \$417,683, with interest thereon from the 11th day of June, 1892, upon the issue presented by the claim for damages sustained by reason of the imperfect and fraudulent milling of said ores. From the judgment thus entered, the present appeal has been taken. After the hearing of the appeal, the respondent filed herein a release of all claim for damages by reason of the imperfect and fraudulent milling of the ores, and has made a motion that the judgment appealed from be modified by striking out that portion thereof which was rendered upon the issue presented by this claim, or which authorizes a recovery from the appellants of any portion of the damages thus sustained, and that upon such modification the judgment appealed from be affirmed. In reply thereto it is urged by the appellants that,

instead of granting the motion, the cause should be remanded to the superior court, and the motion made there.

The motion of the respondent is, however, in accordance with the invariable practice of this court. This court does not reverse a judgment or direct a new trial if it is able from the record to determine the rights of the parties, but will itself make a final determination of these rights by a correction or modification of the judgment. Under its authority to modify any judgment or order appealed from, whenever it is shown, either by the record on appeal, or by the admission or consent of the parties, that their rights can be finally determined here, this court will render its own judgment to that effect, or will direct such action in the court below as in its opinion will best conserve the rights of the parties to the action, without subjecting them to further delay or expense. This rule is followed, whether the error is found upon an examination of the record (*Bank v. Chester*, 55 Cal. 49; *Woods v. Merrill*, 57 Cal. 435), or appears upon the face of the judgment (*Union Water Co. v. Murphy's Flume Co.*, 22 Cal. 621; *Foucault v. Pinet*, 43 Cal. 136), or is confessed by the respondent (*Atherton v. Fowler*, 46 Cal. 320; *Paving Co. v. Bagge*, 79 Cal. 439, 21 Pac. 855; *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786), or when the respondent asks for or consents to a modification (*De Costa v. Mining Co.*, 17 Cal. 613; *Muller v. Boggs*, 25 Cal. 187; *Carpentier v. Gardiner*, 29 Cal. 160; *Beamer v. Freeman*, 84 Cal. 554, 24 Pac. 169). And when, upon an appeal from a judgment, the respondent releases the appellant from that portion of the damages claimed in the action which is involved in the appeal, and withdraws from consideration by the court his right to a judgment upon his claim for such damages, it is proper to direct the court below to modify the judgment appealed from in accordance with such withdrawal. The application of this rule is accentuated in the case of an appeal from a judgment rendered upon two causes of action set forth in the same complaint, where the appellant questions the right of recovery upon only one of them. Whether respondent makes such consent for the reason that he is convinced that he cannot prevail in the action, or, as was suggested in *Carpentier v. Gardiner*, supra, because he prefers to remit the whole of the damages upon this cause of action, rather than submit to the delay and inconvenience consequent upon a new trial, his motion for a modification of the judgment should be granted.

The release by the respondent of all claim for the damages thus sustained, and his consent that the judgment be modified by striking out that portion thereof which authorizes a recovery upon this issue, has the effect to withdraw from consideration upon this appeal all matters involved in the rendition of this portion of the judgment, and to leave for determination only the judgment rendered

upon the other issue presented by the complaint. The judgment of this court upon the former appeal, denying the appellants' motion for a new trial upon the issue presented by the claim for excessive charges paid for milling the ores, and directing that judgment be entered against them for the amount found by the court to be the amount of that excess, was a final determination of the rights of the parties upon that issue; and the action of the superior court in entering such judgment was a compliance with the mandate of this court, and, as its judgment upon this issue is in strict accordance therewith, there is no ground for an appeal therefrom, and this portion of the judgment must be affirmed.

The proposition of the appellants that, if the second cause of action is withdrawn, they are entitled to costs incurred by them upon the second trial, is contrary to the provisions of Code Civ. Proc. § 1022, subd. 3. The prevailing party is entitled to costs incurred by him, whether his recovery be for the whole or a portion of his claim, or whether his claim be made up of one or several causes of action. The only limitation upon his right to his costs is that he shall recover \$300 or over. The right to recover costs is purely statutory, and, in the absence of a statute, no costs could be recovered by either party. By section 1024, Code Civ. Proc., costs are allowed to the defendant only "upon a judgment in his favor." The cause is remanded to the superior court, and that court is directed to modify its judgment herein by striking out those portions thereof which authorize a recovery from the appellants of "the further sum of \$417,683, with interest thereon at the legal rate from the 11th day of June, 1892, upon the issue presented by the claim for damages sustained by reason of the imperfect and fraudulent milling of said ores, together with plaintiff's costs disbursed at the former trial, amounting to the sum of \$840.40, and the further costs given upon the second trial, amounting to \$1,564.50," and also that portion thereof which directs that the plaintiff have execution for the said "further sum of \$417,683, with interest thereon at the legal rate from June 11, 1892." As so modified the judgment is affirmed. The costs of this appeal are to be borne by the respondent.

We concur: BEATTY, C. J.; HENSHAW, J.; GAROUTTE, J.; TEMPLE, J.; VAN FLEET, J.

(122 Cal. 195)

MAXSON v. LLEWELYN et al. (L. A. 352.)<sup>1</sup>  
(Supreme Court of California. Sept. 23, 1898.)

LIFE INSURANCE—FRAUD IN PROCURING APPLICATION—FALSE REPRESENTATIONS—EVIDENCE—CONTRADICTION BY PAROL—BONA FIDE PURCHASERS—INDORSEMENT TO AGENTS.

1. On an issue whether representations that a certain kind of life insurance policy would be issued on a particular application were fraudulently made, it is unnecessary to directly prove that the agent making the representations be-

<sup>1</sup> Rehearing denied October 24, 1898.



lied them to be untrue, where the policy was not procured, and its terms as represented were such that an insurance company doing a legitimate business would in no probability issue it, since in such case fraud might be inferred.

2. Code Civ. Proc. § 1856, excluding evidence of the terms of an agreement reduced to writing other than the contents of the writing, but expressly admitting evidence of fraud, does not exclude parol evidence as to a written application for life insurance, couched in terms not readily understood by one not versed in insurance matters, and which was prepared by an agent and solicitor of the insurer, who represented that it called for a different policy than in fact was the case, and which application was not understood by the applicant; since it thus appears to have been made under the influence of fraud.

3. A soliciting agent procured an application for life insurance by fraudulent representations, and obtained a post-dated check in payment of the premium. He indorsed the check to the insurer's general agent, who paid him his commission, and paid the company the net premium, and delivered the policy with the first premium indorsed thereon paid. The general agent agreed with the company to be responsible for payment of the check, and paid the net premium after the insured had refused and returned the policy, and had demanded back the check. The general agent replied that it had become "property of the company, and could not be recalled." *Held*, that the general agent was not a bona fide purchaser of the check before maturity, but that it belonged to the company, as his and the soliciting agent's principal.

Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by H. E. Maxson against William Llewelyn and others. There was a judgment for defendants, and plaintiff appealed. Affirmed.

Knight & Harpham and G. E. Harpham, for appellant. W. J. Hunsaker, for respondents.

HENSHAW, J. Plaintiff appeals from the judgment and from the order denying him a new trial. He brought his action against the defendant Llewelyn as maker, and defendant George Larrabee as indorser, to recover upon a negotiable instrument in the form of a check. Larrabee was a special or soliciting agent of the Mutual Life Insurance Company of New York, of which corporation Maxson was the manager for Southern California. The check was given by Llewelyn in payment of the first year's premium upon a life insurance policy to be issued by the company to him. By its terms, the check was made payable upon a day after the date upon which it was agreed the policy should be delivered. Plaintiff pleaded that he was the owner of the check, and that he had purchased it for value before maturity. For answer, the defendant made denial, and set up facts constituting misrepresentation and fraud in the procurement of the check, and showing at least a partial failure of consideration. He also averred that plaintiff took the check with knowledge of these facts. Upon the trial he proved that Larrabee represented to him that his company would issue an excep-

tionally and peculiarly favorable policy to him for the sake of other business which it hoped thereby to gain. Defendant signed a written application for a policy, and, not understanding its terms, was assured in answer to his question that this particular application would bring the policy agreed upon. Llewelyn thereupon gave his check for \$560, payable to Larrabee, but payable upon April 20, 1896. The application was signed and the check delivered upon December 20, 1895. The policy was to follow some time in January, 1896. Larrabee agreed that, if the policy was not as represented, the check would be returned. The policy which was issued was such a policy as was called for by the application, but in essential particulars was a different policy, and one less favorable to the insured, than that which Larrabee had represented. Upon January 20, 1896, the defendant Llewelyn received the policy from the plaintiff, Maxson. He returned it the same day, with a letter stating that the policy was not in accordance with the understood terms. Upon January 23d, Maxson again sent the policy to Llewelyn, and in his accompanying letter said: "I return the policy herewith, and shall hold you for its payment. \* \* \* Your check, application, and receipt for check were all dated December 20th. Application and check were in my hands on the 21st of December, and immediately became the property of the company, and could not be recalled." Llewelyn once more returned the policy, and refused payment of the premium. No evidence whatever was offered showing that Maxson had any actual knowledge of any misrepresentation by Larrabee. Larrabee made default, and was not a witness upon the trial. Upon behalf of Maxson, it was shown that Larrabee presented to him upon December 21st the check and the application for the policy. The application called for a policy such as was regularly issued by the company. Maxson testifies that he gave Larrabee \$25 upon account of the check, upon the 21st of December, and a few days thereafter, having satisfied himself of the solvency of the maker, gave him \$75 more. About the 6th day of January, he agreed with Mr. Forbes, his superior officer, and the general manager of the company, that he would be responsible for the payment of the premium to the company, and instructed the company to send the policy to him for delivery and collection. It was so sent to him, and by him delivered unconditionally to defendant Llewelyn, with an indorsement showing the payment of the first year's premium. The net amount of the premium, \$222, was, in a later settlement and adjustment of accounts between him and the general office, made a charge against him, and settled accordingly. The time when the \$222 was thus actually adjusted and settled in the accounts was after plaintiff knew from Llewelyn that he repudiated the contract.

By appellant it is first insisted that the charge of fraud and the evidence in support of it are both insufficient, in that it is not made to appear that, at the time Larrabee made the representations to Llewelyn, he did not believe he could procure such a policy, and that the only testimony upon the point is that such policy was not, in fact, procured. It would in most cases be extremely difficult, and in many cases absolutely impossible, to procure direct evidence of this nature. In all cases it is permissible to prove fraud by circumstances, and in most cases it is the only evidence available. In aid of the direct facts proved, legitimate inferences are permitted to be indulged to establish others not directly in evidence. *Butler v. Collins*, 12 Cal. 457; *Levy v. Scott*, 115 Cal. 39, 46 Pac. 892. Where a man makes a representation in the reasonable belief that it is true, fraud will not be imputed to him if it afterwards be shown to be untrue; but there must be reasonable grounds for his belief. 2 Pom. Eq. Jur. § 880; *Kerr, Frauds*, p. 57. In this case no belief upon the part of Larrabee, and no reasonable grounds for belief, are shown; while, upon the other hand, the fact that the policy returned was not at all the policy represented, taken with the circumstance that it would have been to the last degree improbable that an insurance company doing business by legitimate methods would ever use such a policy as that represented, are circumstances enough from which the fraudulent character of the representations may be inferred.

Appellant further alleges that, whatever were the parol representations, the agreement of the parties was cast into writing in the application signed by defendant Llewelyn, and that in response to that application the precise policy called for therein was delivered to defendant; but the application itself, prepared by the special agent, was of such a nature as not to be readily understandable, if understandable at all, by one not versed in insurance matters. It seems not to have been understood by the defendant, for he asked specifically whether the application which he sent would bring the correct policy. It thus appears that defendant's signature to the application was procured by misrepresentation and fraud, sufficient to vitiate the transaction. Section 1856 of the Code of Civil Procedure, which declares that no evidence may be received of the terms of an agreement which has been reduced to writing, other than the contents of the writing, expressly admits evidence to establish illegality or fraud. In *Insurance Co. v. Wilkinson*, 13 Wall. 222, it is well said: "By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and to procure customers, they not unfrequently mislead the insured, by a false or erroneous statement of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will

meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers. *Rowley v. Insurance Co.*, 36 N. Y. 550. The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estop that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it." The court found that the plaintiff was not a purchaser of the check for value before maturity, and, indeed, that he was not a purchaser at all, but that Larrabee indorsed the check to plaintiff, and plaintiff took it, as the agent of and for the Mutual Life Insurance Company of New York, and that at the time of the commencement of the action the insurance company was the owner and holder of this check. If there be any substantial evidence in the record supporting this finding, it is determinative of the case in respondent's favor. By appellant it is insisted that all the evidence shows that he was an innocent purchaser of the check, for value, before maturity; that he gave to Larrabee \$100 for it; and that he paid the insurance company \$222 more. For respondent it is contended that this evidence is all in harmony with the theory that the insurance company, and not the plaintiff, was the owner of the check; that plaintiff, as the superior of Larrabee, paid to him, upon behalf of the company, \$100 for his commission, and, on behalf of the company, held the check for collection; that the proved fraud of the agent was the fraud of the principal; and that, by showing that Larrabee's principal was the owner of the check, this action for its collection is as successfully defeated as it would have been had Larrabee himself prosecuted it. In support of this argument, respondent adverts to the admission in plaintiff's letter above quoted. Upon January 23, 1896, plaintiff wrote to Llewelyn that the check upon the 21st of December "became the property of the company, and could not be recalled." This is affirmative evidence from the plaintiff's own lips in support of respondent's position, and against his own contention that he was the purchaser of the instrument. It is evidence sufficient, taken with the other circumstances, to support the finding. The judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.



6 Cal. Unrep. 141

STRATTON v. BURR et al. (L. A. 424.)

(Supreme Court of California. Oct. 1, 1898.)

FRAUDULENT CONVEYANCES—IMMEDIATE DELIVERY  
—CHANGE OF POSSESSION—EVIDENCE—SUFFICIENCY—JUDGMENT—REVERSAL.

One partner transferred to a creditor of the partnership their stock of merchandise without the knowledge of his partner, who for a month previous had not had anything to do with the affairs of the firm. After the transferring partner had shown the new delivery boy the delivery route, he left the store, leaving it in charge of the purchaser's agent, who had been employed there for a month previous. *Held*, that under Civ. Code, § 3440, making transfers of personal property unaccompanied by an immediate delivery, and not followed by continued change of possession, fraudulent as to creditors, the evidence was sufficient to show an actual and continued change of possession.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by Minnie E. Stratton against John Burr and others. From a judgment in favor of plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Dillon & Dunning, for appellants. H. T. Gordon and J. W. Swanwick, for respondent.

BELCHER, C. This is an action to recover the possession or value of certain personal property, alleged to have been wrongfully taken from the possession of the plaintiff by the defendant John Burr, as sheriff of the county of Los Angeles, on the 10th day of August, 1895. The defendant justified the taking of said property under and by virtue of a writ of attachment issued in an action commenced in the superior court of Los Angeles county on the 10th day of August, 1895, by one Gregory Perkins, Jr., against J. J. Stratton and U. G. Stratton, co-partners, doing business under the firm name of Stratton Bros. The answer denies that the taking was wrongful, and alleges that on the 8th day of August, 1895, Stratton Bros. were indebted to various persons in sums of money aggregating \$992.50, and that on the 10th day of the month the said creditors assigned their several claims to Gregory Perkins, Jr., who thereupon commenced said action; that, on the said 8th day of August, J. J. Stratton, for the sole purpose of preventing the creditors of Stratton Bros. from attaching said property, and to hinder, delay, and defraud said creditors, without the consent or knowledge of said U. G. Stratton, entered into a secret and fraudulent agreement with Minnie E. Stratton, the plaintiff, under and by virtue of which it was agreed that said J. J. Stratton should transfer to the plaintiff all the property described in the complaint; that thereafter, on the same day, in pursuance of said secret and fraudulent agreement, said J. J. Stratton did sign a bill of sale of said property to the plaintiff, but the same was never

delivered, and the pretended sale made in pursuance of said agreement was not accompanied by any delivery or by any change of possession of the things attempted to be so transferred.

The case was tried by the court, without a jury, and the findings were in substance as follows: On August 8, 1895, and for several months prior thereto, Stratton Bros. were co-partners, engaged in the grocery business in the city of Los Angeles, and on that day were indebted to the various persons named in the answer in the aggregate sum of \$992.50, and were indebted to the plaintiff in the sum of \$1,115 for moneys theretofore loaned by her to them. On the same day, said co-partners, for and in consideration of their indebtedness to the plaintiff, executed and delivered to her a bill of sale, whereby they sold and conveyed to her the property mentioned and described in the complaint; and the same was not made for the purpose of defrauding any person, but was executed by them and received by her for the sole and only purpose of paying the amount then owing by them to her. Said sale was accompanied by a delivery and change of possession of the property thereby transferred, and, prior to the sale, Stratton Bros. were in possession of said property. Immediately after the transfer of said property plaintiff took possession of the same, and remained in the possession thereof until August 10th, at which date she was the owner and in the rightful possession of the same. On August 10th, Perkins, as assignee of said creditors, caused said property to be attached by the defendant in proceedings duly instituted and prosecuted to final judgment, under which the same was sold by said sheriff on execution duly issued. The Stratton Brothers were not in possession of said property when attached, and were not then the owners thereof. The value of the property was \$900. Upon these findings judgment was rendered in favor of the plaintiff for the return of the property, or for the sum of \$900, the value thereof, in case a return could not be had, with interest and costs. From that judgment, and an order denying a motion for new trial, this appeal is prosecuted.

It is not claimed by appellants that the transfer to the plaintiff was made with intent to hinder, delay, or defraud any creditor of the transferrors or other person, or that there was any actual fraud in the transaction, but the contention is—and this is the only ground urged for a reversal—that the transfer was not accompanied by an immediate delivery, and followed by an actual and continued change of possession, of the things transferred. We do not think the judgment should be reversed on this ground. It has been held by this court in numerous cases that what constitutes an immediate delivery and an actual and continued change of possession is a fact to be determined upon the evidence in each particular case. "The circumstances connected with a transfer of per-

sonal property are so varied that it would be impossible to frame a rule applicable to each case, or to determine in advance what acts would be sufficient to meet the requirements of the statute. When the transfer is challenged as fraudulent under this section [section 3440, Civ. Code], all the circumstances connected therewith are essential to a determination of its character, and it can very rarely be the case that there will not be such a conflict of testimony as to preclude this court from re-examining its sufficiency." *Claudius v. Aguirre*, 89 Cal. 503, 26 Pac. 1077; *Byrnes v. Moore*, 93 Cal. 393, 29 Pac. 70; *Porter v. Bucher*, 98 Cal. 459, 33 Pac. 335. Every intendment is in favor of a judgment of a court of record, and, until the contrary is made clearly to appear, the appellate court is bound to suppose that it was based upon proper evidence. *Grewell v. Henderson*, 7 Cal. 291. In view, therefore, of the circumstances shown in this case, we think it cannot be said that the evidence was insufficient to justify the court below in determining as a fact that the transfer to the plaintiff was accompanied by an immediate delivery, and followed by an actual change of possession, which continued until the property was seized by the defendant as sheriff.

It appears that, when the transfer was made, U. G. Stratton had had nothing to do with the business of the store for more than a month, and that, immediately after the transfer, J. J. Stratton left the store, and after that had nothing to do with its business, except that on the morning of that day he went around with the newly-employed delivery boy, and showed him the route for delivering goods to customers, and on the morning of the next day went again with the boy, and showed him another part of the route. Plaintiff's husband had been employed in the store as clerk and assistant to J. J. Stratton for about a month, and after the transfer he took charge of its business, and had full control and management of its affairs, as the agent and employé of his wife. The case is in many respects similar to that of *Ford v. Chambers*, 28 Cal. 13, where, as stated in the syllabus, it was held: "If a merchant, having a stock of goods in his store, and engaged in a retail trade, with clerks in his employ, makes a sale in good faith of his entire stock in trade to a creditor, in payment of indebtedness and for a fair price, and the creditor immediately goes into the store, takes entire control of the business, and proceeds to take an inventory, and also to retail the goods to customers, with the assistance of the clerks of the vendor, this constitutes an actual and continued change of possession, and the sale is valid as against the creditors of the vendor, although there has been no formal discharge of the clerks of the vendor, and rehiring of them by the vendee." We advise that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(122 Cal. 162)

In re HEALY'S ESTATE. (Sac. 482.)<sup>1</sup>  
(Supreme Court of California. Sept. 26, 1898.)  
ADMINISTRATORS—RIGHT TO LETTERS—PETITION—  
CONTEST—INTEREST—APPEAL—ABUSE  
OF DISCRETION—REVIEW.

1. Under Code Civ. Proc. § 1374, providing that any person interested may contest a petition for administration, the public administrator, being interested in the right to letters, is a person "interested."

2. Code Civ. Proc. § 1379, providing that administration "may be granted" to a person not otherwise entitled, at the written request of the persons entitled, reposes a discretion as to the granting of such request in the court.

3. Where the court, in granting letters of administration to a public administrator, found that the appointment of a petitioner for letters on the nomination of the next of kin, under Code Civ. Proc. § 1379, providing that letters "may be granted" to a person nominated by the person entitled, was not to the best interest of the estate, and the evidence on which the finding was made was not in the record, it cannot be said that the discretion so exercised was abused.

Department 2. Appeal from superior court, Lassen county; F. A. Kelley, Judge.

In the matter of the estate of Matthew Healy, L. Abrahams petitioned for letters of administration, and J. W. Hosselkus, public administrator, also petitioned. On hearing of both petitions together, Abrahams' petition and his motion to dismiss the contest of the public administrator were denied, and the latter was appointed. Abrahams appealed. Affirmed.

Spencer & Raker, for appellant. Goodwin & Goodwin, for respondent.

HENSHAW, J. This is the appeal of L. Abrahams from the order denying his petition for letters of administration upon the estate of Matthew Healy, deceased, and granting letters to another petitioner, J. W. Hosselkus, public administrator. The only relations of the deceased living in California are Uity and James McCabe and their married sister, all children of a deceased sister of the intestate. Uity and James, being of lawful age, and of the next of kin, were entitled to letters as belonging to the seventh class enumerated in section 1365 of the Code of Civil Procedure. They did not themselves apply for letters, however, but nominated and requested the appointment of Abrahams, the appellant herein. He petitioned as their nominee. Thereafter Hosselkus entered a contest to Abrahams' petition, and at the same time filed a petition of his own asking for letters. The McCabes, in turn, contested the petition of Hosselkus. The petitions and contests were heard together. Abrahams

<sup>1</sup> Rehearing denied October 26, 1898.



moved the dismissal of Hosselkus' contest, upon the ground that he was not a party interested, within the meaning of section 1374 of the Code of Civil Procedure, and the motion was denied. The outcome of the hearing was the order appealed from.

The public administrator is the eighth in order of the persons and classes of persons entitled to letters of administration, under section 1365 of the Code of Civil Procedure; and he is "a person interested," within the meaning of section 1374 of the same Code. The language of the latter section indicates that the interest mentioned therein is an interest, not alone in the estate, but as well an interest in the question, whose is the right to letters of administration upon the estate. Any one asserting a right to administer may appear in such a contest. This is a different interest from that which is contemplated in section 1307, Code Civ. Proc., concerning contests over wills. There, obviously, the interest is an interest in the estate, either as heir at law or devisee. In such a contest, of course, the public administrator is not a party interested. In *re Hickman*, 101 Cal. 609, 36 Pac. 118. Though the question has never been directly presented for adjudication, it has always impliedly been held in accordance with the foregoing view. Thus, in *Re Muersing's Estate*, 103 Cal. 585, 37 Pac. 520, the nominee of the nonresident father was allowed to contest the application of the public administrator for letters. Assuredly, the nominee of the nonresident father is not a person interested in the estate. In *Re Connors' Estate*, 110 Cal. 408, 42 Pac. 906, the public administrator unsuccessfully contested the application of the father for letters; and in *Re Eggers' Estate*, 114 Cal. 464, 46 Pac. 380, the same official successfully contested the application of a relative of deceased, who was not entitled to a distributive share of his estate.

Appellant next contends that, as the McCabes' right to administer was admittedly superior to that of the public administrator, to their nominee passed the same superior, absolute, legal right, precisely as it passes to the nominee of the surviving husband or wife under subdivision 1, § 1365, Code Civ. Proc. Such right of nomination in the first instance as any other person than the surviving husband or wife may possess is drawn from section 1379, Code Civ. Proc., which declares: "Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court." The power to procure a revocation of letters, and the appointment of a nominee after letters have been issued to one not in the first five classes enumerated in section 1365, Id., is accorded to the members of those five classes and to their nominees by section 1383, Id. But it is here to be noted that the members of class 7, to which the McCabes belong, are not empowered to nominate

under section 1365, Id., nor to secure a revocation of letters under section 1383, Id. Their rights, then, are wholly embraced within section 1379, Id., upon the construction of which this question must depend. This section has formed a part of the law of the state since 1850. St. 1850, p. 381. It was section 66 of the former practice act. It was construed in *Re Carr's Estate*, 25 Cal. 585, and there held to apply only in cases where a vacancy in the administration existed. In view of the well-settled law that the re-enactment of a statute is a legislative adoption of its known construction (*Hyatt v. Allen*, 54 Cal. 356; *In re Baker*, 55 Cal. 303; *Blythe v. Ayres*, 96 Cal. 591, 31 Pac. 915), some difficulty would be experienced in avoiding the conclusion that when section 66 of the practice act was re-enacted as section 1379, Code Civ. Proc., the legislature meant it to apply only in the case of a vacancy arising during administration. But, giving a most liberal construction, and holding that in a case like the present a vacancy may be said to exist, it still remains to be considered whether the right of the McCabes to nominate under section 1379 is absolute, or whether a discretion in the matter of the appointment is conferred upon the court. By the appellant, as has been said, it is contended that the right is absolute; and by the respondent it is insisted that, while the court may not arbitrarily refuse to consider the application of such a nominee, the right of the nominee to appointment is not absolute, but the court may exercise a discretion in the matter which will not be reviewed, except for abuse. In *Re Morgan's Estate*, 53 Cal. 243, the married niece of the deceased nominated and requested the appointment of E. J. Croly as administrator. The public administrator filed a contest, and at the same time petitioned for letters for himself. This court said the fact of Croly's recommendation by the next of kin, under section 1379 of the Code of Civil Procedure, did not give him any preference over the public administrator for two reasons: First, because the next of kin were married women; but, second, continued the court: "Had it been otherwise in this respect, and had the next of kin been laboring under no such disability, their petition requesting the appointment of Croly was addressed to the discretion of the probate judge. It did not operate to supersede the claim of the public administrator otherwise established under the statute to receive letters of administration, and, it not appearing that the probate court in refusing to appoint Croly has abused the discretion confided to it in terms by the statute, the order will not be disturbed." In *Re Allen's Estate*, 73 Cal. 581, 21 Pac. 426, the construction of the section of the Code thus declared in *Re Morgan's Estate* is adverted to and approved. In *Re Dorris' Estate*, 93 Cal. 611, 29 Pac. 244, section 1379, Code Civ. Proc., is again considered, and the same construction put upon it. The opinion

first assigns reasons why a right absolute (if a fit person be named) is conferred upon the nominee of the surviving husband and wife, under section 1365, Id., and as to the other classes it proceeds: "Hence they are only entitled to nominate when they are the persons entitled to administer, and then the nomination is submitted to the discretion of the court, which may, if there is good reason for so doing, refuse to confirm the nominee, and appoint the person next entitled." In *Re Bedell's Estate*, 97 Cal. 339, 32 Pac. 323, the section was again under consideration. It is said that the obvious purpose of the section is to give one entitled to administration the power to select some competent person to discharge the duties of the office, and that to hold that his request is not to be considered, when resisted by one belonging to a class lower in rank, would be to confine the selection to some person falling within the class immediately after his own. But, still emphasizing the fact that in such cases the appointment is addressed to the discretion of the court, it is said: "The provision in this section, being general in its terms, and having no qualifications except the conditions named therein, must be construed as giving to the court the discretionary power to grant administration to any competent person who otherwise would not be entitled thereto at the written request of a person who would be so entitled."

The evidence adduced upon the hearing is not before us. The court made findings, and among them gave the particulars of a single specific transaction from which it found that petitioner Abrahams was wanting in integrity in the discharge of trusts confided to him. This finding is assailed. Its sufficiency need not be considered. Elsewhere the court declared that it was to the best interest of the estate that the public administrator should be appointed, and, as the evidence upon which the conclusion was reached is not before us, it may not be said that the court abused its discretion in so determining. The order appealed from is therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

122 Cal. 189

HUTCHINSON et al. v. BROWN, Secretary of State. (S. F. 1,646.)

(Supreme Court of California. Sept. 30, 1898.)

#### POLITICAL CONVENTIONS—NOMINATIONS.

Where a convention of a political party is regularly called and organized, its nominees, and not those of a convention made up of a minority of the delegates, who withdrew from the regular convention, are entitled to have their certificates filed by the secretary of state, though the delegates violate pledges, and disregard the advice of the executive committee, in that it nominates certain men who do not belong to the party, and makes a bargain by which some of its nominees are to retire in favor of the nominees of other parties.

In bank. Application by E. L. Hutchinson and another for mandamus to L. H. Brown, secretary of state. Writ granted.

E. S. Van Meter, E. A. Bridgeford, Stephen M. White, and Garret W. McEnerney, for petitioners. Thomas V. Cator, for respondent.

BEATTY, C. J. This is an original proceeding in mandamus to compel the secretary of state to file a certificate of nomination presented by E. L. Hutchinson and F. L. Gregory, claiming to be chairman and secretary of the People's party state convention, and to compel him to strike from the files of his office another certificate of nomination presented by D. T. Fowler, as chairman, and Carlton H. Johnson, as secretary, of a People's party convention which is alleged to have been an illegal and pretended assemblage, not entitled to assume the name or exercise the powers of the People's party. There is no dispute as to the facts of the case, and those which we deem material may be very briefly stated: The People's party is a regular political organization, which at the general election of 1896 polled more than 3 per cent. of the vote of the state. For more than two years it has had regularly chosen and organized state and county central committees, and a state executive committee, which exercises full powers when the state central committee is not in session. In May, 1898, the executive committee regularly issued a call for a state convention to be held at Sacramento on the 12th of July, and made an apportionment of delegates to the different counties. Pursuant to this call the convention met and was duly organized on the day named, all but 14 of the counties of the state being represented by delegates. Among other preliminary steps in the organization of the convention was the appointment of a conference committee "to counsel with other political reform forces with a view of political union." This committee, after consultation with a committee of Democrats and another committee of Silver Republicans, agreed upon a plan of fusion, which was reported to the convention and has been fully carried out, though it was never formally adopted. The plan of fusion was, in brief, to divide the state and district offices among the three parties according to a certain schedule of apportionment. To effect this object, the People's party convention was to nominate a full ticket, but the nominees for those offices allotted to the Democrats and Silver Republicans were to place their resignations at the disposal of the conference committee, with the understanding that, if the other party conventions thereafter to be held should conform their action to the plan of fusion, then such nominees should be withdrawn, and the nominees of the Democrats and Silver Republicans substituted. Before this plan was reported to the convention, James G. Maguire, a Democrat, had been nominated for governor; and, although that



was an office allotted to the Democrats in the plan of fusion, it was excepted from the arrangement for withdrawing candidates in favor of the nominees of the other parties. In other words, Judge Maguire was to be the Populist candidate for governor, whatever happened, provided only he would accept the nomination. As soon as Judge Maguire was nominated a minority of the convention, protesting against the action of the majority, withdrew and organized another convention in another room. Of about 160 delegates actually present, 53 participated in the new organization. The remaining delegates went on and nominated a full ticket, appointed managing committees, etc., and adjourned. The minority convention, after effecting an organization, also nominated a full ticket, appointed committees, and adjourned. Hutchinson and Gregory were chairman and secretary of the original convention, and Fowler and Johnson chairman and secretary of the rival convention organized by the minority. Each set of officers presented to the respondent certificates containing lists of the nominees of their respective conventions. He filed that of the minority convention, and refused to file that of the majority convention. This proceeding has been instituted to compel him to reverse his action.

The law governing the case is found in the Political Code (section 1185 et seq.), as construed by this court in a number of cases which we have had occasion to consider. It was determined in *McDonald v. Hinton*, 114 Cal. 484, 46 Pac. 870, that a political party can be represented by but one convention, and, in case the chairmen and secretaries of two rival conventions present certified lists of nominees for filing, the officer whose duty it is to file such certificates should determine which of the two rival conventions really represents the party, and file its certificate, rejecting the other, notwithstanding it may be formally correct and sufficient. A question was discussed in that case which the court found it unnecessary to decide, viz. whether the decision of the registrar (or in this case the secretary of state) is final, or subject to review and correction by the courts. In this case that question cannot be avoided, but it will not require any particular examination, since both parties to the controversy concede that the court not only may, but must, determine, upon the admitted facts, whether, as matter of law, the secretary should have filed the certificate which he rejected, and should have refused to file the certificate which he accepted. It is conceded that both certificates are regular in form, duly authenticated, and that all the conditions of the statute relative to their presentation have been fully complied with. The only question is which emanated from the regular and authorized convention of the party. Upon this point we are satisfied that the respondent erred in his conclusion. It is clear that the full convention was regularly called and organized; and

that only about one-third of its members withdrew after the nomination of Judge Maguire. The withdrawal of a minority of the delegates present did not dissolve the convention, or destroy its identity. It remained, as before, the People's convention, with full authority to nominate a ticket to be voted for at the election. The fact—if it be a fact—that some or all of the delegates who remained were violating pledges or sacrificing party interests in nominating Judge Maguire and adopting the plan of fusion presents a question with which neither the secretary of state nor the court has the slightest concern. That is a matter to be settled between them and their constituents. Delegates to political conventions are, no doubt, trustees, in a large sense of the word, but they discharge a trust with which the courts do not meddle. They obey or disobey instructions as they see fit, and the only remedy for their disobedience is the censure of the people, expressed at the polls. This is true, at least so far as the ballot law is concerned. All the filing officer has to determine is whether the certificate offered for his acceptance emanates from the regular convention of the party. It is no concern of his whether the delegates to the convention have nominated members of their own party, or of other parties; whether the nominees are there to stay, or to be taken down. There is nothing unlawful in fusion. The statute does not forbid it, or attempt to do so, and a statute which did attempt it would be of very doubtful validity. It is for the conventions of different party organizations to decide for themselves whether their principal objects are so far common and paramount over minor issues as to justify them in uniting upon a list of nominees drawn from all parties so agreeing. And, even if they had nothing else in common except a desire to fill the offices, there is no power to prevent them from combining for that object.

One objection of the respondent is that, by the call of the executive committee, the People's party convention was assembled for the purpose of nominating a full ticket, and, of course, a full ticket of Populists, and that if there was to be any fusion, or joint action with other parties, it was only to be the action prescribed by the executive committee, and put forth as part of the call for the convention. As to this, it is enough to say that, according to universal party usage in California, the central or executive committee of a party has no function, after one election is over, except to preserve the organization, and take the necessary preliminary steps for the assembling of the next convention. It has no right to forestall or in any manner limit or curtail the powers of the convention which it calls. The convention, when assembled, is the depository of all party power, and so continues until it adjourns, after which a new committee comes into power for the mere purpose of subserving the party interests

pending the election, and of doing thereafter such things as may be provisionally necessary to keep up the regular organization, and call another convention. It is therefore of no consequence what resolutions the executive committee chose to couple with its call for the People's party convention. They were merely advisory, and as advice were worth just what the convention chose to rate them at.

This case is not like the Michigan cases upon which the respondent relies to sustain his action. The People's convention did not adjourn, and its members unite with members of other conventions in the formation of a new convention, whereby its identity would have been destroyed. It continued its session by itself, and by itself nominated a full ticket as a Populist ticket. It proceeded regularly, and its action cannot be questioned because it nominated men who were not Populists, and made a bargain by which some who were Populists were to retire in favor of Democrats or Silver Republicans. It may be true that the result is the same as it would have been if the three conventions had fused. But the result is not what the ballot law is concerned with. What it demands is not a ticket of Simon-pure Populists, but only a ticket certified by the chairman and secretary of a regular Populist convention. The character and politics of the candidates are not the subject of inquiry for the secretary of state, but only for the voters. There is a wide difference between a fusion convention and a fusion ticket. A fusion convention represents no particular party. A fusion ticket may represent several parties, but is none the less entitled to a place on the official ballot for that reason. Several conventions holding separate sessions do not lose their identity by selecting the same set of nominees. The effect may be to cause difficulty at the next election, from the impossibility of ascertaining the vote of the respective parties, but that is a difficulty to be dealt with when we come to it. For the present we have no doubt that the certificate presented by Hutchinson and Gregory is the one that should have been filed, and consequently that the other certificate presented by Fowler and Johnson should have been rejected. The same observations apply to the certificates of nominations of district officers and members of congress. It is ordered that a peremptory writ of mandate issue as prayed.

We concur: GAROUTTE, J.; HARRISON, J.; TEMPLE, J.; VAN FLEET, J.; McFARLAND, J.

122 Cal. 101

Ex parte OVEREND. (Cr. 455.)  
(Supreme Court of California. Sept. 30, 1898.)

WITNESSES—CONTEMPT—IMPRISONMENT.

Code Civ. Proc. § 1219, authorizing an imprisonment for contempt for refusing to do an

act which is yet in the power of the person to perform, until the act is performed, does not justify such an imprisonment of a witness who refuses to testify in the trial of a case, which is discontinued immediately after such refusal.

In bank. Habeas corpus on the application of Alfred Overend. Prisoner discharged.

Guilfoyle & Quigley, for petitioner. A. P. Black, for respondent.

McFARLAND, J. On the 15th day of June, 1898, in the superior court of the city and county of San Francisco, sitting with a jury impaneled for the purpose, one Minnie Campbell was being tried upon a charge of having obtained money by false pretenses from the petitioner herein, Alfred Overend. On the forenoon of that day, the petitioner herein, Overend, was called as a witness for the prosecution on the said trial, and declined and refused to answer certain questions asked him by the prosecution, upon the ground that the answers would tend to convict him of a felony. The first question which he refused to answer upon that ground was, "Do you know this defendant, Minnie Campbell?" Other questions were asked him, such as, "Do you know the co-defendant, Lewis?" and, "Did you meet the defendant Minnie Campbell and William Lewis, in this city and county, on the 6th day of December, 1897?" The petitioner refused to answer these questions, and refused to give any further testimony in the case, upon the ground above stated. Thereupon the court adjudged him guilty of contempt for not answering the said questions, and, as a punishment, ordered that he be committed to the county jail until 2 o'clock of that day, and also pay a fine of \$500. The further hearing of the case was continued until 2 o'clock of that day. At 2 o'clock the petitioner was again on the stand, and was asked similar questions, which he declined to answer on the same ground; whereupon he was again adjudged guilty of contempt, and punished by a fine of \$500, and imprisoned in the county jail until 10 o'clock next morning. On the next day, June 16th, the trial of the case was resumed; and the petitioner, being put on the stand, again was asked questions similar to those propounded on the day previous, and again declined to answer upon the same ground; whereupon the court again adjudged the petitioner guilty of contempt for not answering the questions, and adjudged that in punishment thereof he suffer imprisonment in the county jail for a term of five days, and pay a fine of \$500; and, in addition thereto, the following judgment was also entered: "I further adjudge that as it appears to me that it is still in your power to obey the order that you answer these questions, that you be further imprisoned in the county jail until such time as you shall submit to answer. The statute provides, when the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned un-



til he has performed it; and I specify in this judgment those questions as the questions that you must answer, and must remain imprisoned until you do submit to answer. That is the judgment of the court, and you will be taken into custody by the sheriff." Thereupon the court said: "Now, in this case of Minnie Campbell it appears to the court that owing to the refusal of this witness to answer questions about matters which are indispensable to be proved by the state—by the prosecution—in order to submit their case to the jury for decision, that owing to his persistent refusal to answer, it has become impossible, gentlemen, for you to render a verdict in this case; and therefore an order will be made that owing to this fact,—the refusal of the witness called by the prosecution, one of the prosecution's witnesses, to answer these questions,—and the inability of the prosecution to supply the testimony desired from another source, that it has thereby become impossible for you to render a verdict, and for that reason you are discharged, gentlemen, from the further consideration of this case." Thereupon, over the objection and exception of counsel for the defendant Minnie Campbell, the jury were discharged, and the trial ended; and it was ordered that the said Minnie Campbell be held in custody, and that her trial be reset at a future period.

Petitioner contends that the power of the court to punish him for contempt for not answering the said questions was exhausted by the first orders sentencing him to imprisonment for five days, which time has expired; also, that his claim that answering the questions would tend to convict him of a felony was conclusive; and, moreover, that, if it was within the province of the court to itself determine whether his answering the questions would have that tendency, the main grounds on which the court based its rulings—namely, that it appeared to the court already, "by a certain transcript here on file, and being part of the records in this court, that the witness had heretofore, in this particular case in the examining court, appeared, and there testified in answer to some of these questions, not objecting then at all, but allowing himself to testify fully"; and that "it appears also by the witness' own statement that he has applied to the district attorney, the prosecuting officer of this court, and requested him to discontinue the prosecution of this case"—are untenable; also, that the judgment imposes two distinct punishments for the same offense,—the first under section 1218, and the second under section 1219, of the Code of Civil Procedure. Some of these contentions present interesting questions, but we do not deem it necessary to discuss them, because in our opinion the petitioner must be discharged upon another ground.

The term of imprisonment for five days has terminated; and as the jury in the case of the people against Minnie Campbell has been discharged, and the trial at which the pe-

tioner was called upon to testify ended, it is no longer possible for him to testify at that trial, and he cannot be imprisoned indefinitely for the nonperformance of an impossibility. A party can be indefinitely punished for contempt only under section 1219, Code Civ. Proc.; and under that section he can be so imprisoned only when the contempt consists "in the omission to perform an act which is yet in the power of the person to perform." "A party cannot be imprisoned for neglecting or refusing to do what it appears it is out of his power to do. And an order of commitment in such a case is void." Rap. Contempts, par. 115; *Adams v. Haskell*, 6 Cal. 316. The case at bar comes within the principles stated in *Ex parte Rowe*, 7 Cal. 175, and *In re Hall*, 10 Mich. 210. As was stated in the latter case, a commitment "would not authorize an imprisonment when the person could not have an opportunity to purge his contempt by answering." In the present case the discharge of the jury and the discontinuance of the trial at which the petitioner was called as a witness left no opportunity for him to purge his alleged contempt. The occasion for enforcing a proceeding against him under section 1219 had passed, and he was subject only to punishment for the past alleged contempt under section 1218. The petitioner is discharged from custody, and the sheriff is directed to release him.

We concur: BEATTY, C. J.; VAN FLEET, J.; GAROUTTE, J.; TEMPLE, J.

122 Cal. 206

TIBBET v. SUE et al. (L. A. 426.)

(Supreme Court of California. Oct. 1, 1898.)

ATTACHMENT—AFFIDAVIT — AMOUNT OF CLAIM—  
SUFFICIENCY OF SURETIES—AMEND-  
MENTS—DISCHARGE.

1. An affidavit in attachment stating the claim to be \$500, "and interest and attorney's fees," is sufficient to sustain the writ, at least to the extent of \$500.

2. A writ of attachment may be issued for a less amount than the demand set forth in the complaint.

3. Code Civ. Proc. § 539, requires an undertaking, with "sufficient" sureties, as a condition to the issuance of an attachment writ. Section 1057 provides that, where an undertaking is required by any law of the state, the officer taking it must require the sureties to accompany it with an affidavit that they are each residents and householders or freeholders within the state, and are each worth the sum specified in the undertaking. *Held*, that an undertaking on attachment which fails to show that the sureties are freeholders or householders warrants the discharge of the attachment on application.

4. An undertaking in attachment which is irregularly issued cannot be amended, under Code Civ. Proc. § 473, providing for amendments to pleadings or proceedings in furtherance of justice, since section 558 expressly provides that in such cases, on application, the attachment must be discharged.

Department 1. Appeal from superior court, Los Angeles county.

Action by George A. Tibbet against Tom Sue and others. From an order refusing to discharge a writ of attachment, defendants appeal. Reversed.

W. J. Hunsaker, for appellants. J. E. Patton, R. A. Ling, and McKinley & Graff, for respondent.

**GAROUTTE, J.** This appeal is taken from an order refusing to discharge a writ of attachment. The motion to discharge the writ was based upon three grounds: (1) The amount of plaintiff's demand is not stated in the affidavit for attachment; (2) the writ of attachment does not state the amount of plaintiff's demand in conformity with the complaint; (3) the undertaking on attachment does not show that the sureties are freeholders or householders.

1. The affidavit for the writ of attachment states that the "defendants in said action are indebted to the plaintiff in the sum of five hundred dollars and interest and attorney's fees, money of the United States." The affidavit directly alleges the specific indebtedness of \$500, and to that extent, at least, will sustain the writ of attachment.

2. It is claimed that the amount stated in the writ of attachment must be the same as the amount of the demand set out in the complaint. The writ of attachment should not be issued for an amount in excess of the demand set forth in the complaint. But it may be for an amount less than the demand set forth in that pleading. *De Leonis v. Etchepare* (Cal.) 52 Pac. 718.

3. The undertaking on attachment does not show the sureties thereon to be either householders or freeholders. Section 539 of the Code of Civil Procedure provides: "Before issuing the writ the clerk must require a written undertaking on the part of the plaintiff in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect," etc. Section 1057 of the same Code declares: "In any case where an undertaking or bond is authorized or required by any law of this state, the officer taking the same must, except in the case of such a corporation as is mentioned in the next preceding section, require the sureties to accompany it with an affidavit that they are each residents and householders or freeholders within the state, and are each worth the sum specified in the undertaking or bond over and above all their just debts and liabilities, exclusive of property exempt from execution." Reading these two sections together, it is plain that the clerk has no authority to issue a writ of attachment unless the request is accompanied by an undertaking, with an affidavit attached setting forth the facts demanded by section 1057. Such affidavit must accompany the undertaking, for the law demands it. That the sureties upon the undertaking are either householders or freeholders is a material part

of the affidavit. It is probably the most material fact demanded by the affidavit. If the affidavit may omit this fact, then the entire affidavit goes for naught, and an undertaking without any affidavit of the sureties whatever would support the writ, even as against a motion by the defendant to discharge it. A writ issued upon an undertaking unaccompanied by an affidavit of the sureties, as required by said section 1057, is irregularly and improperly issued, and should be discharged upon application.

Respondent asks the privilege of amending the undertaking, if it be held defective by this court. For such relief he invokes section 473 of the Code of Civil Procedure, wherein amendments are allowed to pleadings or proceedings in furtherance of justice. In speaking as to an application to discharge a writ of attachment, the Code says: "If upon such application it satisfactorily appears that the writ or attachment was improperly or irregularly issued, it must be discharged." Code Civ. Proc. § 558. This section is specific, and expressly directed to the subject of attachments. It must be held to control and limit the general provisions of the aforesaid section 473. The lawmaking body has declared what shall be the action of the court under the circumstances here presented, and such action demands that the writ should be discharged. It is said in *Winters v. Pearson*, 72 Cal. 554, 14 Pac. 304, that the affidavit on attachment is not amendable. The undertaking upon attachment stands upon the same ground. For the foregoing reasons the order is reversed.

We concur: HARRISON, J.; VAN FLEET, J.

122 Cal. 204

**CUMMINGS v. O'BRIEN.** (L. A. 343.)

(Supreme Court of California. Oct. 1, 1898.)

FOREIGN JUDGMENTS—VALIDITY—PRESUMPTIONS—APPEAL.

1. In an action on a judgment rendered in Texas foreclosing a mortgage, it appeared that a grantee of the mortgagor, by deed subsequent to the mortgage, was not before the court as a party defendant. *Held*, that under Code Civ. Proc. § 1963, subd. 16, providing that a court acting as such is presumed to act in the lawful exercise of its jurisdiction, such judgment must be assumed to be valid.

2. In an action on a judgment recovered in another state, the statutes of such state were put in evidence for the purpose of showing the validity of such judgment. *Held*, that, in the absence of the statute from the record, it must be assumed that the court drew the correct conclusion as to the validity of the judgment.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by A. H. Cummings against John J. O'Brien on a judgment. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.



Jesse F. Waterman, for appellant. Goodrich & Garrison, for respondent.

BRITT, C. Cummings sued O'Brien in one of the district courts of the state of Texas to foreclose a mortgage on lands situated in that state, which mortgage was given by O'Brien as security for payment of his promissory note to Cummings. Intermediate the execution of the note and mortgage and the commencement of that action, O'Brien conveyed the lands affected to a third person, of which conveyance Cummings, it seems, had notice. Such third person was not made a party to said action. Said district court, however, had jurisdiction of causes of that nature, and O'Brien himself appeared by attorney in the case. Judgment was rendered in Cummings' favor, and thereunder a sale of the land was made. The proceeds were insufficient to discharge the debt, and by the terms of the judgment O'Brien was personally liable for the balance. The present action in our courts is on said judgment to recover the amount of such deficiency. At the trial, as appears from the record here, the plaintiff, having made proof of the judgment, etc., in the Texas court, then "introduced in evidence the Revised Statutes of Texas to show the regularity of the proceedings had and taken in the case while pending in the said district court, and to rebut the presumption that the laws of Texas were the same as the laws of California." The superior court rendered judgment for plaintiff, and afterwards denied a new trial.

On appeal the only point is made that the judgment of the court in Texas was wholly void, for the reason that the grantee of O'Brien by deed subsequent to the mortgage was not before that court as a party defendant. It is provided by section 1963, subd. 16, Code Civ. Proc., that a court, acting as such, whether in this state or any other, is presumed to act in the lawful exercise of its jurisdiction. If, notwithstanding this provision of our statute, we ought to presume, when no evidence on the subject appears, that the law of Texas is the same as that of California, in determining the validity of a judgment of that state drawn in question here, and allowing (though without deciding) that a judgment in an action of foreclosure, to which the holder of the legal title is not a party, would, by the law of this state, be a nullity, still we cannot disregard the fact that the law of Texas was in evidence before the court below, nor indulge the presumption that the evidence was ignored by the court. It was competent to prove as a fact the law of that state on which depended the obligation of the former judgment, though the effect of the law, when proved, was a legal question for the court. The statutes of Texas were received in evidence for that purpose. True, their tenor is not disclosed by the record, but we must assume, in the absence of any further showing, that the trial

court drew the right inference therefrom, viz. that the former judgment was rendered by said district court of Texas in the due exercise of its jurisdiction under the law as thus proven, and was, in all respects, valid. The judgment and order appealed from should be affirmed.

We concur: CHIPMAN, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

6 Cal. Unrep. 145

McRAE v. ARGONAUT LAND & DEVELOPMENT CO. (Sac. 456.)

(Supreme Court of California, Oct. 7, 1898.)

APPEAL—UNDERTAKING—PROOF OF AGENCY—  
TRIAL—HARMLESS ERROR.

1. Where the notice of appeal specifies that it is taken from the judgment, and from an order denying a new trial, and the undertaking is one on appeal from the judgment only, the appeal from the order will be dismissed.

2. Testimony that witness acted as agent for another in a given transaction is competent proof of the fact.

3. On an issue whether a written contract was drawn up between plaintiff and defendant, where there was the positive evidence of two witnesses that such a contract was drawn, a refusal to permit defendant to show that a book containing a record of such transactions, kept by him, did not show an entry of a certain date of the drawing of such contract, was not reversible error, it appearing that defendant did not offer to prove that the book contained no entry in regard to the contract.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by Mary McRae, administratrix of the estate of Malcolm McRae, deceased, against the Argonaut Land & Development Company. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, defendant appeals. Appeal from order denying new trial dismissed. Judgment affirmed.

Dudley & Buck, for appellant. J. G. Swinerton and J. A. Louttit, for respondent.

HAYNES, C. The notice of appeal in this case specifies that it is taken by the defendant from the judgment, and also from an order denying its motion for a new trial. The stipulation of counsel to the correctness of the transcript shows that the undertaking on appeal is from the judgment only, and respondent calls attention to this fact, and objects to a consideration of the appeal from the order denying a new trial. This objection is well taken, and the appeal from the order should be dismissed. The record contains a statement on motion for new trial, which respondent concedes may be regarded as a bill of exceptions on appeal from the judgment; but, as the appeal was not taken within 60 days after the rendition of the judgment, exceptions to the findings upon the ground that they are

not justified by the evidence cannot be considered. Code Civ. Proc. § 939, subd. 1. The only questions for consideration arise upon the rulings of the court upon matters of evidence. This action is prosecuted to recover for services rendered by one W. D. McLaurin for the defendant in reference to a large tract of land owned by it near the city of Stockton, the claim and demand therefor having been assigned by McLaurin to Malcolm McRae, plaintiff's intestate. McLaurin was employed by one George H. Fairbrother, who acted, or assumed to act, as the agent of the defendant. Fairbrother's deposition was taken by the plaintiff, and among other questions put to him by the plaintiff was the following: "During the time you were acting as agent, did you know W. D. McLaurin?" Defendant objected, on the ground that the question assumes the witness was acting as agent. Before this question was put, the witness had, without objection, testified generally, and without reference to McLaurin's employment, that he had acted as agent for the defendant. The question, therefore, assumed nothing, and was entirely proper. It was not an attempt to prove agency, as contended by appellant in its brief, but to show that while acting as agent he knew McLaurin. While the statements or admissions of one, not as a witness, that in a certain transaction he acted as agent for another, is not competent to prove the fact of agency, yet, if he is called as a witness, his testimony, not only that he acted as the agent of the party, but as to the fact of agency, and the nature and extent of his authority, where it rests in parol, is as competent as that of any other witness. Mechem, Ag. § 101, and cases there cited.

It is also contended by appellant that the court erred in sustaining plaintiff's objection to the following question put by defendant to its witness Eugene Wilhoit: "Q. Now, look on that record of May 20th, and see whether there is any record of any charge for any work done for that corporation by you?" Fairbrother and McLaurin had each testified that a written contract between McLaurin and the defendant, for McLaurin's employment, was drawn up by Mr. Wilhoit, and Mr. Wilhoit had testified that he had no recollection of it; that he kept a book in which he entered charges for work of this character, and the book shown him covered the period of this transaction. If he had examined the book and testified that no record of it appeared, taken in connection with his testimony to the effect that, if he drew the contract, it should be entered in the book, and that he had no recollection of drawing the contract, it would be competent evidence tending to show that he did not draw it. But the judgment should not be reversed for that reason. We cannot assume that the book would have shown that there was no entry of the drawing of the contract, and, in order to show injury from the

error, the defendant should have offered to prove that it contained no entry in regard to it. This was not done; and, besides, if it were admitted that no entry of the transaction existed in the book, the nonexistence of the entry would be wholly insufficient to overcome the positive evidence of two witnesses to the fact that a contract was drawn. A careful business man may conscientiously swear to the correctness of items appearing in his books, but he must be a rash man who, doing a large business,—as Mr. Wilhoit says he did,—will swear that no proper item was ever omitted. Such evidence would be necessarily of a weak and inconclusive character.

It is also contended by appellant that the court erred in excluding a deed and lease offered in evidence by defendant. The record in this regard is so meager and indefinite that we cannot say that the court erred in excluding them. The record is as follows: "Whereupon defendant offered in evidence the deed from defendant corporation to John Boggs, said deed being recorded and dated May 20, 1890." "Defendant also offered in evidence the lease executed by and between John Boggs on May 20, 1890, for five years, of the same land referred to in the deed, the land being the land referred to in this action as the 'Stockton Garden Tract,' and which has been referred to as the land sold by the defendant to Boggs." These offers were made separately, and objections to each were sustained in their order. The offer of the lease does not even show who the lessee was. The deed and the lease bear the same date, and the term of the lease was five years. If the defendant was the lessee, the conveyance would not affect McLaurin's employment, whether it commenced before or after the conveyance; and in support of the ruling we might properly assume that defendant was the lessee. But the testimony of McLaurin shows that about the time of his employment Fairbrother was making a trade of the land to Boggs, and upon cross-examination he said: "By the trade I mean the twelve thousand dollars a year rent to be paid by the Argonaut Land and Development Company to Boggs." The defendant being the lessee of the land, it is apparent that the conveyance did not dispense with or affect the employment of McLaurin, and therefore the evidence offered was immaterial.

No other errors of law are mentioned in appellant's brief, and we find none in the record which would justify a reversal. We advise that the appeal from the order denying a new trial be dismissed, and that the judgment be affirmed.

We concur: SEARLS, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal from the order denying a new trial is dismissed, and the judgment is affirmed.



122 Cal. 244

In re OLMSTED'S ESTATE. (L. A. 403.)  
(Supreme Court of California. Oct. 5, 1898.)

WILLS—CONTESTS—EVIDENCE—BURDEN OF PROOF  
—REVOCATION—QUESTIONS OF FACT—  
FINDINGS—REVIEW.

1. On appeal by proponents of a will from a decree in favor of contestants, evidence introduced by proponents, although objected to by contestants, will be considered as properly received.

2. Where a will legally executed has been offered for probate, the onus is on contestants to prove its revocation.

3. Testator made a will on May 31, 1893, which was inclosed in an envelope by the attorney drawing it. After his death, memoranda in pencil in testator's handwriting were found on the envelope, as follows: "July 4th. Make over." On the other side: "This has not been renewed up to this 15th day of October, 1895. Neglected it, thinking I would sell something." Testator's signatures, written on the margin of each page of the will and at the foot thereof, were canceled by two ink lines drawn through the length of each. On the last page, under the signature of witnesses, testator had written, "Owing to the depreciation in my property, I will make a new will." Some of the clauses were canceled by ink lines drawn the full length of every line and by cross lines extending from top to bottom. Several changes were made in the amount of legacies. Testator repeatedly, and within 15 days of his death, declared to various persons that he had an ironclad will that could not be broken. *Held*, on a contest, that a conflict of fact as to testator's intent to cancel was presented, and the action of the probate court would not be disturbed.

4. A finding by the probate court that a testator canceled and obliterated his will and his signature thereto and thereon "for the purpose of revoking same," is a sufficient finding of revocation, under Civ. Code, § 1292, providing that a will may be revoked by such acts "with the intent and for the purpose of revoking same."

5. In finding that a will offered for probate was revoked by testator, it is not necessary to find that at such time he was of sound and disposing mind, where his competency was not in issue, and the evidence clearly showed that the revocation was effectuated while he was mentally firm.

Department 2. Appeal from superior court, San Diego county.

Petition by C. A. Buss for the probate of the will of Marcus L. Olmsted, deceased. From a judgment refusing a probate, proponent and others appeal. Affirmed.

Parrish & Mossholder, for appellants.  
Haines & Ward, for respondents.

HENSHAW, J. This is an appeal from the judgment and decree of the superior court refusing probate to an instrument offered as the last will and testament of Marcus L. Olmsted, deceased. C. A. Buss is the proponent of the will, and he, with Martha Buss, Solon C. Buss, Ella M. Stockton, and others, stand as defendants to the contest. The contestants, occupying the position of plaintiffs in this proceeding, are the brothers and sister of the deceased. By the evidence it was disclosed without conflict that the document offered for probate was duly executed by Marcus L. Olmsted as his will upon May 31,

1893. At that time his attorney indorsed on an envelope the words, "Last will and testament of Marcus L. Olmsted. May 31, 1893," and delivered it to Olmsted, with the will inclosed, and with no other writing thereon. Olmsted died upon January 15, 1896. At the time of his death, and for a year immediately preceding it, he resided with Mrs. Martha Buss, who kept house for him, and who is one of the defendants seeking the admission of the instrument to probate. She is likewise the mother of the proponent, C. A. Buss, and of the co-defendant Solon C. Buss. Upon Sunday, January 19, 1896, after the burial of Olmsted, Solon C. Buss met by appointment Albert Olmsted, a brother of the deceased, and a contestant, and one Ryder, at the house of his mother, Martha Buss, to examine the personal effects of the decedent. Buss, Olmsted, and Ryder went into the bedroom which had been the death chamber, and there Buss, in the presence of the others, opened a trunk with one of a number of keys which had been given to him by his mother. In the trunk were two locked tin boxes. These boxes had belonged to the deceased, and had been kept by him in a closet off his room. After his death they had been locked in the trunk by the housekeeper, Mrs. Buss. The keys had been taken from the pocket of the trousers of the dead man on the evening of or the next day after his death by Solon C. Buss and Albert M. Olmsted, and were by them handed to Mrs. Martha Buss, the housekeeper in charge. With one of the keys so delivered to his mother, Solon Buss testified that he unlocked the tin boxes, and in one of them found the will. When found it was inclosed in the envelope which bore the indorsement of the attorney above set out. After examining and reading the will in the presence of Ryder and Olmsted, Buss retained possession both of the envelope and of the will until they were filed with the clerk of the court. The writing upon the will and upon the envelope, and all the ink and pencil marks upon the will, were there when it was found. The will was inclosed in the original envelope furnished by the attorney, and upon the envelope were certain memoranda in pencil in the handwriting of the testator. Upon one side of the envelope was written, "July 4th. Make over," and upon the obverse side the following: "This has not been renewed up to this 15th day of October, 1895. Neglected it, thinking I would sell something." Upon the face of the instrument itself the lines, interlineations, erasures, cancellations, and new writings of words, phrases, or sentences were very numerous. The most significant of these, however, were the following: Upon the margin of each page of the will the deceased had written his name, and he had also written it as his subscription at the foot of the will. There were thus in all seven of his signatures upon the instrument. Each and all of these were canceled by two ink lines

drawn through and across their full length. Upon the last page of the will, and under the signature of the attesting witnesses, appeared in the handwriting of the deceased the following: "Owing to the depreciation in my property, I will make a new will." Some of the clauses in the will were canceled by ink lines drawn the full length of every line of the clause, and by cross lines extending from the top to the bottom. A legacy originally appearing in the typewritten instrument for \$2,000 was changed twice. The "two" was canceled by two ink lines drawn through the word, and the word "one" written in ink immediately over it. Again, the word "one" and the word "thousand" were canceled by a double pencil mark drawn through them, and over the word "one" was written in pencil the numeral "500." These identical changes appear more than once in the will. Upon behalf of the proponents of the will, and those in interest with them, it was permitted to be shown, under the objection and exception of the contestants, that upon many occasions after the execution of the propounded instrument the deceased had declared that he had a will, an ironclad will. These declarations were shown to have been made as recently as 15 days prior to his death, when he said to one Mrs. Woodward that he had a will, and that it was all right. Indeed, there is abundant evidence of many such declarations. They were objected to by the contestants as not having been made contemporaneously with the acts of cancellation, as being no part of the *res gestæ*, and therefore not admissible upon the question of the intent with which the act of cancellation was done; but as the judgment of the court passed in contestants' favor, and as the contestants are not here appealing, their objection to the introduction of this evidence may not be heard, and the question of its admissibility cannot be passed upon. The sole interest which the contestants have is in upholding the judgment, and for the correction of any errors made against them upon the hearing they must prosecute their own appeal. *Klauber v. Car Co.*, 98 Cal. 105, 32 Pac. 876. The case must be considered, therefore, upon this appeal, in the light of all the evidence which the record bears.

The mode by which a written will, once executed, may be revoked, is entirely governed by the provisions of the Code. No will, nor any part thereof, may be revoked or altered otherwise than "(1) by a written will or other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator;" or "(2) by being burned, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence, and by his direction." Civ. Code, § 1292. It is with the revocation recognized by subdivision 2 that this case has to deal. As to

the cancellations of clauses upon the face of the will, the striking out of some legacies, and the changes in others, they are to be considered only for the light which they may throw upon the general act of revocation of the whole instrument for which respondents contend. For the revocation contemplated by subdivision 2 two things are essential: First, there must be a sufficient act within the meaning of the statute,—that is to say, an act of burning, tearing, canceling, or otherwise destroying; and, second, that act must be performed *animo revocandi*, or, as our Code phrases it, it must be performed "with the intent and for the purpose" of accomplishing a revocation. Thus, the mere physical destruction, however complete it may be, is not sufficient, for that may have been occasioned by mistake or fraud, or, as in the case of a testator who, since the making of his will, has become insane, it may be accomplished without any lawful intent whatsoever. Again, the mere intent, without some physical act tending to the destruction of the instrument, and sufficient to fill the requirement of the statute, for very obvious reasons is insufficient, since the law expressly requires the joint union of act and intent. What act of destruction will supply the requirement of the statute is a question much discussed. It is apparent that the destruction may be total or partial. The will, for example, may be wholly burned or totally obliterated, or it may be but partially burned, and still legible. Generally, it may be said that, if the intent to revoke clearly appears, a slight act within the statute will be deemed sufficient. One of the recognized modes of revoking a will is by cancellation. In its primal significance the word means a lattice work. As applied to writings, it means the nullification of a writing by drawing upon its face lines in the form of a lattice work, "criss-cross." Usually, in legal as well as in common acceptance, cancellation is accomplished by the drawing of any lines over or across words with the intent to nullify them. It is a common business practice to cancel negotiable instruments and other written contracts by drawing such lines through the signatures of the makers. Such was the method adopted in this case. It is a well-recognized method, as has been said, and one clearly within the letter and the spirit of the statute.

Where a will legally executed has been offered for probate, the onus is upon the contestants to prove its revocation. This burden the contestants bore, and showed the facts above narrated. From them it appears that the instrument, during the lifetime of the maker, had been in his secure possession; that when discovered it was found by members of the two parties in interest,—by one of the contestants, and by one allied with the proponents; that it was then in the same condition in which it appeared when offered at the hearing, with all the marks of cancel-



lation upon it. From these circumstances alone arise the presumptions—First, that the cancellations were the act of the testator; and, second, that they were performed with the intent and purpose of revoking the instrument. But it is said that acts of cancellation such as here disclosed are, in their nature, equivocal. This may be conceded. Indeed, the same is true of any act looking to the revocation of a will, even if it amount to total destruction, for to the act must always be added the intent to revoke before a compliance with the statute is had. In this instance, besides the facts and circumstances to which we have adverted, the writings of the testator himself, found upon the envelope containing the will, and appearing upon the last page of the will, furnish strong adminicular proof of this intent. There are upon the envelope, in the handwriting of the deceased, these words: "This has not been renewed up to this 15th day of October, 1895." There are upon the last page of the will these words: "Owing to the depreciation in my property, I will make a new will." Neither these writings, nor any of the writings of the testator, unless executed with all the formalities of a will, would be sufficient in and of themselves to prove, nor would they be admissible primarily to prove, the basic fact of a revocation. But, the fact of revocation having been established by prima facie evidence, these contemporaneous declarations of the testator afford strong corroborative evidence upon the presumption of the intent with which the act of cancellation was performed. The declaration that, "owing to the depreciation in my property, I will make a new will," affords a substantial reason for the revocation of the instrument. The words found upon the envelope support the proposition that the will of 1893 had been revoked, and further express the reason why the deceased, up to October, 1895, had not made a new will. Consequence is sometimes attached to the circumstance that the deceased retains among his valued papers an instrument which is contested as a revoked will. Under the circumstances presented in this case it seems quite natural that he should have done so,—to use the old document, as, indeed, he appears to have been using it, as the foundation and framework for another testament.

Against all this appellants oppose the evidence of the oft-repeated declarations of the deceased, made down to a short time preceding his death, to the effect that he had a valid will. We have said that under the circumstances of this case respondent's objection that this evidence should not be considered may not be heard. The question of its admissibility is not before us. The evidence is to be treated upon this appeal as properly in the case, but upon the subject of its admissibility reference may be had to Whart. Ev. (3d Ed.) § 895. Giving, then, to appellants' evidence all the weight to which it is entitled,

what is to be said? Nothing further than at the most it presents a conflict upon an issue of fact which it was the peculiar province of the judge in probate, sitting without a jury, to decide.

It is further argued by appellants that the evidence discloses that the revocation was not absolute, but was dependent upon the making by the deceased of a new will, and, as it is not shown that he carried out his intention in this respect, the conditional revocation will be disregarded, and the old will restored, to avoid intestacy. This is upon the doctrine designated by Mr. Jarman as the rule of "dependent relative revocations," and he thus states it: "Where the act of destruction is connected with the making of another will, so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails also, and the original will remain in force." 1 Jarm. Wills (6th Ed.) c. 7, par. 7. The dangers which lurk in the application of this doctrine have been well set out by Woerner in his American Law of Administration, at page 90. But it is sufficient here to say that under no reasonable theory do the facts of this case bring it within the sweep of the doctrine. The court found that the testator canceled and obliterated his will and his signature thereto and thereon "for the purpose of revoking the same." It is contended that this finding is insufficient; that it does not literally follow the language of the statute, "with the intent and for the purpose of revoking"; that a distinct meaning is to be given to the words as thus employed; and that it is, therefore, not a sufficient finding to say that the acts were done for the purpose of revoking. It would be extremely difficult to conceive of a testator canceling his will for the purpose of revoking it, and yet not canceling it with the intent to accomplish the same result. The truth of the matter is that the use of the words is idiomatic. Their meaning as used is identical. They are as near approaches to perfect synonyms as may be found in the language. In discussing the statute of Elizabeth, which declared a merchant to be a bankrupt who should "depart from his dwelling house or houses to the intent or purpose to defraud or hinder any of his creditors," Lord Ellenborough very aptly said: "It will be observed that upon the language of this statute the act is complete by being done with the intent specified, the words 'or purpose' being merely additional words to the same effect, and which carry the sense no further than it was carried by the preceding word 'intent.'" *Robertson v. Liddell*, 9 East, 487.

It is finally urged that the findings are insufficient because of the absence of a judicial declaration that the acts of revocation were

done by the testator when he was of sound and disposing mind. To this it may be answered that the question of his sanity or mental competency was not made an issue. The court affirmatively finds that at the time he executed the will he was of sound and disposing mind. The presumption of sanity always exists until dispelled by proof. In this case the only evidence touching the question was that in the last week of his life he had become mentally infirm, as well as physically debilitated. But there is positively no evidence that the revocation was effected during that time, while, upon the other hand, the evidence of the testator's own writings upon the face of the will, and upon the envelope inclosing it, clearly indicate that the act was effectuated at a time long before. The judgment and decree appealed from are affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

6 Cal. Unrep. 148

HOWE v. HALSEY. (Sac. 414.)

(Supreme Court of California. Oct. 7, 1898.)

SUPERIOR COURTS—JURISDICTION—AMOUNT INVOLVED—INTEREST.

Under Const. art. 6, § 5, giving the superior court jurisdiction in cases in which the demand, exclusive of interest, amounts to \$300, the compounding of interest on a note for less than \$300, pursuant to its terms, does not convert such interest into principal, and hence the superior court has no jurisdiction of an action on the note, although the amount of interest compounded renders the amount involved in excess of \$300.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county.

Action by William S. Howe against Milton S. Halsey. From a judgment of dismissal, plaintiff appeals. Affirmed.

Isaac Joseph, for appellant. A. A. De Ligne and A. M. Johnson, for respondent.

HAYNES, C. This action was brought in the superior court of Sacramento county upon a promissory note dated April 4, 1894, for the sum of \$200, payable one month after date, "with interest thereon from date until paid at the rate of five per cent. per month, payable monthly, and, if not so paid, the interest may be added to the principal, and bear like interest, and the whole note may, at the option of the holder, without notice to the maker thereof, be treated as due and collectible. \* \* \* Both principal and interest to be paid at," etc. The court dismissed the action without prejudice, upon the ground that it had no jurisdiction, and the plaintiff appeals from the judgment of dismissal.

In this case the complaint set out a copy of the note, alleged that no part of the principal or interest had been paid, that at the time the original complaint was filed there was due "the sum of \$415.67 principal, and inter-

est thereon from July 4, 1895," etc.; and the prayer for judgment was for said sum of \$415.67, and interest from July 4, 1895. Appellant contends that the ad damnum clause of the complaint determines the jurisdiction. That is undoubtedly the rule in proper cases but it would certainly not be held that the superior court would have jurisdiction in an action for goods sold and delivered where the complaint alleged that the plaintiff sold and delivered to the defendant goods of the agreed price and value of \$100, and that he had not paid for the same, or any part thereof, by reason whereof the plaintiff has been damaged in the sum of \$500, and prays judgment for that sum; but where the complaint sets out several causes of action upon contract, each below the jurisdiction of the superior court, but which in the aggregate exceeds \$300, exclusive of interest, it has jurisdiction. The rule, however, has its more general application in actions to recover damages for torts. Here the question is whether the provision in the note allowing the interest to be compounded monthly, and to bear like interest, converts the interest into principal to be treated as part of the sum loaned, or whether all beyond the sum named as the principal of the note is not interest, within the meaning of the constitution and statute fixing and defining the jurisdiction of the superior court? This precise question has been quite recently decided by this court in bank, adversely to appellant, in *Christian v. Superior Court* (L. A. No. 309; filed Sept. 15, 1898), 54 Pac. 518. Upon the authority of that case we advise that the judgment of dismissal in this case be affirmed.

We concur: BELCHER, C.; CHIPMAN, C.

PER CURIAM. For the reasons and upon the authority cited in the foregoing opinion, the judgment appealed from is affirmed.



(122 Cal. 272)

**ANDERSON v. BYRNES et al.** (S. F. 769.)<sup>1</sup>  
(Supreme Court of California. Oct. 8, 1898.)

**PENALTIES—WHAT ARE—CONSTITUTIONAL LAW—  
VESTED RIGHTS—STATUTES—REPEAL—  
PARTIAL INVALIDITY.**

1. Act April 23, 1880, providing that a stockholder may recover \$1,000 as liquidated damages from the directors of a mining corporation for failure to post monthly balance sheets as required by the act, imposes a penalty.

2. The repeal of a penal statute pending appeal from a judgment obtained thereunder is not a deprivation of a vested right, since no one has a vested right in an unenforced penalty.

3. Although an act amending a law be unconstitutional as limiting the operation of the law to a certain class of corporations, this does not invalidate another part of the act limiting the liability of the directors of a corporation, where there is nothing indicating that the legislature would not have made the latter limitation in any event.

Department 1. Appeal from superior court, city and county of San Francisco; Murphy, Judge.

Action by Isaac Anderson against J. D. Byrnes and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

E. L. Campbell and J. S. Spilman, for appellants. C. M. Jennings, for respondent.

GAROUTTE, J. In plaintiff's original brief he says: "This is an action qui tam by a stockholder (a common informer) to recover the statutory penalty from the directors of a domestic mining corporation for failure to make or post monthly balance sheets, etc., required by act approved April 23, 1880." By that statute it is declared that a stockholder may recover the sum of \$1,000 as liquidated damages from the directors of mining corporations for failure upon their part to comply with certain of its provisions. Subsequent to the filing of plaintiff's original brief, and while the appeal from the judgment in his favor was pending in this court, the legislature amended the act under which this litigation was inaugurated. This amendment was most important and substantial,—so important and substantial that it may be said that, so far as this plaintiff's rights are concerned, the act was repealed. Plaintiff, by supplemental argument, now claims that the act is not penal in character; that the \$1,000 recovered by him as liquidated damages is not a penalty; and that, therefore, under the judgment recovered, he has vested rights, which a repeal of the statute cannot affect. That it is necessary to his ultimate success in the litigation in this court that his later position as to the law be correct is clearly apparent; for, if this act of the legislature is essentially penal,—if the \$1,000 which he has recovered as a stockholder from the directors is a penalty, and not damages,—he has no case. This is eminently true, for the penalty had not yet been enforced, and, as has been said by judges of

<sup>1</sup> Rehearing denied October 31, 1898.

other courts, "no person has a vested right in an unenforced penalty." Therefore a repeal of the statute before the penalty is enforced is not a deprivation of any vested right. It follows that the amendment to the statute here under consideration absolutely prevents any further prosecution of this litigation if the statute is penal in character, and the amount recovered in the lower court is in all essentials a penalty.

Is the statute of penal character? This question seems to be easy of solution. The statute in this particular regard has not been directly before the court as a controverted question. At the same time, ever since the statute was enacted it has proven a prolific source of litigation, and has been viewed, weighed, measured, and tested by this court many times; and it may be said there is no case in our reports where the act has been before us, from the first to the last, from *Loveland v. Garner*, 71 Cal. 541, 12 Pac. 616, to *Miles v. Woodward*, 115 Cal. 310, 46 Pac. 1076, but what in some way and to some degree refers to this act of the legislature as penal, and the amount recovered as a penalty. In the earlier case it is said: "It will be perceived that this act is in its nature penal, and does not specifically declare that for each failure to comply with its requirements a penalty may be recovered. Nor does it declare that each refusal or neglect of that kind shall render the directors liable for a penalty." In the later case it is said: "The law is designed to protect stockholders of domestic corporations, and to that end has declared that the directors of those corporations the conduct of whose internal affairs is subject to the control of the legislature shall do specific acts under a prescribed penalty for their failure and refusal." In other jurisdictions, acts of the same general kind are declared penal, and the amounts to be recovered, for failure to comply with their provisions, penalties. In one of these cases it is said: "This statute is in its nature penal. It prescribes a determinate penalty for neglect of a duty imposed by law upon the trustees of companies organized under our general incorporation act. The amount of the forfeiture is measured by the aggregate debt contracted by the company. The liability is not founded upon contract, but arises from misconduct in office. As the trustees who make default in publishing the report are wrongdoers, if the penalty or any part thereof should be recovered from any one of them, he could not without a special statute compel the others to contribute." *Gregory v. Bank*, 3 Colo. 334. Under another statute of the same general tenor, the Colorado court said: "The matter repealed was the right to recover twice the full value of the animal killed, upon failure of the company to file the notice required, and the statute giving such right was in its nature penal. \* \* \* Appellee has not such a vested right under the judgment recovered by

him that he cannot be divested of it by a repeal of the statute upon which the recovery is based." *Railway Co. v. Crawford*, 11 Colo. 600, 19 Pac. 673. In the consideration of an act of the state legislature of New York, in no essential principle different from the act here involved, it is said by the supreme court of that state: "With this decision before us, which we do not feel at liberty to overrule, this cause of action must be regarded as an action upon a statute for a penalty or forfeiture." *Wiles v. Suydam*, 64 N. Y. 177. And in this case it may well be said there can be no question but that the statute of limitations would run as against a penalty or forfeiture.

The power of the legislature to fix an arbitrary amount as "damages" for the violation of duty upon the part of the directors of a corporation is not apparent. Here the stockholder, having but a single share of stock, may bring suit and recover the same amount by judgment as a stockholder holding 1,000 shares of stock. It is thus apparent that compensation for the actual damage done to the stockholder was not intended to be given by the act. Indeed, conditions might arise where a dereliction of duty upon the part of the directors in not complying with the requirements of this law in posting notices, etc., would be peculiarly beneficial to the stockholder; yet such benefits would not bar a right of recovery, and could not be set up as a defense to an action brought by a stockholder, based upon a violation of the statute. As testing the penal character of the act, we see no difference in principle if it had provided that the directors should be guilty of a misdemeanor, and punished accordingly, for a violation of its provisions, rather than providing, as it does, for the mulcting of the directors in damages in the arbitrary amount of \$1,000, at the suit of any stockholder of the corporation. As to the language used in *Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546, it is sufficient to say that the question here under consideration was not then in the mind of the court.

The act of 1897 purports to amend the earlier act in two important particulars: (1) It amends section 1 by limiting the scope and effect of the act to mining corporations "whose stock is listed and offered for sale at public exchange." (2) It amends section 3 by limiting the liability of directors of the corporations, for failure to do the things commanded by the act, to the actual damage sustained by the stockholder by reason of such failure, and costs of suit. It is now contended by plaintiff that the amendatory act is unconstitutional, in this: that it does not apply to all mining corporations, and therefore is not uniform in operation. The exigencies of the present case do not require the court to pass upon this question of constitutional law. Conceding, for present purposes alone, the contention of plaintiff to be sound, still section 3, as amended, entirely



changes the remedy of the stockholder, and therefore necessarily deprived this plaintiff of the remedy afforded him under the old act, and which he has sought to enforce. In answer to this contention, plaintiff insists that the amendment changing the remedy is dependent upon the amendment limiting the scope and effect of the act to a certain class of mining corporations, and that amendment failing to the ground, by reason of its unconstitutionality, necessarily carries with it the second amendment to the act. But we see no dependency between these sections causing such a result. We see nothing in the act indicating in any way that the legislature would not have changed the remedy unless that body had first limited the effect of the act to mining corporations whose stock is listed and offered for sale at public exchange; and that is the test when a question of this character is presented to the court for decision. A very similar question upon principle to the one here considered is discussed at length by this court in *Robinson v. Southern Pac. Co.*, 105 Cal. 544, 38 Pac. 94, 722. And, tested by the law there declared, the amendment to this act relating to the remedy of the stockholder is valid and constitutional legislation, even if it be conceded that the prior amendment pertaining to the character of mining corporations affected by the act is invalid and unconstitutional. For the foregoing reasons, the judgment is reversed, and the cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.

(122 Cal. 244)

LEWIS v. FOX et al. (L. A. 375.)<sup>1</sup>

(Supreme Court of California. Oct. 6, 1898.)

PLEADING—CROSS COMPLAINT—CAUSE OF ACTION—SUPPLEMENTAL COMPLAINT.

1. In an action to quiet title to 49 inches of water derived from a certain source, defendants answered, alleging their own right to 30 inches of such water, and in a cross complaint, bringing in new parties as defendants, alleged a contract with the grantor of such new parties, providing that, in case of the failure to supply the 30 inches from such source, it should be supplied from certain other properties conveyed to such new defendants after the making of the contract. *Held*, that such cross complaint could not be maintained under Code Civ. Proc. § 442, permitting the filing of a cross complaint whenever defendant seeks affirmative relief against any party "relating to or depending upon which the action is brought or affecting the property to which the action relates."

2. A complaint failing to show that the cause of action had accrued when the action was brought cannot be aided by a supplemental complaint setting up facts showing that such cause of action has subsequently accrued.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by Frank D. Lewis against S. B. Fox and others. Defendants filed a cross

complaint against plaintiff and others, and from a judgment and order against defendants in the cross complaint certain of them appeal. Reversed.

A. R. Metcalfe, Goodcell & Leonard, F. W. Gregg, and Frank B. Daley, for appellants. Gibson & Titus, for respondent.

HAYNES, C. This action was brought May 1, 1893, by the plaintiff against S. B. Fox and a large number of others, as defendants, alleging that he is the owner of lots 7 and 8 in block 25 of the Rancho San Bernardino; that upon said lots there has been developed, by artesian wells, 84 inches of water, continuous flow, measured under a 4-inch pressure; that such amount of water is now flowing from said wells; that out of said quantity the first 35 inches, and the right to the use and control of the same, is owned by parties other than the parties to this action; that the right to the use and control of the same is prior and paramount in right to any other waters that now are or hereafter may be derived from said land; that the remainder of said 84 inches of water, namely, 49 inches thereof, and the right to use and control the same, is owned by plaintiff; that defendants, and each of them, claim some right, title, or interest in and to said 49 inches adversely to the plaintiff; that their claim is without right, etc.; and asks to have his title to said 49 inches quieted. S. B. Fox and 15 others of defendants, severing from the remaining defendants, answered the complaint, and admit that 84 inches of water had been developed by artesian wells on said land, "but deny that 84 inches of water, measured under a 4-inch pressure, has been since the commencement of this action, or is now, flowing from said wells"; admitting that the first 35 inches was owned by the Terrace Water Company (not a party to the suit), denying plaintiff's ownership of the land and of said 49 inches of water, and alleging their own right to 30 inches of said 49 inches of water from said source. In addition to this answer they filed a cross complaint against the plaintiff and the Vivienda Water Company (a corporation), Shirley C. Ward, and A. C. Armstrong (whom they prayed might be brought in as parties to the action), alleging, in substance, the following facts, among others, viz.: That in 1887 certain parties, of whom Ward was one, formed a corporation known as the Vivienda Water Company, and conveyed to it, through said Ward, said lots 7 and 8 named in the complaint, and, through others, lot 9 in the same block; that prior to said conveyance said Ward mortgaged said lots 7 and 8 to one Donovan to secure his promissory note for \$2,000, payable July 8, 1889, which note and mortgage were afterwards assigned to the Terrace Water Company, a corporation, said corporation being then the owner of said first 35 inches of water flowing from the artesian wells on said lots 7 and 8; that said

<sup>1</sup> Rehearing denied November 5, 1898.

corporation commenced a suit to foreclose said mortgage in January, 1891, and said action was still pending; that said Vivienda Water Company was also the owner of 148½ inches of water from another source, known as the "Meeks Mill and Garner Properties," and on December 6, 1887, entered into a contract with certain of the defendants, and conveyed to them 30 inches of water flowing and derived from the artesian wells on said lots 7 and 8, and an interest in the pipe line conveying the water to the grantees' lands; that it was further provided that, in the event that at any time the supply of water at the artesian wells should be insufficient to supply the said 30 inches of water, then the same should be supplied from its other source of supply, viz. the Meeks Mill and Garner properties. The cross complaint further alleged that on March 22, 1892, the Vivienda Water Company conveyed said lots 7 and 8 to the plaintiff, Frank D. Lewis, but that the conveyance was without consideration, and that Lewis took with notice of their rights, etc. Also, that on May 4, 1891, the Vivienda Water Company, disregarding its obligation to furnish to cross complainants said 30 inches of water from the Meeks Mill and Garner properties in case of the failure of the wells on lots 7 and 8, conveyed said 148½ inches, which it owned in the Meeks Mill and Garner properties supply, to said Shirley C. Ward, and that said Ward conveyed approximately one-half thereof to A. C. Armstrong, one of the parties brought in by said cross complaint, and charged that both Ward and Armstrong took with knowledge of the cross complainants' right and title to said 30 inches of the said 148½ inches. Pending the action, A. C. Armstrong died, and his executrix, Mary E. Armstrong, was substituted, and she and Shirley C. Ward separately answered the cross complaint. The Vivienda Water Company made default. In addition to her answer, Mary E. Armstrong filed a cross complaint against P. A. Raynor, the Rialto irrigation district, and A. McBean, and these parties were brought in, and said district and McBean answered her cross complaint; but the allegations of these several pleadings need not be stated further than to say that they all relate to the question of the liability of P. A. Raynor, Mrs. Armstrong, executrix, the Rialto irrigation district, and A. McBean to the first cross complainants, S. B. Fox et al., for the 30 inches of water originally contracted to be supplied by the Vivienda Water Company from the artesian wells on lots 7 and 8. Final judgment of foreclosure of the Donovan mortgage in favor of the Terrace Water Company was entered August 6, 1894, and said lots 7 and 8 were sold thereunder in September, 1894, to said Terrace Water Company; and Lewis, the plaintiff in this action, not having redeemed said lots from said sale, a deed therefor was executed to said Terrace Water Company on March 23, 1895, and thereupon it filed a complaint in intervention, praying that it be ad-

judged the owner in fee of said lots and of all the water, etc., and that the defendants in intervention (the plaintiff and the original defendants) are without right, title, or interest therein; and upon the hearing it was so adjudged. The findings and decree were filed May 2, 1896, and are to the effect that the defendants and cross complainants named therein are entitled to the perpetual use of 30 inches of water from the Meeks Mill and Garner properties; that, subject to said right of cross complainants, the estate of A. C. Armstrong is the owner of 148½ inches from said supply, the Rialto irrigation district to 150 inches, subject also to the rights of the Armstrong estate; that after all the foregoing owners are supplied, McBean is the owner of the residue thereof, except 4 inches reserved by said Raynor; and determined the order in which these parties should supply said 30 inches to the cross complainants. This appeal is taken by said Mary E. Armstrong, executrix, Alexander McBean, and the Rialto irrigation district, out of whose water supply said 30 inches are to be furnished to those of the original defendants who filed the first of said cross complaints, and who are the respondents here; and, except as to the rights of the intervener, who became the owner of lots 7 and 8 under the foreclosure of the mortgage executed before any rights had attached to the water developed thereon, the judgment relates to waters derived from a different property, and is based upon issues framed between certain of the defendants and parties brought in by their cross complaint and by the cross complaint of Mrs. Armstrong. The appeal is from the judgment and from an order denying a new trial.

1. Appellants contend that the relief sought by the cross complaint constitutes no ground for a cross action. This question is raised by the answer of Mrs. Armstrong to the cross complaint, and by demurrer, and also by objections to evidence. Section 442 of the Code of Civil Procedure provides: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross complaint. The cross complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint." I think appellants' contention must be sustained. The suit was brought by the plaintiff to quiet his title, as against the defendants, to 49 inches of water flowing from artesian wells upon lots 7 and 8, to which lots he held the legal title under a conveyance from the Vivienda Water Company. The defendants claimed title to 30 inches of water flowing from said wells, but subject to the first 35 inches of water therefrom, which had been sold to the Terrace Water Company by the former owner of said



lots prior to the contract for the 30 inches to defendants. Defendants' contract was made with the Vivienda Water Company prior to the conveyance to plaintiff, and in said contract it was provided that if said wells should at any time fail to afford sufficient water to furnish defendants' said 30 inches, it would supply that quantity from its other source of supply known as the "Meeks Mill and Garner Properties." This provision in the contract in no way affected defendants' right to 30 inches of water from the wells then owned by the plaintiff, and their right to that water was pleaded in their answer to plaintiff's complaint, and could have been fully and finally determined under said complaint and answer. The plaintiff was not a party to that contract, and could not be affected in any way by that part of it by which, in a certain contingency, the 30 inches of water was to be supplied by the Vivienda Water Company from an entirely different source, with which the plaintiff was in no way connected. The property in controversy between the plaintiff and the defendants was 30 inches of water, to be taken from the artesian wells on lots 7 and 8, while the property in litigation under the cross complaint was a wholly different property, though of the same nature and quantity, to be obtained from an entirely different source, and which neither the plaintiff nor any party to the action was under any obligation to supply. It formed no part of the controversy between the plaintiff and the defendants, or any of them, nor did it form any controversy between the different defendants, but it formed a controversy between certain of the defendants and persons who were not parties, and which in no way affected the plaintiff, or the contract by which the cross complainants acquired the right to the 30 inches of water from the plaintiff's wells. Respondents cite *Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, to the proposition that new parties may be brought in upon a cross complaint. That is not questioned, but the presence of the new parties thus brought in must be necessary to the full determination of the rights of the parties then before the court, touching the property in litigation between them, where the proper relief cannot be given upon the answer to the complaint without their presence. In that case the presence of the Helbings was necessary to the determination of defendants' right and title to the property as against the plaintiffs, who claimed title under a deed from them, and who, relying upon that deed, were seeking to quiet their title as against the defendants to the same property. Here the property was not the same, and the plaintiff was not interested in or affected by the questions or property to which the cross complaint related.

2. Appellants also contend that the cross complaint did not state a cause of action against them. If that is true, the judgment against them cannot be sustained. That the

cause of action, if any is stated in the cross complaint, had not accrued at the time it was filed, I think is clear. The contract or conveyance of the water under which respondents claim, dated December 6, 1887, sold and conveyed a perpetual flowing stream of water equal to 30 inches, "said water to be obtained from first party's artesian wells on lots 7 and 8 on block 25 of the Rancho San Bernardino; \* \* \* and in the event that first party's supply of water from its artesian wells should at any time be insufficient to supply the said 30 inches of water, then first party agrees that the same shall be supplied from its other source of supply, to wit, from the Meeks Mill and Garner properties." This conveyance was recorded April 21, 1888, and the conveyance of said lots to plaintiff, Lewis, was not made until March 22, 1892. He therefore took the property with notice of the conveyance of said 30 inches of water to the defendants and cross complainants, and was bound to furnish said water so long as he retained the title and possession of the property, unless the wells should fail to supply sufficient for that purpose. The cross complaint alleges that 84 inches of water had been developed on said lots 7 and 8 prior to and at the time they were conveyed to the Vivienda Water Company (which quantity was more than sufficient to furnish said first 35 inches and the 30 inches to the cross complainants), and cross complainants further allege that they received said 30 inches immediately after said grant, "and ever since, without interruption or objection, except the commencement of this action by said Lewis, have continuously used said 30 inches of water upon their said premises for irrigation and domestic uses." There is no allegation in the cross complaint that any contingency had arisen which would entitle the cross complainants to demand that the water should be supplied from the Meeks Mill and Garner properties. It is not only not alleged that the artesian wells had failed to furnish sufficient water, but it is alleged that they had continuously received that quantity of water from that source. It is true they allege the pendency of the suit to foreclose the mortgage executed by Ward upon said lots, but the title and possession of the plaintiff had not failed, and their supply of water from that source has not been interrupted. To prevent misapprehension, it may be added that whether the foreclosure of the mortgage which was executed prior to the contract for the water here in controversy, and which terminated respondents' supply from the wells, is a contingency which, under the contract, would entitle respondents to have the water supplied from the other source, the wells not having failed to flow "a sufficient quantity of water," is a question not necessary to be decided, and upon which no opinion is expressed. All we mean to say is that, if it would constitute such contingency, no failure to obtain the water was caused by the pendency of the proceedings to foreclose

at or prior to the filing of the cross complaint.

It is said by respondents, however, that "the deprivation of the thirty inches of water from the artesian wells, and ouster from the same by reason of the foreclosure and sale and sheriff's deed under the Donovan mortgage, is pleaded in their supplemental cross complaint." But this does not aid the original cross complaint. The cause of action must exist when the action—commenced by the cross complaint—was brought. If a suit be brought upon a promissory note before it becomes due, the complaint would not be aided by a supplemental complaint filed after it became due, alleging its maturity at a date subsequent to the commencement of the action. It must be clear that, until the cross complainants' supply of water from the artesian wells had failed from some cause, no right or cause of action could exist against the owner of the Meeks Mill and Garner properties, or against the owners of water supplied from that source. Not only so, but the court found that on or about March 30, 1895, the Terrace Water Company, by virtue of the sheriff's deed of said property, and of all the water flowing from the artesian wells thereon, ousted the cross complainants therefrom, and deprived them of all water from said wells, and from the use of said pipe line connecting therewith; and that on the — day of April, 1895, they demanded of the Vivienda Water Company and the executrix of A. C. Armstrong that they be supplied with 30 inches of water from the Meeks Mill and Garner properties; nor is there any finding that they were deprived of water from the wells prior to the execution of the sheriff's deed, though it is found that there was a gradual diminution of the flow, until, at the time the sheriff's deed was executed, there was not more than sufficient to supply said first 35 inches of water.

Other questions made by appellants need not be noticed. The judgment and order against appellants should be reversed, and the cross complaint of respondents dismissed.

We concur: SEARLS, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order against appellants are reversed, and the cross complaint of respondents dismissed.

6 Cal. Unrep. 134

TUFFREE et ux. v. STEARNS RANCHOS CO. (L. A. 387.)

(Supreme Court of California. Oct. 1, 1898.)

APPEAL—DECISIONS REVIEWABLE—JUDGMENTS—VACATION—NEW TRIAL—NOTICE—EVIDENCE.

1. Under Code Civ. Proc. § 963, allowing an appeal from a special order made after final judgment, an order denying a motion to correct a judgment, or the file mark thereon, is appealable, where an appeal from the judgment will not present all the facts on which the motion is based.

2. A judgment regular on its face cannot be set aside on motion attacking its validity.

3. As to time of moving for new trial, notice of intention, filed after judgment entered on a remittitur from the supreme court, may be given in reference to such judgment, rather than the original judgment.

4. In a trial to the court, plaintiff was permitted to detail a conversation with one of several defendants, the court remarking that it would take care that the evidence harmed no one else. *Held*, that there was no error.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by J. K. Tuffree and wife against the Stearns Ranchos Company. From a judgment for plaintiff, from an order denying its motion to amend the judgment and to correct a file mark thereon, and from an order denying its motion for a new trial, defendant appeals. Affirmed as to the judgment, as to the order refusing to amend the judgment, and as to the order denying a new trial, and dismissed as to the order refusing the correction of the file mark.

E. W. McGraw, for appellant. J. S. Chapman and A. M. Stephens, for respondents.

CHIPMAN, C. Plaintiffs, husband and wife, brought an action to quiet title, on complaint filed August 25, 1886, alleging ownership of the premises in the wife. Answers were filed for all the defendants, of whom there were many. The cause was tried, and findings were filed July 11, 1891, and judgment January 15, 1892. The judgment was that plaintiff Mrs. Tuffree was the owner in fee of the premises, and that defendant C. B. Polhemus has no right or title thereto, and that plaintiffs take nothing as to the other defendants. The cause was appealed by plaintiffs and by Polhemus to this court, and is reported in 108 Cal. 670, 41 Pac. 806. The judgment here, on that appeal, was given on October 2, 1895, and the judgment below was affirmed as to defendant Polhemus, and was reversed and judgment directed in favor of plaintiff Mrs. Tuffree as to all the other defendants except defendant Alfred Robinson. The remittitur went down November 2, 1895, and pursuant to directions therein the trial court entered judgment, which was indorsed: "Filed April 28, 1896. Docketed July 16, 1896. Entered July 15, 1896." On July 25th and 27th the court made an order substituting the Stearns Ranchos Company at its request for all the defendants, the company claiming to have succeeded to the interests of all the defendants, as set forth in supplemental answers. On July 18th counsel for defendant company and all other defendants served upon plaintiffs' attorneys a notice of motion that he would move the court "to have the file mark on said judgment corrected and altered so as to express the truth, to wit, that the date April 28, 1896, on said file mark, be stricken out, and in lieu thereof be stated July 15, 1896." Defendant company, as successor of the interest and on behalf of Moses Hop-



kins and Edward F. Northam, original defendants in said action, moved to amend the judgment by striking out the names of Hopkins and Northam so that the judgment shall not affect the interests formerly held by them. The ground of the motion was stated to be that Moses Hopkins died in February, 1892, prior to the appeal to the supreme court, and, being dead, was not a party to the appeal; that his executor was never substituted in his place, nor was the Stearns Ranchos Company, successor to his interest, substituted as a party; and the judgment of the supreme court did not affect such interest and was without jurisdiction. As to Northam, that he died in 1888, and Robert E. Northam, as executor, was substituted, but that he ceased to be such executor long prior to said appeal, to wit, March 1, 1889, on which day the estate was settled and the executor discharged; and that the supreme court never acquired jurisdiction over said executor, and the judgment as to him or the interest of Northam, deceased, was inoperative. The motion was heard, and on September 14, 1896, was denied. Defendant appeals from the judgment entered July 15, 1896; also from the order denying its motion to amend the judgment and to correct the file mark thereon; also from an order denying defendant's motion for new trial. It was stipulated that all these appeals might be heard upon a single transcript.

The appeals turn largely upon the question as to the effect of the judgment upon the defendant's interest in the premises as successor to Hopkins and Northam. Appellant contends that this court never acquired jurisdiction to disturb the judgment of the lower court in favor of Hopkins and Northam, because Hopkins was dead before the appeal was taken, and the executor of Northam was discharged upon final settlement of his testate's estate before the appeal, and was as though dead.

1. Respondents contend that the order denying the motion to correct the judgment or the file mark is not appealable; citing *Tregambo v. Mining Co.*, 57 Cal. 501; *Swain v. Burnette*, 89 Cal. 564, 26 Pac. 1093. In the first of these cases the court said that an order refusing to set aside a default is not an appealable order; and in the other case, where the court granted a nonsuit on defendant's motion, and plaintiff moved to modify the judgment, this court said: "The order refusing to modify the judgment is not an appealable order." The question arises under section 963, Code Civ. Proc., which gives an appeal "from any special order made after final judgment." The rule stated in 89 Cal., *supra*, must not be accepted as universal, but must be applied to the case as it there stood, where it appears that the appeal from the judgment gave plaintiff all the relief he could have received by the appeal from the order. We think the rule and its reason better stated in *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 Pac. 345, where it was held that an order refusing to

set aside the judgment was appealable even though the judgment was appealable. Here, as in that case, the order is plainly within the statute, and, as there, an appeal upon the judgment roll now here would not present all the facts upon which the motion is based. We see no reason why the appeal should not be entertained.

2. The view we have taken of the motion to annul the judgment as to Hopkins and Northam relieves us from the necessity of passing upon the question as to whether the conduct of the attorneys for all the original defendants and of the attorney for the substituted defendant, appellant, estops the appellant from calling the judgment in question; and it also makes unnecessary a construction of section 385, Code Civ. Proc., under which respondents claim that as to defendant, the transferee of the Hopkins and Northam interests, the proceedings were regular, and defendant will not now be heard to complain. This motion is not made under section 473, Id., because of the mistake, inadvertence, surprise, or excusable neglect of the defendant, but is a direct attack upon the validity of the judgment irrespective of that section. The rule is well settled by our decisions that a judgment void upon its face, or that by an inspection of the judgment roll is found to have been given without jurisdiction, or for other reason thus appears to be void, will be set aside upon motion, without reference to the provisions of section 473. Such a judgment is said to be "a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists." *People v. Greene*, 74 Cal. 400, 16 Pac. 197. But it has been held that this cannot be done upon motion where the judgment is valid upon its face or its infirmity cannot be ascertained by an inspection of the judgment roll. *Wharton v. Harlan*, 68 Cal. 422, 9 Pac. 727; *People v. Greene*, 74 Cal. 400, 16 Pac. 197; *People v. Harrison*, 84 Cal. 607, 24 Pac. 311; *Moore v. Superior Court*, 86 Cal. 495, 25 Pac. 22; *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899; *Manufacturing Co. v. Heiler*, 102 Cal. 615, 36 Pac. 928; *People v. Temple*, 103 Cal. 447, 37 Pac. 414; *People v. Harrison*, 107 Cal. 541, 40 Pac. 956; *Young v. Fink*, 119 Cal. 107, 50 Pac. 1060.

The rule that allows a judgment void upon its face to be set aside upon motion is eminently wise and just, but so much cannot be said of a rule that would allow a judgment regular upon its face to be thus attacked. When a party is driven to evidence dehors the record to show that a judgment is void, and he does not proceed under section 473, *supra*, he should be permitted to do so only where the facts upon which he relies may be examined into under the forms and sanctions of a regular trial. The Code furnishes ample remedy for cases of surprise, excusable neglect, inadvertence, and mistake; and this remedy is supplemented by the rule which allows the annulment by

motion of a judgment within a reasonable time, when void upon its face. This, we think, is as far as the remedies should be carried by mere motion.

3. Respondents make the point that the notice of motion for new trial was not given in time. The findings on the original judgment, from which this present appeal is taken, were filed July 11, 1891, and judgment was entered January 16, 1892. The notice of intention to move for a new trial now here was made July 25, 1896, and in time if the entry of judgment upon the remittitur, July 15, 1896, is to control; but, if the date of the decision and filing of the original judgment is to control, the notice was too late. Appellant concedes that its notice was too late if *Brady v. Feisil*, 54 Cal. 180, upon which respondents rely, is a correct statement of the practice. We are asked to overrule that case. We do not think that *Brady v. Feisil* is a sound exposition of the right of appeal conferred by our statutes, and it is in effect overruled by *Klauber v. Street Car Co.*, 98 Cal. 105, 32 Pac. 876. After clearly pointing out the reason why the first appeal might not present the errors of which the prevailing party in the lower court would have a right, but would be deprived of the privilege, of having reviewed, the court said: "As it is only when upon the second appeal the record presents the same matters, either of fact or of law, upon which the determination of this court was rendered at the former appeal, that the determination is held to be final, it follows that, if there is presented upon the second appeal a different state of facts, or any errors that were committed by the trial court which were not presented in the former record, this court is at liberty to consider them as fully as though presented upon a first appeal." The defendant had the right to have any matters of law or of fact reviewed on a second appeal which would affect the judgment against Hopkins and Northam, under whom it claimed, and which had not been reviewed or determined on the first appeal. Where the judgment was directed to be entered upon the findings, as was the case here, the appeal would be upon the same evidence, and in many respects must be upon the same record; but the assignments of error would include those matters of which the prevailing party at the first appeal was precluded from having any consideration of by this court. The judgment was not final as to such matters until it was entered under direction of this court, and the notice of intention may be given with reference to that judgment. The question, then, is, are there presented by this record any matters of law or fact not determined by the former appeal of which appellant can complain? We have compared the former transcript with the present one, and find that the appeal now is upon the same original pleadings, evidence, findings, and original judgment. The remit-

titur and decree pursuant thereto, the substitution of defendant for all the former defendants, and its answers and motions, are added to the original transcript. The specifications of insufficiency of the evidence to justify the findings are not identical with those assigned in the first appeal, but we are unable to discover that any questions raised by the appellant now, so far as the rights of appellant and respondents are involved, were not fairly raised and decided in the former appeal.

The rule we have laid down by which this second appeal is held to be properly taken we do not think should entitle appellant to have the former decision of this court reviewed except upon matters not previously considered. A comparison of the present with the former record and the opinion found in 108 Cal., supra, we think will show that the merits involved in this appeal, so far as they are related to the facts, had full consideration in the first appeal.

4. Counsel calls attention to but one alleged error of law occurring at the trial and excepted to by defendants. The court, against objection, permitted the witness Tuffree to relate a conversation with George H. Howard about making selections of land. The objection was as to all defendants except Howard. The court overruled the objection, remarking: "If it is admitted in evidence I will undertake to take care of it, and see that it don't harm anybody else." We find no error in the ruling.

5. As to that part of the order refusing to correct the file mark, we do not see that any right involved in the appeal is affected by it, and we therefore do not pass upon the question presented by the motion. If, in any future litigation, the date of entry of judgment should become material, it may be deemed an open question.

6. The appeal from the judgment presents no question except as to whether it is in conformity with the directions of this court, and, as there is no dispute as to the fact, there is nothing in this appeal.

Our conclusion is that so much of the order as refused to amend the judgment, the order denying a new trial, and the judgment appealed from should be affirmed; and, as to the motion and order relating to the change of date in the file mark of the judgment, that the appeal should be dismissed without prejudice.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, so much of the order as refuses to amend the judgment, the order denying a new trial, and the judgment appealed from are affirmed; and, as to the motion and order relating to the change of date in the file mark of the judgment, that the appeal is dismissed without prejudice.



(122 Cal. 216)

**ANDERSON et al. v. SUPERIOR COURT OF LASSEN COUNTY. (S. F. 1,441.)**

(Supreme Court of California. Oct. 4, 1898.)

**PROHIBITION—ADEQUATE REMEDY—INSOLVENCY—PETITION—AMENDMENTS—BOND—JURISDICTION.**

1. Acts 1895, p. 134, allowing an amendment of a petition to declare a debtor an insolvent, does not authorize a petition commenced by less than five creditors, or by creditors whose claims are less than \$500, as the statute requires in such cases, to be amended so as to bring in the requisite number of creditors, or so as to increase the amount to a sum sufficient to sustain jurisdiction.

2. A petition filed by creditors whose claims were less than \$500, to declare a debtor an insolvent, was permitted by the court to be amended so as to bring in new creditors to increase the amount to \$500, as the statute requires in such cases, without the filing of a new bond. *Held* that, the proceeding being statutory, the attempt to proceed without a new bond was in excess of jurisdiction.

3. Prohibition will lie to restrain an inferior court from proceeding on an amended petition in insolvency bringing in creditors other than those filing the original petition without requiring a new bond to be filed, since such proceeding would be in excess of the court's jurisdiction, and an appeal would be an inadequate remedy.

In bank. Original petition by Albert I. Anderson and another for writ of prohibition to superior court of Lassen county. Granted.

M. Marsteller and W. M. Boardman, for petitioners.

BEATTY, C. J. The petitioners ask for a writ of prohibition to restrain the superior court from proceeding against them as involuntary insolvents, upon the ground that the court has acted, and is threatening to act, in excess of its jurisdiction. Upon the filing of the petition an alternative writ was issued, and the return thereto consists merely of a general demurrer to the petition. The question is whether the facts alleged show any excess, or threatened excess, of jurisdiction, for which the petitioners have no plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. §§ 1102, 1103.

The material facts are that in October, 1896, five persons filed a petition in the superior court of Lassen county asking an adjudication of the insolvency of these petitioners. After two amendments to that petition a trial was had which resulted in an adjudication of insolvency, but a motion for a new trial was granted, and that judgment vacated upon the ground that these petitioners were not indebted to the petitioning creditors therein in the sum of \$500 at the time their second amended petition was filed. When the matter again came on for hearing, in pursuance of the order for a new trial, the original five petitioning creditors were permitted, against the objection of these petitioners, to file a third amended petition, in which four new parties were joined as petitioning creditors and their claims set forth. No new bond accompanied this petition, nor was any

new citation served or issued thereon. The alleged insolvents (these petitioners) objected at the time the third amended petition was presented—and have since renewed the objection in various forms—to allowing new petitioning creditors to be brought in by way of amendment. They contend that the law does not permit such an amendment; that the addition of new petitioning creditors constitutes it a new and distinct proceeding; and consequently that the court cannot proceed without a new bond and a new citation. These objections were overruled by the superior court as often as they were made, and the petitioners required to answer the third petition. The superior court threatens and intends to proceed upon the third amended petition in insolvency, not as upon a new petition, but as upon a proper amendment of the original petition, and without requiring any new bond or new citation.

The conditions upon which a person may be forced into insolvency and his property sequestrated for the benefit of his creditors are prescribed by the statute. Considering the serious consequences to the supposed insolvent and to those who have dealt with him, the conditions imposed by the statute are not onerous, and there is no reason why they should be disregarded. One of the conditions required is that five creditors should unite in the petition, and that they should hold claims to the amount of \$500. It was not intended that less than five bona fide creditors, or creditors in a less amount than \$500, should set this proceeding in motion, and afterwards drum up the requisite number and amount to sustain the jurisdiction, and there is nothing in the language of the statute to support the contention that a defect of this character can be cured by amendment. It is true the petition may be amended, but the language of the act is: "The petitioners may from time to time amend and correct the petition so that the same shall conform to the facts," etc. St. 1895, p. 134, § 9. This means nothing more than it says; i. e. that the original petitioners may amend and correct their allegations as to acts of insolvency and the particulars of their own claims, not that they may hunt up and bring in new creditors to set up new claims. If those who have originally commenced the proceeding cannot show that they are, to at least the number of five, creditors of the alleged insolvent, and creditors to the amount of \$500, the proceeding ought to fail, and, in our opinion, does fail. The third amended petition, so called in this case, was therefore, at best, the beginning of a new proceeding, and not properly an amendment of the former petition. As a new proceeding, it was subject to the provisions of the statute in reference to citation, bond, etc.

The respondent cites *Creditors v. Lumber Co.*, 98 Cal. 318, 33 Pac. 196, and *Dixon v. Allen*, 69 Cal. 528, 11 Pac. 179, to the proposition that the requirement of the bond is not

jurisdictional. Those cases merely hold that, the bond being for the benefit and security of the person against whom the proceeding is taken, he can waive defects in the bond or delay in filing it, but they do not countenance the claim that in this proceeding the superior court has the power to make a decree of insolvency in the absence of a bond, and over the specific objection that no bond has been given. Grant that a bond may be waived, there is here a direct allegation showing that it has not been waived, but is, on the contrary, insisted upon, and, the proceeding being special and statutory, the attempt to proceed without a bond is an excess of jurisdiction.

And this particular excess of jurisdiction is one for which an appeal is a wholly inadequate remedy. The only effect of an appeal would be to reverse the adjudication of insolvency, but in the meantime the petitioners would have incurred costs and damages, for the recovery of which they would have no security. The bond accompanying the original petition covers only the costs and damages sustained by reason of the filing of that petition, with such proper amendments as may have been made thereto. It does not cover costs and damages sustained by reason of the filing of a petition by other creditors in a new proceeding. The judgment is that the respondent be, and it is hereby, prohibited from proceeding upon the so-called third amended petition in the matter of Anderson and Berry, insolvent debtors, as an amendment to the original petition therein, or otherwise than as a new and independent proceeding.

We concur: TEMPLE, J.; HARRISON, J.; McFARLAND, J.; VAN FLEET, J.; HENSHAW, J.

GAROUTTE, J. I concur in the foregoing opinion and judgment. In re Visalia City Water Co., 119 Cal. 561, 51 Pac. 856, is direct authority upon the question.

(122 Cal. 233)

PEOPLE v. FELLOWS. (Cr. 371.)<sup>1</sup>

(Supreme Court of California. Oct. 5, 1898.)

JURY—CHALLENGE TO THE PANEL—ELISORS—VALIDITY OF APPOINTMENT—HOMICIDE—INTOXICATION—MANSLAUGHTER.

1. Pen. Code, § 1064, making the bias of the person summoning the jury a ground of challenge to the panel, does not warrant a challenge on the ground that the summoning officer was not legally appointed.

2. Pol. Code, § 4192, provides that process and orders in an action may be executed by a person appointed by the court, and denominated an "elisor," when (subdivision 3) both the sheriff and coroner are disqualified from acting. Code Civ. Proc. § 226, provides that, whenever jurors are not drawn or summoned to attend any court of record or session thereof, or a sufficient number of jurors fail to appear, such court may order the "sheriff or an elisor" chosen by the court forthwith to sum-

mon jurors. Pol. Code, § 4480, requires the Codes to be construed as one statute. Held, that the words "sheriff or an elisor," as used in the Code of Civil Procedure, mean simply that an elisor shall summon in those instances when the court is authorized to appoint an elisor, and hence it is error to appoint an elisor on the disqualification of the sheriff, unless it is also shown that the coroner is disqualified.

3. A sheriff who was disqualified from summoning the jurors in a case on account of bias should not be given charge of the jury on their retirement to consider the verdict.

4. The insanity caused by intoxication which will excuse responsibility for murder is the permanent general insanity caused by chronic alcoholism, and not the species of insanity brought about by a sane man becoming intoxicated by his own voluntary act.

5. Where there is no evidence which, by the most liberal interpretation, could be held to reduce the killing to manslaughter, it is not error to refuse to instruct on manslaughter.

In bank. Appeal from superior court, Orange county.

Manuel Fellows was convicted of murder in the first degree, and he appeals from the judgment and from the order denying him a new trial. Reversed.

J. G. Scarborough and H. T. Matthews, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. Defendant, convicted of murder in the first degree for the killing of one Dolores Garcia, appeals from the judgment and from the order denying him a new trial.

1. Dolores Garcia kept a saloon in the little town of San Juan Capistrano. The defendant was a farmer and vaquero. He was a hard drinker, and usually made himself drunk when he came into town. At the same time he was not incapacitated by drink from attending to his usual vocation. In the past he had had some business trouble with the deceased, and frequently referred to that trouble, and evinced his hostility toward Garcia when he had been drinking. He said that Garcia "had done him up for a hundred dollars, and that he would do Garcia up anywhere he met him." Upon the afternoon of June 16, 1897, he came into the town of San Juan Capistrano upon horseback, carrying a heavy rifle. He had been drinking, and continued to drink. To several people whom he met upon his way to the town, and to others with whom he talked after he arrived at the town, he declared his intention of killing Garcia. Between eight and nine o'clock in the evening he met Pedro Lebat, who was "pretty intimate with him," and to him declared his purpose, and offered Lebat, first twenty-five cents, and then a dollar, to go to the saloon of Dolores, and see who might be there. At that time defendant was carrying his rifle. Lebat refused to go, and they separated. About 9 o'clock in the evening the report of a rifle was heard in the neighborhood of Garcia's saloon, and, upon hurrying to the spot, the citizens found Garcia shot through the

<sup>1</sup> Rehearing denied October 5, 1898.



head by a heavy rifle bullet. A short time after the shooting defendant appeared at the house of one Concepcion Guingochea, and explained to him that he had killed Dolores, and that he had left his rifle about 20 yards from the corner of the street. He desired Guingochea to send the rifle to the town of San Mateo, and in that way he thought he could clear himself. The defendant handed over to the witness the cartridge belt which he wore, and then rode on into town. The witness informed the constable, and together they found the rifle of the defendant at the spot he had indicated. About half past 9 that night Pryor, the constable, met the defendant upon the street, mentioned the killing of Garcia, and asked him if he was the one that had done the deed. Defendant answered that he was, and that he had given his rifle to one Cuevas, for him to take down to San Mateo. This is substantially all of the evidence in the case. Upon the part of the defendant no evidence was introduced, further than testimony to the effect that the defendant was and had been a hard drinker for many years; that he did not refer to his trouble with deceased except when he had been drinking; and that he had been drinking heavily during the afternoon and evening of the day of the homicide. We think this naked statement of the facts sufficiently answers appellant's contention that the verdict is against the evidence.

2. The regular panel was exhausted in securing the jury, and a special venire was issued, directed to the sheriff. Upon its return defendant interposed a challenge to the panel upon the ground of the bias and prejudice of the sheriff who had summoned the members of it. The challenge was sustained, and a new venire ordered to issue, directed to and placed in the hands of an elisor named in the order. No showing was made that the coroner was likewise disqualified. To this order defendant reserved an exception. He also interposed a challenge to the panel thus formed. Pen. Code, § 1064. As it did not appear that the elisor was biased or prejudiced, and as that is the only ground of challenge contemplated by section 1064, defendant's objection to the panel may not be considered. *People v. Welch*, 49 Cal. 174. But defendant reserved his exception to the order appointing an elisor. His point is that the order was error, in the absence of a satisfactory showing that the coroner also was disqualified; or, in other words, that the special venire, under the circumstances shown, should have been directed to and returned by that officer. Therefore defendant is entitled to a consideration of the question as an alleged error at law occurring during the course of the trial.

Section 4192 of the Political Code provides as follows: "Process and orders in an action or proceeding may be executed by a person residing in the county, designated by the court, the judge thereof, or a county judge, and denominated an elisor, in the following

cases: (1) When the sheriff and coroner are both parties. \* \* \* (3) When either of these officers is a party and there is a vacancy in the office of the other, or when it appears by affidavit to the satisfaction of the court in which the proceeding is pending, or the judge thereof, that both of these officers are disqualified, or by reason of any bias, prejudice, or other cause, would not act promptly or impartially." Section 226 of the Code of Civil Procedure provides: "Whenever jurors are not drawn or summoned to attend any court of record or session thereof, or a sufficient number of jurors fail to appear, such court may order a sufficient number to be forthwith drawn and summoned to attend the court, or it may, by an order entered in its minutes, direct the sheriff or an elisor chosen by the court forthwith to summon so many good and lawful men of the county," etc. The Codes are to be construed as one statute. Pol. Code, § 4480. So construing these provisions, it is clear that the Political Code limits and defines the power of a court in appointing an elisor, and enumerates the circumstances under which such an appointment is permissible. When the sheriff is disqualified, the duty in the first instance is always cast upon the coroner. When both are disqualified, then only may an elisor be nominated. And this, it is to be observed, is not a departure from, but is in strict adherence to, the rule of common law. 3 Bl. Comm. 355. Section 226 of the Code of Civil Procedure, upon the other hand, is directed to the mode of completing the jury, when from the regular list a sufficient number shall not be in attendance. The declaration that the court shall direct "the sheriff or an elisor" to summon so many men very obviously means that an elisor shall summon in those instances in which the court is authorized to appoint an elisor. To determine whether such an instance has arisen, reference must be had to section 4192 of the Political Code. *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341.

The omission to name the coroner in section 226 of the Code of Civil Procedure is not significant, for by operation of law, clearly expressed in another section of the Code, which section must be construed with section 226, the coroner must act in such a case, when the sheriff is disqualified, and the need of an elisor, as well as the power to appoint him, only exists upon a showing of the disqualification or inability of both to act. In *Wilson v. Roach*, 4 Cal. 362, the court says: "The objection that the elisor was improperly appointed is not well taken. The sheriff and coroner had been made defendants. In the event of their disqualification the court had the power to appoint an elisor." In *Pacheco v. Hunsacker*, 14 Cal. 124, the sheriff was disqualified, and this court said: "There being no coroner, the appointment of an elisor to perform this service [summoning a special jury] was proper." The statute at this time,

however, provided only that the sheriff might summon. St. 1852, p. 109, § 16. In *People v. Young*, 108 Cal. 8, 41 Pac. 281, an elisor was appointed, but only after a showing that both sheriff and coroner were disqualified. The proceeding was upheld. In *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, upon proof of the sheriff's disqualification, a special venire was ordered summoned by the coroner. When the time came for the jury to retire, affidavits were presented showing the inability of the coroner to act by reason of sickness, whereupon the court appointed an elisor. These proceedings were held to be regular. For the reasons indicated the order appointing an elisor in this case, in the absence of a showing of disqualification upon the part of the coroner, was erroneous.

3. Notwithstanding the proof of the sheriff's disqualification for bias, when it came time for the jury to retire to deliberate upon its verdict the sheriff, under defendant's objection and exception, was given charge of it. While no statute or Code provision speaks expressly upon the subject, it is apparent that the same reasons which forbid the sheriff to summon jurors when he is biased should forbid his being intrusted with the care of such jury when it retires to deliberate. The proper course to have pursued was that adopted in *People v. Ebanks*, supra.

4. The court gave the well-known, oft-improved, and readily comprehended definition of "reasonable doubt" laid down by Chief Justice Shaw. But, following a practice repeatedly disapproved and deplored by this court, it elaborated the simple theme of the definition till its meaning was well nigh lost in complex variations of verbiage. It is not necessary here to say whether or not the result was error. Assuredly it was dangerously close to error. But let us again repeat that upon the doctrine of reasonable doubt an instruction is certainly free from error if the trial judge will but content himself with giving the definition of Chief Justice Shaw. As to the need of further exposition of the subject, it may be said that, if a juror cannot comprehend that definition, a trial judge may well despair of enlightening such an intelligence by any efforts of his own.

5. Upon the subject of intoxication, as an excuse for crime, the court of its own motion gave the instruction first considered in *People v. Lewis*, 36 Cal. 531, and since then reviewed and approved upon many recurrent occasions. *People v. Williams*, 43 Cal. 344; *People v. Ferris*, 55 Cal. 588; *People v. Jones*, 63 Cal. 168; *People v. Blake*, 65 Cal. 275, 4 Pac. 1; *People v. Franklin*, 70 Cal. 641, 11 Pac. 797; *People v. Vincent*, 95 Cal. 425, 30 Pac. 581. A sentence from that instruction is as follows: "Insanity produced by intoxication does not destroy responsibility where the party, when sane and responsible, made himself voluntarily intoxicated." At the request of defendant the court further instructed the jury upon the subject, saying: "The

jury is further instructed that, while mere voluntary intoxication is no excuse or justification for the commission of a crime, still insanity, although produced immediately by intoxication, is a defense. Under our Code, an insane person is incapable of committing a crime; that is to say, if a man kills another while insane, or his mind is unsound, it is no crime, and this is so whether his insanity is produced or brought on by intoxication, or the use of intoxicating liquors, or by any other cause." The instructions so given are manifestly contradictory, and calculated to confuse and mislead the jury. Yet the law of the matter is quite simple. No act committed by a person while in a state of voluntary intoxication is less criminal for that reason, saving that, when the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any specific species or degree of crime, the circumstance of voluntary intoxication may be considered by the jury in determining the fact whether or not that particular purpose, motive, or intent was present. Pen. Code, § 22. But a sane person who voluntarily becomes intoxicated is not relieved from responsibility because of any mental derangement, mania a potu, or insanity produced by and consequent upon his own voluntary act. Such is the import of the instruction in *People v. Lewis*, supra, and it is that form of insanity, if insanity it may be called (for we do not think the word happily chosen), to which the instruction has reference. A sane man, therefore, who voluntarily drinks and becomes intoxicated is not excused because the result is to cloud his judgment, unbalance his reason, impair his perceptions, derange his normal faculties, and lead him to the commission of an act which in his sober senses he would have avoided. Upon the other hand, if one, by reason of long-continued indulgence in intoxicants, has reached that stage of chronic alcoholism where the brain is permanently diseased, where the victim is rendered incapable of distinguishing right from wrong, and where permanent general insanity has resulted, then, and in such case, he is no more legally responsible for his acts than would be the man congenitally insane, or insane from violent injury to the brain. See *People v. Hubert*, 119 Cal. 216, 51 Pac. 329. Such is the insanity to which the latter instruction doubtless had reference, but there was a failure to emphasize the distinction, with the result, as has been said, of leaving the subject confused and confusing.

6. It was not error for the court to refuse to instruct upon the crime of manslaughter. There is no evidence in the record which could by the most liberal interpretation be held to reduce the crime to that grade, and therefore to justify such a verdict. *People v. Welch*, 49 Cal. 174; *People v. Turley*, 50 Cal. 469.

No other alleged errors call for special con-



sideration, but for the foregoing reasons the judgment and order are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; McFARLAND, J.; HARRISON, J.; TEMPLE, J.

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122 Cal. 171

## PEOPLE v. MILNER. (Cr. 406.)

(Supreme Court of California. Sept. 26, 1898.)

HOMICIDE—SUFFICIENCY OF EVIDENCE—QUESTION FOR JURY—OPINION EVIDENCE—VIEW.

1. Pen. Code, § 1105, provides that on a trial for murder, where the killing by defendant is proven, the burden of proving mitigation or justification devolves on him, unless the prosecution's proof tends to show that the crime is equivalent to manslaughter, or that he was justified or excused. By Code Civ. Proc. § 2061, subd. 2, jurors are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds against a presumption. *Held*, that where the killing by the defendant was clearly proven, and his evidence made out a case of self-defense, uncontradicted on any essential matter by any other positive evidence, and no circumstances to bring the case within the exception contemplated by section 1105 were shown in the prosecution's evidence, and he was convicted of manslaughter, the verdict will not be disturbed on the ground that it was against the evidence, since it was for the jury to decide whether he had overcome the burden imposed on him by said section 1105.

2. The opinion of a physician who examined the wounds of the deceased is inadmissible to show that the person shooting deceased was either above or below him when he fired, since such a matter is not the subject of expert evidence, and no one could tell merely from the course of a bullet the positions of the one who was shot and the one who did the shooting.

3. Pen. Code, § 1119, provides that when, in the opinion of the court, it is proper that the jury should view the place of the crime, it may order the jury to be taken by the sheriff to the place, which must be shown to them by a person appointed by the court for that purpose. *Held*, that where the court in a prosecution for murder appointed a witness, who had heard and seen the defendant declare and point out the scene and objects relating to the crime before the coroner's jury, to show the jury the place described by the defendant, and the witness points out the different places

to them, stating what the defendant had said before the coroner's jury in regard to each, an objection that the jury received evidence out of court, other than that which came from an inspection of the premises, is not available, since the witness by necessity was compelled to orally designate the place, to comply with the statute.

Department 2. Appeal from superior court, Riverside county; J. S. Noyes, Judge.

One Milner was convicted of manslaughter, and from a judgment and order denying a new trial he appeals. Reversed.

Thos. Fitch and John G. North, for appellant. W. F. Fitzgerald, Atty. Gen., and C. N. Post, Dep. Atty. Gen., for the People.

HENSHAW, J. Defendant, tried for the murder of S. J. Darrah, was convicted of manslaughter. He appeals from the judgment, and from the order denying him a new trial. The facts are presented without conflict upon any material proposition, and under them defendant's counsel strenuously insist that the verdict is against the evidence.

Milner and Darrah were neighbors, living in Snow Creek cañon. Darrah's was the lower ranch, and, to reach his land, Milner was obliged to pass through the land of Darrah. Milner had sold to Darrah this land; reserving in the deed a right of way across it, and reserving also from his water rights in Snow creek 30 inches for his own use. This water he was diverting, and had been for some years, by means of a flume and ditch; taking the water from Snow creek a short distance above his house. There is some slight evidence, but evidence of little consequence, of pre-existing trouble between the two men. A witness testifies that about two years before he had heard the defendant say "that he had beat Darrah out of ten thousand dollars, and that he would beat the damned son of a bitch out of ten thousand dollars more before he got through." The use of this language, however, defendant denies. There is no evidence, saying this, of any antecedent difficulty; and there is positive evidence that the business transaction between Darrah and Milner was the sale by Milner to Darrah of his ranch for the sum of \$839. Some little time before the tragedy, other parties, with whom Milner was in no way connected, took preliminary steps to appropriate water from Snow creek. After having done so, they secured a bond or option for the purchase of Milner's land and water right. Darrah seems to have conceived the notion that an attempt was about to be made to deprive him of the water rights which he claimed, and that Milner was aiding in the effort. A surveying party attempted to cross the land of Darrah by Milner's right of way, and was stopped by Darrah, armed with a rifle, and turned back; Darrah threatening to kill any of them that came upon his land. Darrah then threatened Milner's life, denied to Milner a right of way, and ordered him off of his land. Dar-

rah's violent language and threats against the life of Milner are abundantly proven. Milner, by all of the evidence, seems to have maintained a pacific demeanor, and, according to the testimony of one witness, said that he dreaded having trouble with Darrah, because it could end in only one way; Darrah being excitable, and he (Milner) always maintaining his coolness and temper, for which reason he (Milner), in the event of a deadly collision, would have a decided advantage. Milner, it appears, repeatedly told Darrah that they would settle their differences at law, and Darrah as repeatedly answered that he did not have to, or did not or would not settle his troubles that way. Milner went to town, and procured the arrest of Darrah for disturbing his peace. That case was untried at the time of the tragedy. Again he went before the justice of the peace, and swore to a complaint seeking to have Darrah put under bonds to keep the peace. Darrah, with his lawyer, came before the justice. The testimony of that officer is as follows: "We then asked Darrah— I believe I put the question to Darrah myself,—that Milner had said to me he wanted to go to La Cueva ranch (the Snow Creek ranch) that evening with his family, and that he was afraid that Darrah would injure him in crossing that land. He wanted to go that night. I then asked Darrah if he would have any objections to Milner crossing that land for that purpose. At first Darrah did not consent. He seemed to hesitate about giving his consent, but by Mr. Purington (his lawyer) talking to him, as well as myself, he finally consented to allow Milner to cross the road without molestation from himself, excluding the power company from the permission, and I believe he named Barker. Milner objected to that kind of permission; said his brother might want to call and see him, and that permission would bar him from coming to his house. Upon the suggestion of Mr. Purington, I think, the permission was amended to include any one having legitimate business with Milner. \* \* \* There was nothing said directly concerning any water disputes or water claims. When Milner first came into the court room, Darrah presented him a paper, and asked him to look at it and tell him whether he would pay it,—an account of some kind. Milner picked it up and glanced at it, and threw it down again. \* \* \* To the best of my recollection, at the very last moment Darrah again called Milner's attention to this account, as near as I can recollect, in these words: 'Milner, I want you to look at that paper, and give me a definite answer whether you will pay it or not.' Milner asked Darrah how much it was. He said it was seventy-five dollars. Milner then took the paper and answered: 'I will not pay it until the court decides I have to.' Then Darrah made reply: 'Then I forbid you taking any water out of that ditch. If you want water,



you will have to go to the head of the ditch and get it." The bill for \$75 was for carrying water from the head of Milner's ditch to his turnout. In making the deed, Milner had reserved, as has been said, 30 inches of water in Snow Creek ditch. His flume and turnout were in place and in use. Milner had been using the water for four years.

Upon the morning of the tragedy, which was the next day after this conversation, Duvoisney, Darrah's hired man, passed beyond the house of Milner, and proceeded, as he testifies he was under instructions from his employer to do, to tear out the flume from which Milner diverted water, and which was upon Milner's own land. This same witness testifies that his employer had said to him about two weeks previously that, if he killed Milner and Barker, he would die happy. Milner noticed the change in the condition of the water flowing past his house, and, walking up the cañon unarmed, found Duvoisney engaged in the work. He protested against it, and Duvoisney ceased and went away, saying he would have nothing further to do with it. Not long after, Milner again noticed that the flow of water past his house was decreasing considerably, and concluded that Darrah was removing his flume. In view of Darrah's threats, and of the fact that Darrah carried a rifle, Milner, when he went up to investigate, took with him his shotgun, both barrels of which were loaded with buckshot. He had three other cartridges similarly loaded in his pocket. Reaching the point of diversion of the water, he mounted a small rock, and there saw Darrah engaged in tearing out his flume. This was the tragic meeting, and, as there were no eyewitnesses to it, the account is Milner's alone. Darrah was about 30 yards distant from Milner. Milner called to him, in a loud voice, to desist; holding his shotgun, both barrels cocked, in the hollow of his left arm, but not pointing toward the deceased. Darrah raised up, and, seeing Milner, answered: "Shoot, you God damned, cowardly son of a bitch." Milner answered: "I won't do it, only I want you to get off my property. I don't intend to shoot if I can avoid it. I want you to get off my property." On the bank was lying a wet piece of board, which, glistening in the sun, Milner thought was Darrah's rifle. Darrah moved away, approaching the piece of board. Milner shouted to him not to pick up the gun. Darrah passed the board, and disappeared behind a large bunch of grass. Milner was still standing on the rock, when, from behind the grass where Darrah had placed his rifle, Darrah raised up and fired at him. Milner was startled by the suddenness of the shot. One barrel of his gun, which was extremely "light upon the trigger," went off in the air, and as he fell or leaped from the rock he fired the other barrel as well as he could in the direction of Darrah. He ran for shelter over a ridge of land to a hollow beyond, and, as he passed the ridge in plain sight, Darrah fired again. Reaching

shelter, Milner crouched down and reloaded his shotgun. As he rose up, Darrah was on the watch for him, and fired again. Milner immediately returned the fire, and Darrah fell. Milner went back to his house, and returned with a blanket with which he covered the body. Duvoisney was notified, and came and stood guard over the corpse. When it was discovered, it was lying prone, with 16 buckshot wounds in the front portions, ranging from the groin to the head. One had entered the heart, and, by the testimony of the physicians, immediate death was the probable result. The rifle was lying beside the body, the right hand of the deceased grasping the lever, with which a fresh cartridge had been thrust into the barrel. By the body were found empty shells and a loaded cartridge, the cap of which had been struck by the firing pin, but not exploded. Mrs. Milner, first testifying to her knowledge of firearms, and her ability to distinguish the difference in sound between the report of a rifle and the report of a shotgun, swore that she heard the shots, and that the first shot was from a rifle. Another witness testified that all the shots were rapidly fired. The range of the wounds in the body of Darrah, according to the testimony of the physician upon the trial, was inward and slightly upward. The same witness, however, according to the record of his testimony, at the preliminary examination had testified that the range was inward and downward.

To appellant's contention that a verdict of manslaughter is entirely unsupported by such evidence, respondent concedes that the testimony, if accepted without reservation, makes out a case of self-defense. But it is said that there are physical facts which are absolutely at war with defendant's testimony. These facts, as set forth by respondent, are the following, and we quote from respondent's brief: "The witness Johnson testified that defendant showed him the spot where he (defendant) stood when he shot deceased, and where deceased stood at the time of the shooting, and that the spot where defendant stood was higher than the spot where deceased stood. This being true, the bullets from defendant's gun, upon taking effect upon the body of deceased, should take a downward course, unless deflected by striking a bone. The testimony of Dr. King is to the effect that the wounds on the body of the deceased had ranged slightly upward. This testimony is fatal to defendant's testimony as to the relative positions occupied by himself and deceased, and casts suspicion on all his testimony, under the code rule." Johnson's testimony is as follows: "I saw him [defendant] point out a place where he said he stood when he fired a shot at Darrah. I examined the ground between these two places pretty carefully, and closely near where the defendant said he stood when he fired. There were rocks, not as large by a good deal as a good many in that section of country, but too large for a man to carry. At the right of the way he would be standing,

I suppose, I think there is a boulder, as I remember, to one side of that. I think I noticed at the time sufficiently to have a recollection as to who was on the higher or lower ground, the deceased or the defendant, and I think Milner was on higher ground a few feet." The testimony of King has already been adverted to. It cannot be said that this evidence either raises a conflict, or discredits the account of defendant. Depending upon the exact position of Darrah's body at the time when he received the fatal shot, the wounds might have ranged upward, as the doctor testified, and the shot still have been fired from the exact position which Milner indicated.

Respondent further answers in his brief: "The record discloses a number of hostile and threatening remarks made by defendant with reference to deceased, all tending to prove malice on defendant's part, and other remarks by defendant showing that defendant had no real fear of deceased. Shortly after the killing, defendant said he was not afraid of Darrah's killing him." The hostile remarks to which reference is here made, and which defendant admits that he uttered, were to the effect that "the son of a bitch [meaning Darrah] should not prevent him [Milner] from using his right of way." But the fatal affray was not over the right of way, and, while it is abundantly shown by the evidence that bad blood existed between the two, it uniformly appears that the defendant was the more contained of the two, and kept himself within the pale of the law. The declaration of counsel that shortly after the homicide defendant said that he was not afraid of Darrah's killing him is misleading when detached from its context. What he did say, by the testimony of a witness, is the following; and this, it will be noted, had no reference to the actual circumstances at the time of the tragedy: "Defendant said he was not afraid of Darrah killing him. The only thing he was afraid of was its ending just as it did. If it came to a shooting scrape, he had the best of it. He was not nervous and never got excited, and Darrah was a nervous and excitable man." The other hostile declarations testified to as having been made by defendant were "that he had already had Darrah arrested there to keep the peace. He said he failed to do it. He was turned out on his word, and he was not a man to keep his word. He [defendant] said he didn't know as it made much difference. He said he was going to watch that water, and he would watch it. No son of a bitch would keep him from doing it. He would take no chance whatever. There were several men could testify, if living, that he was capable of taking care of himself, but, thank God, they wasn't. \* \* \* 'He has ordered Barker not to go over it, but, by God, I am going over it. No son of a bitch can keep me. He gave me permission, and, by God, I am going. If he opens his mouth, he had better keep it shut.'" The use of this

language defendant denies, saying that he admits that he said no "son of a bitch could keep him from using his right of way"; but, accepting it, what shows it? That defendant believed Darrah was interfering with him in the enjoyment of his rights, as from the evidence Darrah certainly seems to have been; that defendant proposed to enjoy his rights; and that against such a man as Darrah, who had repeatedly threatened his life, he would take no chance whatever. What there may be in this language to have justified a verdict of manslaughter, we are unable to perceive.

These are the only considerations presented by respondent as supporting the verdict. One other circumstance appears from the evidence, and, though not called to the attention of the court in the brief of respondent, merits attention in this connection. Witnesses testified that, so far as their observation disclosed, no blood was found upon the ground by or under the body of Darrah. The physician was asked to say, from the character and location of the wounds, whether the person receiving them would have bled sufficiently to leave blood upon the ground. He answered that "it would depend upon the amount of clothing, etc., between the ground and the body to absorb the blood. Ordinarily there would be blood on the ground from those wounds." Darrah wore two shirts and a vest, but no coat, at the time of his death. Whether this clothing was sufficient to absorb the flow of blood is not made to appear. It was for the jury to decide under the evidence offered. It is shown, however, that Darrah's body was pierced by small bullets,—buckshot; that one of them entered the heart, and caused almost instantaneous death; and that with the cessation of the heart's pulsations the blood would cease to flow from the wounds. The theory and argument of the district attorney were that Darrah was not shot where the defendant stated, but was shot elsewhere, and his body dragged or carried to the spot behind the bush. The only fair conclusion to be drawn from all this is that the defendant's evidence is not contradicted upon any essential matter by any other direct and positive evidence in the case. If this consideration could properly end here, there can be no doubt but that a new trial should be ordered, for the reason urged, that the verdict is contrary to the evidence; but a trial for murder differs in some respects from the trial of any other criminal offense. "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." Pen. Code, § 1105. In this case the killing by the defendant was clearly established by the people's proof. No circumstances of mitigation or justification to bring the case within the exception contem-



plated by the section were shown in the prosecution's evidence. The burden of proof, then, of justifying and excusing the act, or of proving circumstances which would lessen the gravity of the offense to manslaughter, devolved upon the defendant. At the close of the prosecution's case the presumption against the defendant was that he had committed an unlawful homicide. It may not be said that the presumption of innocence countervailed against this, since by the express provision of the law the presumption of innocence was overcome, and a presumption of guilt took its place when the required facts were proven. By section 2061 of subdivision 2 of the Code of Civil Procedure, jurors are to be instructed "that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or against a presumption or other evidence satisfying their minds." In this is a distinct recognition of the fact—First, that a presumption is evidence; and, second, that it is evidence which may outweigh the positive testimony of witnesses against it. It has been said that disputable presumptions are allowed to stand, not against the facts they represent, but in lieu of proof of the facts, and that when the fact is proven contrary to the presumption no conflict arises, but the presumption is simply overcome and dispelled. *Society v. Burnett*, 106 Cal. 514, 39 Pac. 922. This is true. Against a proved fact, or a fact admitted, a disputable presumption has no weight; but, where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven, and, if they are not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption. In the *Burnett* Case, *supra*, both parties testified to a state of facts contrary to the presumption. It was like an admission. It relieved the question from conflict. But here the burden of proving circumstances exonerating the defendant, or reducing the grade of the crime, was cast upon him; and, even though there be no direct contradictory evidence in the record, the jury was not bound to decide in accordance with the defendant's statement, if the presumption the better satisfied their minds. In this connection the language of Justice Field in *Quock Ting v. U. S.*, 140 U. S. 417, 11 Sup. Ct. 733, 851, is peculiarly applicable: "Undoubtedly, as a general rule," says the learned justice, "positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his own

account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying, may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statement, although there be no adverse verbal testimony adduced." In *Blankman v. Vallejo*, 15 Cal. 639, it is said: "We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears. A court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him, or contradicting his statements." In *People v. Lewis*, 36 Cal. 531, a verdict of murder was set aside by this court as being contrary to the evidence. In that case the fact of the killing by the defendant was not proved, and it is said that the defendant was convicted chiefly on the vague "impressions of a drunken witness," and that the testimony of the drunken witness "leaves it entirely in doubt whether the deceased may not himself, either by design or accident, have fired the shot which caused his death." But the distinction between the case of *People v. Lewis*, and others like it, and the present one, is both radical and important. In those cases the people failed to prove the defendant's commission of the homicide. It is easily possible for this court to say, when the identity of the slayer is in doubt, whether the evidence adduced is legally sufficient for the conviction of the defendant; and, if it be not, then clearly it is the duty of the court to set the verdict aside. Under such a state of facts no burden is cast upon a defendant to prove anything. In the case at bar, however, the killing by defendant is both proved and admitted. The burden then is by law cast upon him to exculpate himself, or mitigate the gravity of the crime with which he is charged. He has to do this to the satisfaction of the jury. They are to weigh his evidence, and determine the fact whether or not it is to be believed, and, if believed, whether it is sufficient. How much or how little weight has the jury attached to his evidence? How much has the witness' credibility been affected in their minds in his appearance upon the witness stand, by his manner of testifying, by what may seem to them some improbability in his story? All these are considerations before the jury in passing upon the weight of evidence. In this case by its verdict the jury has, in effect, said: "The burden of proof cast by law upon the defendant has not, in our judgment, been sustained. His evidence does not produce conviction in our minds against the presumption arising from the proof of the people, which does satisfy our minds." In such a case as this, therefore, the verdict of the jury may not be set aside for the lack of legally sufficient evidence to support it.

But other considerations demand that the defendant should be awarded a new trial. Dr. King, testifying to the wounds found upon the body of Darrah, said: "The wounds had a range slightly upward, except where the bullets struck bones, and were deflected thereby. Q. Does that indicate whether the person firing the shot, and from whom the shot was received, was either above or below the person receiving the shot?" The objection of defendant to this question was overruled, and the witness answered: "It would indicate that the muzzle of the gun was below the party receiving the shot, or, rather, it would indicate that the muzzle of the gun was below the point of entrance of the bullets." The admission of this evidence was incontestably error. *People v. Westlake*, 62 Cal. 303; *People v. Smith*, 93 Cal. 445, 29 Pac. 64. The very slightest consideration is enough to show that such a matter is not the subject of expert evidence, and that in fact neither a physician nor anybody else could tell the positions of the man who shot and the man who received the shot, merely from the course of the bullet. If a man were supine, and a pistol were discharged directly at him, or if the pistol were discharged at him when he was standing upright, or if it were discharged at him when he was in any one of a multitude of other positions, the result still might be exactly the same in every case,—a wound traversing the body in a given direction. Upon the other hand, if a man standing upright should receive a gunshot wound from a weapon whose line of fire was horizontal to his body, nothing deflecting the bullet, the course of the wound would be horizontal. Yet, with the weapon held in exactly the same position, if his body was slightly inclined forward, the course with reference to it would be downward, while, if the body were slightly inclined backward, an upward course would appear.

The coroner's jury inspected the scene of the tragedy. One Carpenter was with them. The defendant accompanied the jury, and gave his story of the homicide as he gave it upon the trial. He pointed out, however, upon the spot, certain physical features of interest and importance,—the flume, the rock upon which he stood, the bunch of grass behind which deceased picked up his gun and fired upon him, and the spot where he (the defendant) stood when he fired the fatal shot. To these declarations of the defendant the witness Carpenter testified. He further testified that at that time he discovered marks upon the brush caused by shot, and lead marks upon the rocks caused by shot, from one of which he actually picked a buckshot. The court deemed it advisable that the jury should view the premises, and gave its order accordingly. It made provision for the presence of the parties and their counsel, the officers of the court, and the stenographer, and directed that the places designated in the order should be shown to the jury by the

witness Carpenter appointed for that purpose. The places were: "(1) The place where the dead body of S. J. Darrah was found by the coroner's jury. (2) To show to the jury the place where Milner said to the coroner's jury that S. J. Darrah stood when he called to him from the top of the rock. (3) The place where the defendant said to the coroner's jury that he stood upon a rock or boulder with a shotgun in his hands. (4) The place where defendant said to the coroner's jury that he reloaded his shotgun. (5) The place where defendant said before the coroner's jury that he stood when he fired the shot that killed S. J. Darrah. (6) The place where marks of buckshot on the rocks were found east of the place where the dead body of Darrah was found. (7) The tuft of grass from behind which the defendant Milner said before the coroner's jury that Darrah picked up his gun. (8) The place where shot marks are on the brush, and the place or places where shot marks are on the rocks. (9) The Milner ditch and flume. (10) The Darrah ditch, commonly called 'Snow Creek.' (11) The place where the Milner ditch did divert the water from said Darrah ditch or Snow creek. (12) The trail where it crosses the Darrah ditch or Snow creek next below the said point of diversion of water in the Milner ditch, and passes to the north and east of where Darrah's dead body was lying, and within about ten or twelve feet of the same." The order was carried out; counsel for defendant neither objecting nor consenting to the order, but reserving, as appears, any legal objection which they might have to make to it. Arrived upon the ground, the terms of the order seem to have been obeyed with scrupulous exactness. Carpenter addressed the jury in the very terms of the order, saying: "This is the place where defendant said to the coroner's jury that he stood upon a rock or boulder with a shotgun in his hands." "This is the place where defendant, before the coroner's jury, said he stood when he fired the shot which killed S. J. Darrah," etc. Objection is now made, and was urged upon the motion for a new trial, that in this the jury received evidence out of court, other than that which came from an inspection of the premises. Pen. Code, § 1181, subd. 2. The power of the court in regard to the matter under consideration is derived from and regulated by section 1119 of the Penal Code: "When in the opinion of the court it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be taken in a body, in the custody of the sheriff, to the place, which must be shown to them by a person appointed by the court for that purpose, and the sheriff must be sworn to suffer no person to speak or to communicate with the jury, nor to do so himself, on any subject connected with the trial, and to return them into court without



unnecessary delay, or at a specified time." Wright v. Carpenter, 49 Cal. 609, was a civil case. The jury were permitted to view the premises, and instructed that they might use the evidence of the witnesses before them, and their examination of the lands from such inspection, in determining whether they were rendered unfit for cultivation by reason of overflow. It was said by a bare majority of the court (two justices not participating), that this was error, in that it was not the purpose of the statute to convert the jurors into silent witnesses acting on their own inspection of the land, but only to enable them the more clearly to understand and apply the evidence; and it was reasoned that, if the rule were otherwise, the jury might base its verdict wholly on its own inspection of the premises, regardless of an overwhelming weight of evidence to the contrary, and the losing party would be without remedy upon motion for a new trial, since it would be impossible to determine how much weight was due to the inspection by the jury, as contrasted with the opposing evidence, or, treating the inspection as in the nature of evidence, whether it was sufficient to raise a substantial conflict. In the criminal case of People v. Green, 53 Cal. 60, the order of the court was to this effect: "Mr. Nye, you will go with the jury, and show them the position that you occupied during the transaction, and where the other parties were, and where Officer Collins was; and they can judge for themselves after that. There are not to be any explanations or comments made, except to show the jury where these parties were at the time the thing occurred." It is said that this proceeding was erroneous, and that the action of the court was not only opposed to the letter of the Code above quoted, but also to the purpose of the oath required to be administered to the officer who conducts the jury to the place mentioned in the order, and to the principle which gives to a defendant the privilege of being confronted by the witnesses against him. To the last proposition,—that of the right of the defendant to confront the witnesses against him,—no exception need be taken. It has since been declared to be error for the jury to receive a view of the premises in the absence of defendant. People v. Bush, 68 Cal. 623, 10 Pac. 169. But the very proposition upon which the case of People v. Bush was decided is that in so viewing the premises the jury was receiving evidence, and this certainly is the case. If, for example, it were material to determine whether a hole in the panel of a door was or was not caused by a bullet, it would be permissible to remove the panel, to bring it into the court room, offer and have it received in evidence, and submit it to the inspection of the jury. It would not for a moment be doubted, if this procedure were adopted, but that the physical object was evidence in the case. If, instead of so doing, the court should direct that the place where

the material fact occurred should be viewed by the jury, and the jury should be conducted to the spot, and the panel of the door pointed out to them, would it be any the less the reception of evidence because obtained in this way? Certainly not; and, indeed, the Criminal Code recognizes that evidence is thus received when it declares that a new trial shall be granted when the jury has received evidence out of court, other than that resulting from a view of the premises. It must be concluded, therefore, that the doctrine of Wright v. Carpenter has been set aside by the later utterances of this court. So, also, has the ruling in People v. Green, supra, been reversed by the later case of People v. Bush, 71 Cal. 602, 12 Pac. 781. In that case the witness Bundy was instructed by the court as to the places to be viewed, precisely as was done in this case. In so doing he orally named and designated the places, as was done by the witness here. The objection was based, as is this objection, upon the language of the Code; and it was urged that the law forbade any person from speaking to the jury upon any subject connected with the trial, and that for the witness Bundy so to do was in direct violation of the language. But to that this court in bank replied that the objection was without merit, "for we cannot conceive how he could have shown the jury the two places which they were sent to view, in any other way under the statute." We perceive no error, therefore, either in the order or in its execution.

The matter of the citizenship of the juror Dole, and of the right of the defendant to raise the question, either in an attack upon the judgment, or upon a motion for a new trial, has not been overlooked; but as a new trial must be ordered, and as the juror could not again act in the case, it becomes unessential to this consideration. No other of appellant's points seems to require particular consideration, but for the reasons given the judgment and order are reversed, and the cause remanded.

We concur: TEMPLE, J.; McFARLAND, J.

(122 Cal. 167)

CAMP et ux. v. LAND. (Sac. 416.)<sup>1</sup>

(Supreme Court of California. Sept. 26, 1893.)  
TRUST DEED—ESTOPPEL—NATIONAL BANKS—RIGHT TO TAKE TRUST DEED—HOW QUESTIONED—RESTRAINT ON ALIENATION—MERGER.

1. Where one gave a trust deed to a bank, he was estopped to deny its power to take it.  
2. The question whether a national bank may loan money, taking a trust deed as security, could not be raised by the borrower, but only by the United States.

3. A trust deed, made to secure a debt, giving the trustees power to sell the property conveyed for its nonpayment, and providing for a reconveyance on payment of the debt, is not void as imposing an unlawful restraint on alienation.

4. Where trustees of a trust deed, made parties to a foreclosure of a prior mortgage on

the property covered by the deed, merely prayed that the decree establish as a fact their assertion of superiority to the claims of all other defendants, and declare their preference right to any surplus, and the judgment did not pretend to foreclose the deed, it is not merged therein.

Department 2. Appeals from superior court, Sacramento county; J. W. Hughes, Judge.

Action for redemption by J. E. Camp and wife against William Land. From a judgment for defendant, and an order denying a new trial, plaintiffs appeal. Affirmed.

McKune & George, for appellants. Holl & Dunn, for appellee.

HENSHAW, J. These appeals are from the judgment and from the order denying a new trial. To secure payment of his promissory note, plaintiff Camp had executed a mortgage upon certain realty to defendant, Land. Afterwards, being indebted to the National Bank of D. O. Mills & Co., he executed to trustees in its behalf a deed of trust to the same land affected by the mortgage. This deed was in the form commonly used in this state, and frequently considered by this court. Land brought suit to foreclose his mortgage, impleading the Camps, husband and wife, the bank, its trustees under the deed of trust, and others. The bank and its trustees answered, averring the debt due the former from Camp, and setting forth the trust deed. The priority of Land's mortgage lien was conceded, but the trustees' interest under their deed was asserted to be superior to the claims of all other defendants. The prayer was that the decree establish this fact, and that if, upon the sale of the land, any money remained after payment of plaintiff's just demands, it be applied in extinguishment or reduction of the debt due the bank. Mrs. Camp answered this pleading. She denied that the bank was a corporation organized under the laws of the United States, and denied the indebtedness of her husband to the bank. She alleged a violation of the law by the bank in making the loan and accepting the security. She set up the filing by her of a declaration of homestead affecting 54 acres of the mortgaged premises, and asked that the land, if sold, be sold in parcels, reserving the homestead portion until the last. The court found in favor of plaintiff, and in favor of the defendant bank and its trustees. It decreed the sale of so much of the land as might be necessary to pay the demand of plaintiff, and directed that the sale be made by parcels. It proved necessary to sell all of the land to extinguish plaintiff's debt. The homestead portion brought \$3,748.60. Land was the purchaser. In time plaintiffs brought this action, asking to be allowed to redeem the homestead from the sale. Land answered, denying their right, and by cross complaint pleaded title in fee in himself, and sought a decree quieting his title. Upon the trial, plaintiffs offered and secured the admission in evidence of the judgment roll

in Land against Camp et al., and rested their case. Defendant, and cross complainant, by the parol evidence of the bank's president, received without objection, proved the organization of the National Bank of D. O. Mills & Co. as a national bank under the laws of the United States, and established the additional fact that for many years before and after the execution of the trust deed it had done business as a national bank. The deed of trust was admitted in evidence over plaintiffs' objections and exception. The default of Camp, the trustor under the deed, was shown, and also a sale of the property to defendant according to its terms. The judgment of the court passed for defendant, and quieted his title against the claims of the plaintiffs. The facts abundantly justified this judgment, unless, as plaintiffs contend,—and it is their only contention,—the deed of trust was improperly admitted in evidence against them.

1. Of the objections to the introduction of this deed the first goes to the absence of proof of the corporate existence of the bank, and of its capacity to enter into the contract in question. But it is sufficient to answer, with reference to the plaintiff J. E. Camp, that, since he dealt with the bank as a corporation having power to enter into the particular contract, and since he received the benefit of that contract, upon well-settled principles of equity he may not be heard to advance these objections. *Association v. Clark*, 67 Cal. 634, 8 Pac. 445; *Irrigation Co. v. Warner*, 72 Cal. 379, 14 Pac. 37; *Yancey v. Morton*, 94 Cal. 558, 29 Pac. 1111; *Bank v. Boyd*, 99 Cal. 604, 34 Pac. 337. As to his wife, those very questions were litigated by and decided against her in the foreclosure suit; while, as to both husband and wife, the evidence of the bank's president, admitted without objection, is sufficient to establish the de facto character of the institution. And, even if it be admitted that the bank, under sections 5136, 5137, Rev. St. U. S., was not authorized to make the loan in question, it did not lie with plaintiffs to raise this point. The United States alone can be heard upon this question. *Bank v. Mathews*, 98 U. S. 621; *Bank v. Whitney*, 103 U. S. 99.

2. The trust deed is in the form of those considered in such cases as *Grant v. Burr*, 54 Cal. 300; *Bateman v. Burr*, 57 Cal. 480; *Society v. Burnett*, 106 Cal. 514, 39 Pac. 922. The objection that it is void as imposing an unlawful restraint upon alienation has been decided against appellant's contention in the very recent case of *Bank v. Alcorn* (Cal.) 53 Pac. 813.

3. The final objection, that the deed was merged in the foreclosure judgment, is not tenable. It is not even necessary to decide whether the trustees could treat such a deed as a mortgage, and seek an equitable foreclosure and sale. The fact is that they did not attempt to do so. The judgment of the court makes no pretense so to foreclose, and therefore there can be no merger.



A junior mortgagee, brought into court at the suit of a superior mortgagee, may do one of two things: either affirmatively seek a foreclosure upon his own account, or without foreclosure ask for an application of any surplus to the reduction of his own debt. In the one case his mortgage lien is merged in the judgment; in the other, it is not. In *Black v. Gerichten*, 58 Cal. 56, the earlier case of *Frink v. Murphy*, 21 Cal. 108, is reviewed, and this distinction clearly pointed out. It was the latter course which the trustees adopted, and their deed was not extinguished, nor their rights under it merged, in the Land judgment. The judgment and order appealed from are therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

122 Cal. 268

STANQUIST v. HEBBARD, Judge. (S. F. 1502.)

(Supreme Court of California. Oct. 8, 1898.)

PROCESS—SUMMONS—SUFFICIENCY.

1. Under Code Civ. Proc. § 407, providing that a summons shall notify defendant that, unless he appears and answers, plaintiff will take judgment for the money or damages demanded as arising on contract, or will apply for any other relief demanded by the complaint, it is not necessary that a summons state the nature of the cause of action against the defendant.

2. A summons which, in the language of Code Civ. Proc. § 407, providing what a summons shall contain, notifies defendant that, if he does not appear and answer, judgment will be taken against him for any money or damages demanded in the complaint as arising upon contract, or that application will be made to the court for any other relief demanded in the complaint, is not void on the ground that the relief asked for is in the alternative.

3. Under Code Civ. Proc. § 407, requiring a summons to notify defendant that, unless he appear and answer, plaintiff will take judgment for any money or damages demanded as arising upon contract, or will apply to the court for any other relief demanded in the complaint, a summons may demand only damages or only equitable relief.

In bank.

Catherine Stanquist petitions for a writ of mandate against J. C. B. Hebbard, judge of the superior court of San Francisco. Writ issued.

Stafford & Stafford, for petitioner.

GAROUTTE, J. This is a petition for a writ of mandate to compel respondent, as judge of the superior court, to proceed with the trial of the case of Stanquist against Stanquist. The action is one of divorce, and personal service of the summons was had. The judge refuses to proceed further with the trial, upon the ground that the summons is defective in material parts, and by reason of such defects no jurisdiction over the person of the defendant has been obtained.

It is first insisted that the summons is void because it does not state the nature of the

cause of action alleged against defendant. A sufficient answer to this contention is found in the fact that the statute which provides what matters shall be stated in the summons fails to make such a requirement. While it might be a convenience to a defendant to be able to ascertain from the face of the summons the nature of the action brought against him, yet, being a convenience merely, the legislature has the right to deprive him of it. None of his constitutional rights are denied him by reason of a failure upon the part of the state legislature to require the summons to include a general statement as to the nature of the cause of action. The Code of Civil Procedure (section 407) now reads: "The summons must be directed to the defendant, signed by the clerk and issued under the seal of the court, and must contain: \* \* \* (3) A notice that unless the defendant so appears and answers the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint." The summons in the present case, following the very language of the statute, states: "You are notified that unless the defendant so appears and answers the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint." It is now insisted that the summons is void because the relief to be asked for is stated in the alternative. Prior to the last session of the legislature, section 407, as to this matter, provided (subdivision 4): "In an action arising on contract for the recovery of money or damages only, a notice that unless the defendant so appears and answers the plaintiff will take judgment for the sum demanded in the complaint (stating it)." Subdivision 5: "In other actions a notice that unless defendant so appears and answers the plaintiff will apply to the court for the relief demanded in the complaint. The name of the plaintiff's attorney must be endorsed on the summons." Why the legislature made these changes in the law, and bulked the legislation found in subdivisions 3 and 4 of the old section into subdivision 3 of the new section, we do not know. But by elementary principles of statutory construction, the court has a right to assume that some change in the meaning of the statute was intended by this radical change in the language of the statute. At the same time it must be borne in mind that section 407 does not assume to declare the particular form of a summons, but declares what matters it must contain; and a substantial compliance with the requirements of the statute in making a statement of those matters is all that is required. The summons under consideration follows literally the language of the Code, and must be held sufficient. To be sure, the purpose and intent of the

statute is most awkwardly expressed, but that fact is a matter with which the court has nothing to do. The statute is not so bad as to be meaningless, and if the legislature in its wisdom sees fit to frame this statute in the alternative form, as to the relief to be demanded by the plaintiff, it certainly has the power so to do. It seems the purpose of this provision of the section, in part at least, was to require the defendant to look to the complaint alone to ascertain the nature of the cause of action alleged against him. Especially is this apparent when we find that the legislature, at the same time, repealed that subdivision of the section requiring the summons to state generally the nature of the cause of action. Under the notice now provided by the section, the defendant may only ascertain the relief sought against him by an examination of the complaint. It will be observed that the legislature, in enacting this section as it now stands, also repealed that portion of the old section requiring the summons in actions arising upon contract for the recovery of money or damages to state the amount for which plaintiff will take judgment in case of failure to answer. Possibly this change in the law has affected the power of the clerk to enter up judgments in certain cases as provided in section 585, but that is a matter in no way touching the jurisdictional question here involved. The legislature had the power to prescribe the contents of a summons, omitting therefrom all matters now found in subdivision 3 of the section. This could have been done, and still defendant had due process of law. Hence the whole matter is purely one of statute,—a matter solely with the legislature. If subdivision 3 of the section could be repealed by the legislature, and still sufficient of the section remain to constitute a valid summons, then the mere fact that the matters stated in that subdivision are stated in the alternative furnishes no ground upon which to hold the summons void.

In deciding that a summons which follows the language of section 407 is not void, we do not intimate that a summons based on a complaint on contract for money or damages, or a summons based upon a complaint asking for equitable relief, would be void if not worded in the alternative. In one case a notice that, unless the defendant appears and answers, the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, and in the other case a notice that unless the defendant so appears and answers the plaintiff will apply to the court for the relief demanded in the complaint, would substantially comply with the statute. For the foregoing reasons the writ should issue, and it is so ordered.

We concur: BEATTY, C. J.; VAN FLEET, J.; HARRISON, J.; McFARLAND, J.; TEMPLE, J.

6 Cal. Unrep. 150

**WALLACE v. RANDOL. (S. F. 804.)**  
(Supreme Court of California. Oct. 7, 1898.)

**BROKERS—BILLS AND NOTES—CONSIDERATION.**

Plaintiff brokers were engaged to sell certain property for a specified commission, one-half to be paid when the first installment of the price was paid, and the other half on the payment of the second installment. A sale was effected, it being agreed that the purchaser should be allowed one-half of the commissions. To settle the purchasers' claim that they were entitled to one-half of the entire commission on the payment of the first installment, plaintiffs allowed the former to retain half the entire commission, and entered into an agreement with them which recited that the purchasers had received the full amount of their commission, and plaintiffs were to have all the commission due on the second installment; and that certain nonnegotiable notes contemporaneously executed by the purchasers to plaintiffs for plaintiffs' share of the commission on the first installment should be returned to the purchasers if the second payment "was completed." The second installment was not paid, and plaintiffs sued the purchasers on the notes. There was nothing to show that plaintiffs had in any way prevented the payment of the second installment. Held that, irrespective of whether there was a tender of the second installment by the purchasers, and a wrongful refusal of the sellers to accept it, which of itself would "earn" the commission, plaintiffs were entitled to recover on the notes, since they were based on a valuable consideration, and the second payment was not "completed."

Department 1. Appeal from superior court, city and county of San Francisco; J. M. Seawell, Judge.

Action by James H. Wallace against James B. Randol to recover on a note. From a judgment for plaintiff, defendant appeals. Affirmed.

Edward J. Pringle, for appellant. W. S. Goodfellow, for appellee.

**GAROUTTE, J.** The facts of this case, as disclosed by the record, are somewhat complicated. In many respects we do not see their materiality as bearing upon the merits of the present litigation, and proceed to state those we deem material. A Scottish company owned a large tract of land in the state of California, known as the "Chowchilla Ranch." They placed this ranch in the hands of a broker in London for sale at the price of \$1,500,000, agreeing to pay him \$75,000 commission if effecting a sale,—one-half of this commission to be paid when the first installment of the purchase price was paid, and one-half upon the payment of the second installment. The London broker secured the services of Catton, Bell & Co., brokers of the city of San Francisco, to assist him in effecting a sale of the property, agreeing to pay them for their services three-fourths of the commission. The San Francisco brokers found purchasers in E. B. Perrin and James B. Randol, and agreed that they should be allowed one-half of the commission, which amount was to be credited upon the purchase price. Perrin and Randol paid the first installment of the purchase



price. This payment was composed in part of commissions on the sale, and in crediting those commissions as part payment complications arose which have come to a head in this litigation. \$37,500 in commissions being due when Perrin and Randol made the first payment, they claimed a credit to that extent. But the London broker claiming one quarter interest in the commissions, and Catton, Bell & Co. claiming one quarter interest, a difference between the parties arose. A one-fourth part of this commission earned amounted to \$9,375. This difference between Perrin and Randol upon the one part and Catton, Bell & Co. upon the other part was settled in the following manner: Randol, having a one-third interest in the purchase, gave Catton, Bell & Co. his promissory note for \$3,125, payable upon the 2d day of February, 1892. Perrin, having a two-thirds interest in the purchase, gave his promissory note to Catton, Bell & Co. for \$6,250, payable at the same time. The date of the payment of these notes was also the date when the second installment of the purchase price would fall due. As part of the transaction between the parties at this time an agreement was entered into, which recites: "Witnesseth, the said Randol and Perrin have this day received from Messrs. Catton, Bell & Company the sum of twenty-eight thousand one hundred and twenty-five (\$28,125) dollars, in full payment of their share of the commission on the sale of the Chowchilla Ranch, situated in Merced and Fresno counties, and therefore waive all claim to any portion of the commission that is payable when the second payment is completed on account of the purchase of the ranch. \* \* \* The said Randol has this day given his note unnegotiable for \$3,125 to the said Catton, Bell & Company, and the said Perrin his note unnegotiable for \$6,250. Both of said notes are to be held as security for the payment of the shares of Catton, Bell & Company in the said commission, upon the understanding that, should the second payment to be made on account of the ranch out of which is to come the full share of Catton, Bell & Company in the commission, to wit, \$28,125, be completed, the said notes are to be returned to the said Randol and Perrin, respectively; otherwise the notes shall be considered good and payable to the extent to which there may be deficiency in the commission of said Catton, Bell & Company." In due course the time arrived when these notes became due and payable. No second payment was made to the Scottish company upon the purchase price of the ranch, hence no commissions came to Catton, Bell & Co.; and this action was thereupon commenced against Randol upon his note by the assignee of the brokers. He now appeals from the judgment rendered against him. Clearing away the rubbish, we find the foregoing facts are practically all that are material to the consideration of this case. Both evidence and argument have been presented as to the liability of the Scottish company for the balance of the

commission, and also time and labor have been spent in attempting to show that it was the fault of the Scottish company that the second installment of the purchase price upon the ranch was not paid, and also that Perrin and Randol made a legal and proper tender of such installment of the purchase price. It is further disclosed that the original contract of purchase between the Scottish company and Perrin and Randol was subsequently modified, and practically supplanted, by other and different contracts. But we fail to see the materiality of these matters as bearing upon the pending litigation. The note here sued upon and the contemporaneous contract were matters arising entirely between Catton, Bell & Co. upon the one side and Perrin and Randol upon the other. They were contracts in which the Scottish company was not a party, and in the result of which it had no possible interest.

Let us see what the contract was between these parties. They had \$28,125 in commissions to divide, one part to the brokers and two parts to Perrin and Randol. With the utmost liberality let us concede that Perrin and Randol claimed this entire amount, yet at the same time it must be conceded that Catton, Bell & Co. claimed one-third of it. Whatever may have been the exact claim of Perrin and Randol to the portion claimed by Catton, Bell & Co., to wit, \$9,375, they induced those brokers to relinquish that claim, and as a consideration for such relinquishment they gave their respective notes to the brokers for the amount, payable February 1, 1892, the time when the balance of the purchase price fell due. And they thereupon agreed by the instrument from which we have quoted that, if such purchase price was not completed, then these notes were to be deemed immediately due and payable. This was a plain, fair contract entered into by the parties, based upon valuable considerations, and unless Catton, Bell & Co. in some way prevented the payment of the balance of the purchase price, they are entitled to recover in this action. Nothing of the kind is alleged. No fraud is suggested. It is apparent that the Scottish company, by any act upon its part, could not defeat recovery upon these notes, for it was in no sense a party to the transaction. Catton, Bell & Co., in making the contract were acting for themselves alone. Even the London broker had no interest of any kind or character in the matter. The notes would become due and payable upon the happening of a certain event, namely, noncompletion of the purchase price. This event took place, and under the terms of the agreement a cause of action at once arose. Conceding the alleged tender of Perrin and Randol to the Scottish company had the legal effect of an earning of the balance of the commission agreed to be paid by that company,—a matter not necessary to here consider,—still that was not the condition specified in the agreement which was to render the notes nugatory.

"Earning the commission" is not the equivalent of a "completion" of the payment of the purchase price. For the foregoing reasons the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

122 Cal. 279

**LATTA v. TUTTON. (L. A. 428.)**

(Supreme Court of California. Oct. 13, 1898.)

**MORTGAGES — DEFICIENCY JUDGMENT — PERSONAL SERVICE — PRESUMPTIONS — PLEDGES — TENDER — DEMAND — LIEN — EXTINGUISHMENT — CONVERSION.**

1. A recital in a default judgment for a deficiency after a foreclosure sale, that defendants "were regularly and duly summoned" to answer the complaint, does not raise the presumption of a personal service on defendants, where the judgment roll shows that the service was by publication.

2. A deficiency judgment rendered in an action to foreclose a mortgage is void on its face where the judgment roll shows that the service was by publication.

3. Where a tender is made to a pledgee, who makes no objection to the amount of it, but does not surrender the pledge or accept the tender, the lien is extinguished, and his possession becomes a wrongful conversion, even though the tender is in fact less than the amount due the pledgee.

4. No demand for the return of pledged property need be made where the pledgee claims ownership in himself.

5. In an action of claim and delivery, the sufficiency of a demand by pledgor for the return of the pledged goods is admitted by pledgee's failure to deny it in his answer.

6. A pledgee who surrenders his possession for the purpose of selling the pledged property, and who becomes the purchaser under a void sheriff's sale, loses his lien on the property, so that no tender of the amount due thereon is necessary in order that pledgor may maintain an action to recover its possession.

Commissioners' decision, department 2. Appeal from superior court, San Diego county.

Action by Ida Latta against George M. Tutton. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Parrish & Mossholder and Puterbaugh & Puterbaugh, for appellant. Gibson & Titus and J. C. Hizar, for respondent.

**CHIPMAN, C.** Claim and delivery of certain five bonds of the Linda Vista irrigation district of the value of \$500 each. Defendant denies the ownership of plaintiff, and claims ownership in himself, and sets up the statute of limitations. The pleadings are verified. The trial was by the court, and the findings of fact are: That plaintiff was the owner of the property on November 12, 1892, and ever since has been such owner, as her separate property; that on the day last named W. C. Latta, husband of plaintiff, delivered the property to defendant as a pledge, with the knowledge and consent of plaintiff, as part of the security for a loan of \$2,500, evidenced by a note executed by plaintiff and her husband, due three years

after date, secured by mortgage on certain real estate; that defendant foreclosed said mortgage upon said real estate, and it was sold thereunder, leaving a deficiency of \$523.28; that plaintiff, at the city of San Diego, on January 7, 1897, prior to the commencement of this suit, offered in writing to pay defendant said sum, with legal interest, the amount she claimed to be due defendant on said indebtedness, and demanded possession of said bonds; that defendant made no objection to the amount of the offer in any wise or at all, and refused to accept said offer or deliver the property; that defendant received such pledge in good faith, in the ordinary course of business, and for value, and without any knowledge that plaintiff owned or claimed said bonds, and believing that her said husband was the owner thereof; that the agreement of pledge was not in writing, and by its terms was not to be performed within one year from the making thereof; that the cause of action is not barred; that defendant, on September 29, 1894, claimed to be the owner of said bonds, and has since claimed ownership of them, "but defendant [should be plaintiff] had no knowledge of said claim until said demand was made." As conclusions of law from the facts and from the admissions of the pleadings the court found the plaintiff to be the owner of the property, and entitled to its possession or value thereof, and that the cause of action is not barred, and gave judgment accordingly. The appeal is from the judgment and from the order denying motion for new trial, and comes here on bill of exceptions.

1. Defendant claims title by virtue of a levy of execution on his deficiency judgment, and sale thereunder to him of October 20, 1894. The validity of this purchase is drawn in question, and arises on the judgment in the foreclosure proceedings. The only service on the defendants in that action shown by the record was by publication of summons, and this appears from the judgment roll. The judgment was by default, and contains the following recital: " \* \* \* It appearing to the satisfaction of the court that said defendants, W. C. Latta, Ida B. Latta, and James F. Brooks, have, and each of them has, been regularly and duly summoned to answer unto the plaintiff's complaint herein, and said defendants have, and each of them has, made default in that behalf, and that the default of each of said defendants for not appearing and answering unto plaintiff's complaint has been duly made and regularly entered herein," etc. We are asked to presume personal service from the recitals found in the judgment alone, although the judgment roll shows what service was in fact made, and that it was made by publication. The presumption which the law implies in support of judgments of courts of general jurisdiction only arises with respect to jurisdictional facts concerning which the record is silent. *Galpin v. Page*, 85 U. S. 350. Here



the record is not silent. The recital in the judgment applied as well to service by publication as to personal service, and the recital must be presumed to refer to such service as the record affirmatively discloses. *Belcher v. Chambers*, 53 Cal. 635. A judgment void upon its face is one that appears to be void by an inspection of the judgment roll. *People v. Harrison*, 84 Cal. 607, 24 Pac. 311; *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899; *Whitney v. Daggett*, 108 Cal. 232, 41 Pac. 471. The deficiency judgment was void. *Anderson v. Goff*, 72 Cal. 65, 13 Pac. 73; *Blumberg v. Birch*, 99 Cal. 416, 34 Pac. 102.

2. Much attention is given by counsel to the question whether there was a sufficient tender to and demand made upon defendant by plaintiff before the action was brought. Plaintiff alleged a demand and refusal to surrender possession, and that at the time of the demand "plaintiff offered to pay defendant the sum of \$523.28, with interest thereon from September 29, 1894, at seven per cent. per annum; that defendant refused to accept said offer, and refused to deliver said property to plaintiff, and claimed to be the owner thereof." This is admitted by failure to deny. Defendant sets up a pledge to himself of the property, and alleges ownership of it since November 12, 1892, the date of the pledge. The only evidence of ownership in defendant is his purchase from the sheriff under the void deficiency judgment, to accomplish which he surrendered possession of the bonds to the sheriff, in order that the execution might be levied, and the sale made; and at the sale he became the purchaser. When the tender was made to him, he made no objection to the amount. The effect of the tender was to release the bonds from any further claim of defendant by reason of his lien. *Haile v. Smith*, 113 Cal. 656, 45 Pac. 872. We think that when a tender is made to a pledgee, and he makes no objection to the amount, but does not surrender the pledge nor accept the tender, the result is to extinguish the lien, and amounts to a wrongful conversion, even though the tender in fact is less than the amount that may be due the pledgee. It is his duty to make known his objections, and, failing to do so, the tender must be deemed to have been the full amount due, and his refusal to surrender the property is a wrongful conversion. *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, citing section 2910, Civ. Code; *Jones, Pledges*, § 543. Whether the demand was sufficient need not be decided, for, being admitted by failure to deny, and defendant claiming ownership in himself by his answer, no demand was necessary. *Cobbey*, Repl. § 447 et seq.; *Wells*, Repl. § 374; *Jones v. Spears*, 47 Cal. 20.

3. Defendant's original possession as lienor was lawful, and was dependent upon possession (Civ. Code, § 2988); but when he surrendered that possession, and became a purchaser under a void sale, he no longer could be said

to be in the lawful possession, nor that he came into possession lawfully. He was thenceforward in the position of any purchaser without right under void sheriff's sale, and, having lost his lien, no tender was necessary. It is therefore immaterial whether the tender was good or not. It was held in *Wingard v. Banning*, 39 Cal. 543, that if a common carrier sues out and procures to be levied a writ of attachment against property on which he has a lien for freight, he thereby abandons and forfeits his lien. No more do we think a pledgee can surrender the pledge to be sold on an execution, and afterwards be allowed to fall back on his original claim of lien in the event his purchase at sheriff's sale proves abortive. *Jones, Pledges*, §§ 328-330. It was so held in *Jacobs v. Latour*, 5 Bing. 130, and that the subsequent possession must have been acquired under the sale. *Jones, Pledges*, § 1014.

4. The action was not barred by the statute of limitations. The court found that defendant claimed ownership, September 29, 1894, and has ever since, but that plaintiff had no knowledge of such claim. The sheriff's sale of the bonds was October 20, 1894. The tender and demand were made shortly before complaint was filed. In any case the action was in time. *Code Civ. Proc.* § 338, subd. 3. We discover no error, and therefore recommend that the judgment and order be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(122 Cal. 240)

BARKER v. GOULD et al. (L. A. 448.)<sup>1</sup>  
(Supreme Court of California. Oct. 6, 1898.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

1. Findings based on conflicting evidence will not be reviewed.

2. The court's determination of the cogency and sufficiency of an expert's reasons for his opinions is as conclusive of the weight to be given to them as its determination where the evidence is conflicting.

Department 1. Appeal from superior court, Santa Barbara county.

Action by one Barker against Gould and others to determine adverse claims to waters of a tunnel. From a judgment for plaintiff and from an order denying a motion for a new trial, defendants appeal. Affirmed.

Canfield & Starbuck, for appellants. Thomas McNulta, Richards & Carrier, and W. S. Day, for respondent.

HARRISON, J. The plaintiff is the owner of certain lands in the county of Santa Barbara, situated upon both sides of a natural stream of water known as "Cold Spring Creek," which rises at a point north of the plaintiff's land, and flows through his prem-

<sup>1</sup> Rehearing denied November 5, 1898.

ises into lands belonging to the appellants, which border upon the stream and lie south of and below the plaintiff's lands. Between July 1, 1894, and the commencement of this action, the plaintiff constructed a tunnel upon his land, on the east side of the creek, into which the water percolates from the adjoining land, and produces a stream which flows from its mouth, discharging at that point about  $4\frac{1}{2}$  inches of water under a four-inch pressure. The mouth of the tunnel is adjacent to the east bank of the creek, at an elevation of about 5 feet above the creek, and the tunnel runs from that point 100 feet in a direction nearly at right angles with the creek; thence, in a northerly direction and nearly parallel with the general course of the creek, 450 feet; thence, in a northerly direction, gradually diverging from the course of the creek, 375 feet, where it terminates at a point about 600 feet from the creek, measured along the strike of the strata. The tunnel is constructed with a slight deviation from a horizontal line, so that at a distance of 40 feet from its mouth it passes below the level of the creek, and at its breast, or inner end, its floor is at a depth of 120 feet below the level of the creek. The appellants, other than the Montecito Water Company, are the owners of certain lands which are riparian to the creek, and situate south of and below the lands of the plaintiff, and the water company claims the right to the use of a portion of the waters of the creek under a grant from them.

The plaintiff alleges that he is the owner of all the water which flows from the tunnel, and that the defendants make some claim against him to the water entering and flowing from the tunnel, the exact nature of which is unknown to him, but that their claim thereto is without right, and asks that they be required to set forth their respective claims, and that it be adjudged that they are invalid and void as against him, and that he is the owner of all the water entering the tunnel and discharging therefrom. In their answer to the complaint the appellants set forth their ownership of the lands as above, and that they are riparian to the creek, and allege that the water which enters the tunnel and is discharged therefrom is a portion of the water naturally flowing in the creek, but which, by reason of the nature of the rock through which the tunnel is excavated, has been abstracted from the creek; that such abstraction by the plaintiff is without right, and is an infringement upon their right to have all the water which naturally flows in the creek flow down to and through their lands.

At the trial the following issue was submitted to a jury that was called in to advise the court thereon, viz.: "Does the tunnel constructed by plaintiff abstract any water from the Cold Spring branch of the Montecito creek or any of its tributaries? If so, how much?"—to which issue the jury replied,

"No; it does not." The court accepted this verdict in its own findings upon the evidence, and found that the stream of water which flows from the tunnel is the accumulation of percolations from the soil and rocks, percolating therein from the adjoining land on either side of the tunnel, and that said tunnel was not constructed with the intention of abstracting the water from Cold Spring branch of Montecito creek, and that it does not abstract the water from said stream or any of its tributaries. Upon these findings of fact the court rendered judgment in favor of the plaintiff. The appellants moved for a new trial, and, it having been denied, they have appealed therefrom and also from the judgment.

The point particularly discussed by counsel upon this appeal is the sufficiency of the evidence to sustain the above findings of the court, but, as these findings were made upon the consideration to be given to conflicting evidence, we are not at liberty to review them. Whether the water entering the tunnel and flowing therefrom was withdrawn from the creek by reason of the construction of the tunnel, or was made up of percolations from the ground adjacent to the tunnel, independent of the creek, was the issue to which the evidence of both the plaintiff and the defendants was directed. Upon this issue the burden of establishing the claim of the defendants was upon them. There was no evidence of any visible or open flow of water from the creek to the tunnel, but the defendants sought to establish the fact by means of expert testimony, based upon the geological formation of the surrounding country, the direction and angle of dip of the strata, the character of rock in the different strata, and the character of the intervening seams. Testimony upon these subjects, and of the conclusions to be drawn therefrom, was also given on behalf of the plaintiff, and the court was called upon to determine, not only the weight to be given to the evidence on either side of the question, but also the value of each witness as an expert thereon. The conclusion of each expert witness was but an opinion formed by him from his knowledge of the science applicable to the subject-matter of the investigation, and his capacity for forming this opinion, as well as the value to which the opinion was entitled, depended upon the extent of his studies and of his experience in reference to that subject, and also upon the extent to which he had applied the knowledge thus acquired by him to this particular subject. His testimony was not of a fact, but was merely his deduction from other facts under the theory adopted by him as the result of his previous studies and experience. The court was not required to accept the opinion of either expert as conclusive upon the subject, unless it should be satisfied that it was based upon cogent and sufficient reasons; and its action in determining the sufficiency or cogency of these reas-



ons is as conclusive upon the weight to be given thereto as is its decision upon a conflict of testimony upon any other question at issue. The decision of the trial court that the water entering the tunnel and flowing therefrom was the result of percolations from the soil adjacent to the tunnel, and was not abstracted from the creek, necessarily implies that it did not consider the testimony of the expert on behalf of the defendants to be entitled to sufficient weight to overcome the testimony on behalf of the plaintiff. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

122 Cal. 253

HUMPHREY v. POPE. (Sac. 461.)

(Supreme Court of California. Oct. 8, 1898.)

RIGHT OF WIFE TO SUE—ENTICEMENT OF HUSBAND—PLEADING.

1. Under Code Civ. Proc. § 370, providing that a wife, when living separate from her husband by reason of his desertion of her, may sue alone, the desertion need not have continued for the statutory period entitling a wife to a divorce, but a voluntary separation with intent to desert is sufficient.

2. Under Civ. Code, § 49, declaring that the rights of personal relation forbid (1) "the abduction of a husband from his wife," etc., and (2) "the abduction or enticement of a wife from her husband," etc., the right of action of the wife is not limited to a case where her husband has been forcibly taken from her, but she has the same right to sue for the enticement of her husband as the husband has to sue for her enticement.

3. A wife may maintain an action against a third person for enticing her husband away from her and destroying his affection for her.

4. The fact that the damages recovered in such action might be community property does not affect the wife's right of action.

5. A complaint for the enticement or abduction of plaintiff's husband and the alienating of his affections, alleging that defendant during the marriage, and before the commencement of the action, destroyed his affection for her, and illegally enticed and abducted him, is not objectionable for ambiguity in not showing whether the abduction was committed before or after the husband's desertion of plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by Mary L. Humphrey against Louisa C. Pope. From a judgment sustaining a demurrer to the amended complaint, plaintiff appeals. Reversed.

James A. Louttit, for appellant. Gibson & Ramage and J. G. Swinnerton, for respondent.

CHIPMAN, C. Action for damages. A demurrer to the amended complaint was sustained without leave to further amend, and judgment was given in favor of defendant, from which this appeal is prosecuted. The complaint alleged that at all the times mentioned in the complaint plaintiff and one W. G. Humphrey were husband and wife. On

the —— day of September, 1896, the husband willfully deserted plaintiff, and by reason of said desertion plaintiff "is living separate and apart from him." Defendant, "willfully and wrongfully intending to injure plaintiff, and to deprive her of the affection, support, comfort, fellowship, society, aid, and assistance of \* \* \* the said husband, wrongfully, \* \* \* at divers days and times before the commencement of this action, and while such marriage existed, alienated and destroyed the affection of the \* \* \* husband of this plaintiff, \* \* \* and did illegally persuade, entice, and abduct said W. G. Humphrey from plaintiff, whereby plaintiff has wholly lost and been deprived of the assistance, comfort, fellowship, society, aid, and support of \* \* \* her said husband; to all of which plaintiff during all said time was entitled \* \* \* and otherwise would have had, but for the illegal persuasion, conversation, and the enticement, abduction, and doings and actions of defendant, as hereinbefore recited." The demurrer was upon several grounds: (1) Plaintiff had not legal capacity to sue; (2) insufficiency of facts to constitute a cause of action; (3) the complaint is ambiguous, unintelligible, and uncertain.

1. Respondent contends that plaintiff could not bring the action without making her husband a party plaintiff. The amended complaint was filed June 7, 1897, and the alleged desertion occurred in September, 1896. The statutory period required to make the desertion cause of divorce had not elapsed. In *Andrews v. Runyon*, 65 Cal. 629, 4 Pac. 669, the wife sued in her own name alone for personal injuries. It was objected that she could not do so, but that the husband must be joined. It was held that section 370, Code Civ. Proc., authorized the suit, because when commenced she was living separate and apart from her husband by reason of his desertion of her. *Baldwin v. Railroad Co.*, 77 Cal. 390, 19 Pac. 644. Section 370, supra, requires the husband to be joined when a married woman is a party, which is the common-law rule; but the section introduces certain exceptions, and among them: "(3) When she is living separate and apart from her husband by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone." It was held under the provisions of the act of March 9, 1870 (St. 1869-70, p. 226), in *Tobin v. Galvin*, 49 Cal. 34, that the words, "while living separate and apart from her husband," do not mean a temporary absence of the wife. There must have been an abandonment on the part of the husband or wife, or a separation which was intended to be final. The Code adds to the language of the former act the words, "by reason of his desertion of her." The desertion through which comes the separation and forms the exception we do not think must necessarily have continued for the statutory period entitling the wife to a divorce. But the desertion must be such as is given as a

cause for divorce by section 95, Civ. Code, to wit, a voluntary separation with intent to desert. The two sections should be read together to ascertain the meaning of the word "desertion" in section 370, supra. Section 107, Civ. Code, fixes the time the desertion must continue; but what is willful desertion is defined by section 95, supra. It would be a harsh rule and an unwarranted construction of the statute to hold that a husband may willfully separate from his wife with intent to desert, and yet that she could not maintain an action for a personal injury to herself if it occurred at any time within one year after the husband's desertion and abandonment of her. We think the allegations of the complaint sufficient upon this point.

2. The more serious question is that raised by respondent for insufficiency of facts alleged. The argument is that personal rights are defined by section 43, Civ. Code, and include the right to protection from injury to personal relations, and that such injuries are carefully defined by section 49, Id., and are entirely different from injuries to the person, such as bodily restraint, bodily harm, and defamation, which are enumerated in section 43, Id. Section 49 reads: "The rights of personal relation forbid: (1) The abduction of a husband from his wife, or of a parent from his child; (2) the abduction or enticement of a wife from her husband, of a child from a parent or from a guardian entitled to its custody, or of a servant from his master." Respondent claims that "abduction" means something different from "enticement," and that this is recognized by section 49, because the word "enticement" is omitted from clause 1, but is included in clause 2.

The word "abduct" is from the Latin "abduco," to lead away. Abduction is the taking away a wife, child, or ward by fraud and persuasion or open violence. *Carpenter v. People*, 8 Barb. 606; *State v. George*, 93 N. C. 570. In private or civil law it is the act of taking away a man's wife by violence or persuasion. 3 Steph. Comm. 536. In reason, the wife should be as much entitled to sue for violation of her personal right, where her husband has been taken away from her by enticement, if such right exist at all, as should the husband, when his wife has been enticed from him. Ordinarily the injury is greater to the wife than to the husband. We are unwilling to give a construction to this section which would limit the wife to an action when her husband has been forcibly taken from her. Our criminal statute as to the crime of abduction for purposes of prostitution uses the words "takes away" for the word "abduct," and it has been held "that a physical carrying away is not required to constitute the taking, but that inducements are sufficient." *People v. Demousset*, 71 Cal. 611, 12 Pac. 788. In the decisions of courts generally the word "abduction" and the words "taking away" are used as the equivalent of each other, as we think they in fact are. We are unwilling

to impute to the legislature any intention to give to the husband a right of action for the abduction of his wife, under clause 2, § 49, Civ. Code, of which the wife is deprived by the phraseology of clause 1. The abduction meant in both clauses we think should be held to be the same. And this brings us to the question, has the wife an action against another woman for enticing the husband away from and destroying his affection for her?

It was decided as early as the nineteenth year of George II., in *Winsmore v. Greenbank*, Willes, 577, and has been the law ever since, that the husband has an action for enticing away his wife,—for taking away from him the comfort and society of his wife (per quod consortium amisit),—and the action was invented to help out the lonely and forsaken husband. But at common law the wife had no right of property in any damages recovered on her account for any cause, and was given no right of action to recover them. She was not only inferior to her husband, but she had no personal identity separate from him. As the wife was then regarded, the courts, with perfect consistency, in denying her this action, simply added this to her many other disabilities. Obviously and grossly wrong, such, nevertheless, was the generally accepted theory of the common law. And yet it was not accepted without protest, for in *Lynch v. Knight*, 9 H. L. Cas. 577, Lord Chancellor Campbell said: "Nor can I allow that the loss of consortium, or conjugal society, can give a cause of action to the husband alone." I have been able to find but two cases in this country not overruled, and respondent cites no others, where this barbarous discrimination has been approved. *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522; *Doe v. Roe*, 82 Me. 503, 20 Atl. 83. The first of these decisions was placed upon the ground that neither the common law nor the statutes of the state gave the wife the right to maintain such an action. The second denies the right apparently because (1) against good policy, and (2) particularly because it is not allowed by statute. Opposed to this view, and giving to the wife a right of action, without joining her husband, on various grounds,—in some states because the statutes have removed the disabilities from the wife, in others on the broad ground that the wife should have the action,—we find a long array of decisions the force and reasoning of which are entirely satisfactory to our minds. The courts of last resort have so held in Connecticut, New Hampshire, New York, Ohio, Michigan, Indiana, Illinois, Iowa, Missouri, Wisconsin, Kansas, Nebraska, and Tennessee. The cases are too numerous to be cited, and we content ourselves by referring to a few of them. *Bennett v. Bennett* (1889) 116 N. Y. 584, 23 N. E. 17, where it was said that the common law gave the right of action, but afforded no remedy, and that the remedy is now supplied by the Code; *Westlake v. Westlake* (1878) 34 Ohio St. 621, where the doctrine of the common law and the rea-



son upon which it rests are clearly pointed out; *Warren v. Warren* (1891) 89 Mich. 123, 50 N. W. 842, where the leading case (*Duffies v. Duffies*, supra) against the right is controverted, and many of the cases in support of the action are cited; *Foot v. Card* (1889) 58 Conn. 1, 18 Atl. 1027, where the points presented in the present case are fully met, and where will be found a lucid statement of the modern opinion upon the subject, and where it is held that by the very nature of the action, and "of legal necessity, therefore, damages for injury to this right must be to her solely," and this even though at the time the husband was living with his wife, the plaintiff. See, also, *Price v. Price* (1894) 91 Iowa, 693, 60 N. W. 202; *Clow v. Chapman* (1894) 125 Mo. 101, 28 S. W. 328, where it was said: "As the only reason why the wife formerly could not maintain an action for the alienation of her husband's affections was the barbarous common-law fiction that her legal existence became suspended during the marriage and merged into his, which long since ceased to obtain in this jurisdiction, there remains now not the semblance of reason, in principle, why such an action may not be maintained here." It remains to determine whether the law of this state is such as to constrain us to adopt the effete and inhuman doctrine of the common law, or whether we may not follow the more enlightened and humane principles so universally approved in our own country. The right to sue in her own name is expressly given to plaintiff by paragraph 3, § 370, Code Civ. Proc. The only possible impediment to the right of action that may be suggested arises out of the question, would not the damages recovered be property of the community, and, if so, would not that fact require the husband to be joined? She is given the right of action, as we have seen, by section 49, Civ. Code. She is given the remedy in her own name by section 370, Code Civ. Proc. Where the husband sues for the loss of his wife's affections, the fact that the damages might or might not be held to be community property would not affect his right of action, and we can see no reason why any different rule should apply where the wife brings the action. Conceding, but not deciding, that any damages the plaintiff may recover would be community property, we think the action properly brought in her name alone.

3. The objection to the complaint for ambiguity, etc., respondent says is based upon the ground that it cannot be ascertained therefrom whether the abduction was committed before or after the husband deserted the plaintiff. While we think it but fair to defendant to be informed with some certainty during what period of time the blandishments of the husband's seducer were brought to bear upon him, we cannot say that the action should be dismissed for failure to do so. The complaint does charge with definiteness that

defendant during the marriage, and before the commencement of the action, did wrongfully destroy the husband's affection for plaintiff, and did illegally persuade, entice, and abduct him from her, whereby she was wholly deprived of his assistance, comfort, fellowship, and society. This alleged conduct of defendant may have begun while the husband was still living with his wife, and plaintiff would have the right to so show. The gist of the action alleged is the enticing or taking away of plaintiff's husband and alienating his affections. The judgment should be reversed, and the cause remanded, with directions to overrule the demurrer.

We concur: HAYNE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to overrule the demurrer.

6 Cal. Unrep. 154

#### ROBERTS v. BURR. (L. A. 435.)

(Supreme Court of California. Oct. 7, 1898.)

FRAUDULENT CONVEYANCES—INTENT—POSSESSION—EVIDENCE—ADMISSIBILITY—SUFFICIENCY.

1. Civ. Code, § 3442, makes a question of fraudulent intent one of fact. Act 1895 makes a voluntary transfer without consideration by one insolvent, or in contemplation of insolvency, fraudulent as to creditors. *Held*, that the rule under section 3442, Civ. Code, was not changed by Act 1895, except in transfers of the kind specially mentioned in the act.

2. A firm composed of father and son sold to the wife and mother jewelry, which was delivered to her and kept for three months in her house, where she resided with her husband and son, except when she intrusted a part of it to them to sell to obtain necessities for the family; they returning it on failing to find a purchaser. *Held*, that there was an actual and continued change of possession, as against creditors.

3. A mother purchased jewelry from a firm composed of her son and another, and, after keeping the property three months, delivered it to plaintiff, to be sold on commission. *Held*, that the employment of the son by plaintiff to assist him in his business, under a contract to which the mother was not a party, did not indicate that there had been no actual and continued change of possession in the mother, as against creditors.

4. A firm sold its stock to a creditor, after which plaintiff purchased it from him, and published a newspaper notice stating that a member of the firm was his manager. *Held*, that as against firm creditors, who attached property of plaintiff as belonging to the firm, the notice was admissible to show the partner's connection with plaintiff's business.

5. As against one claiming goods under a purchase from an insolvent firm, a statement of the firm to a mercantile agency long before the sale is not admissible in behalf of attaching creditors, if no actual fraud is alleged, and the only question is whether there was an actual and continued change of possession in the purchaser.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by James H. Roberts against John Burr. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

Jones & Newby, for appellant. L. H. Valentine, for respondent.

CHIPMAN, C. Action to recover possession or the value of certain jewelry, precious and semiprecious stones, as bailee of the owner. Defendant justifies as sheriff under an attachment. Defendant had judgment, from which, and from the order denying motion for a new trial, plaintiff appeals. The trial was by the court without a jury.

S. E. Lucas & Son (composed of S. E. Lucas and James H. Lucas) were in the jewelry business at Los Angeles. Emily A. Lucas was wife to S. E., and mother of James H. She had made large advances of money to the firm out of her separate estate, and the firm owed her on August 2, 1895, nearly \$6,000. On that day the firm conveyed by written bill of sale and delivered to her the possession of certain of their goods, the subject of this action, of the value of \$5,025. November 14th and 16th Mrs. Lucas delivered the goods to plaintiff, to be sold on commission. On January 7, 1896, one Trafton, a creditor of the firm, commenced an action against the firm by attachment, and caused the goods to be seized. Subsequently he obtained judgment, and the property was sold under execution; Trafton becoming the purchaser for the amount of his judgment and costs, about \$700. The court found "that the execution of the bill of sale was not accompanied by an immediate delivery, \* \* \* and was not followed by an actual and continued change of possession, \* \* \* and no actual nor continued change of possession \* \* \* had occurred at the time of the levy of the attachment." The court also found that plaintiff at the commencement of the action "was not the owner nor in the possession of, nor entitled to the possession of, the stock of jewelry \* \* \* described in the complaint, as against an attaching creditor of the said S. E. and James H. Lucas," and "that the said bill of sale \* \* \* is fraudulent and void against the creditors of the said S. E. and James H. Lucas."

Appellant challenges the sufficiency of the evidence to justify the decision. The sole question contested arises out of the finding that there was no immediate delivery followed by an actual and continued change of possession, as required by section 3440, Civ. Code. It appears from the evidence, and is not contradicted, that Lucas & Son were indebted to Mrs. Lucas as already stated, and that on her demand for payment they sold and delivered to her the goods in question. S. E. Lucas took the package to her, and delivered it and the bill of sale to her, and received certain notes, aggregating over \$5,000, in payment. There is no substantial conflict as

to the following facts: Mrs. Lucas at the time resided with her husband and son in a house belonging to her. She placed the package containing the articles when delivered to her in a private satchel, and put the satchel in her bedroom closet, to which her husband had access. In October she delivered some of the articles to her husband, and some to her son, to be sold to obtain necessities for the family; but, finding no purchaser, the articles were returned to her and replaced in the satchel, which she kept under lock and key. With this exception, neither the husband nor the son had possession or control of the property at any time. Lucas & Son continued in business until September 2d, when they sold out to Lyons & Son, creditors, and the latter went into exclusive possession. No question is raised as to the bona fides of this sale. On November 13th, plaintiff took a lease of the premises, and purchased the fixtures and fittings of Lyons & Son, and the latter surrendered the premises to plaintiff. He went into business, and advertised himself as dealer in precious stones, and placed his name on the window. He received goods on sale from several persons. On November 14th and 16th, Mrs. Lucas personally delivered to him the articles she had purchased from Lucas & Son, to be by him sold upon commission. He receipted to her for the goods. He took James Lucas into the store as manager, and agreed to share with him the profits of a certain part of the business and of the commissions, and James had the management in running the store. He reported sales to plaintiff from time to time, and they had settlements as to their share of the profits and commissions. James made return to Mrs. Lucas of sales of her goods made by plaintiff, paying over to her in all between three and four hundred dollars. Lucas, Sr., was at the store frequently, but took no part in its management. Both he and the son had advised the arrangement between Mrs. Lucas and plaintiff, and were present at the store when she brought the articles and delivered them to plaintiff; and James wrote the receipt, which plaintiff signed and gave to her. Plaintiff continued in charge and control of the business, James being the active manager; and on January 7, 1896, the attachment was served, and Mrs. Lucas' property was taken by the defendant sheriff. There is considerable evidence in the record, not summarized, tending more or less to bear upon the good faith of the sale, which might have some significance if actual fraud were alleged, but which, in our opinion, does not throw any light upon the issues, for the reason that there is no question of actual fraud presented by the pleadings or by the findings. Respondent cites *Cook v. Cockins*, 117 Cal. 140, 48 Pac. 1025, to the point that under section 3442, Civ. Code, as amended in 1895, the question of fraudulent intent in cases arising under section 3440, Civ. Code, is one of law,



and not of fact, and that it was incumbent upon plaintiff to show the good faith of the transfer to Mrs. Lucas, as well as that it was accompanied by immediate delivery and followed by actual and continued change of possession. The provisions of section 3442 are unchanged by the act of 1895, except where the transfer is voluntary, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, in which case the transfer "shall be fraudulent and void as to existing creditors." With this exception, there is no change in the rule that fraudulent intent is a question of fact, and not of law, and when actual fraud is relied upon it must be alleged and proved. See cases cited in *Cook v. Cockins*, supra; *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045.

We think the fact that Mrs. Lucas claims by purchase from her husband and son cannot, of itself, in any way affect her rights any more than if the purchase had been from a stranger. Nor do we see that an immediate delivery followed by an actual and continued change of possession of the goods could not and did not take place because it was under the same roof where all the parties resided. This court sustained a sale of hay by a husband to his wife, as against creditors of the husband, which was not moved from the corral where it was stacked on the homestead premises of the husband and wife, and where the wife was feeding it to her stock. *Porter v. Bucher*, 98 Cal. 454, 33 Pac. 335. The trial court took the case from the jury because in its opinion there could have been no change of possession such as the statute required. In speaking of this, it was said here: "If the ruling of the court below correctly stated the law, it would logically follow that, in order to make a valid purchase of hay from her husband, she must immediately remove the hay from the homestead, or buy it from day to day as she fed it to her cattle," and this the court held she was not called upon to do. We have seen that the wife may purchase personal property from her husband, the same as from a stranger. A rule, therefore, that would preclude her taking and holding the possession in the home of both, in the case of a purchase from the husband, would preclude the purchase of personal property from a stranger, and bringing it to her home, and continuing her possession under the same roof with her husband. But such a rule would practically deny the right altogether. There can be no doubt but that the wife may take and hold possession, notwithstanding her husband and son live in the same house. *Bump*, *Fraud. Conv.* § 132; *Ludlow v. Hurd*, 19 Johns. 218; *Wilson v. Lott*, 5 Fla. 324; *Porter v. Bucher*, supra. What is meant by "continued change of possession" has been the subject of much comment, and has never yet been, and never can be, reduced to any fixed and certain rule. What would be regarded as in law continued possession under one state of circumstances

would not be under other conditions of fact. It was said in *Stevens v. Irwin*, 15 Cal. 503, so often quoted: "The word 'continued' was designed to exclude the idea of a mere temporary change; but it never was the design of the statute to give such extension of meaning to the phrase 'continued change of possession' as to require, upon penalty of the forfeiture of the goods, that the vendor should never have any control over or use of them. This construction, it made without exception, would lead to very unjust and very absurd results." In the case at bar the possession was taken August 2d, and retained, with a single temporary interruption in October, until November 14th,—over three months,—and was then parted with, not to the vendors, but to a bailee of the vendee for sale. In October a portion of the goods were delivered to the vendors to sell, to obtain family necessities, but were returned to the vendee at once, no sale having been made. With this exception, the vendors never had possession after the sale. Many of the cases speak of an open and notorious possession, but the statute does not require a publication of ownership in all cases. "While our statute makes the want of an immediate delivery and continued change of possession conclusive evidence of fraud, it introduces no new rule as to what acts shall constitute delivery and change of possession." *Godchaux v. Mulford*, 26 Cal. 316. The visible, open, and notorious delivery and possession spoken of in the cases refer generally to sales of the entire business, or of some bulky object of property. Acts of secrecy or concealment would go far towards showing actual fraud, but the fact that Mrs. Lucas did not inform her husband's creditors of the purchase does not change her position. Her husband had a right to prefer her as a creditor, except as the transaction was open to attack under the insolvent law or for actual fraud. We cannot regard the temporary parting with possession to the husband and son of some of the goods, under the circumstances disclosed, as inconsistent with an immediate and actual and continued change of possession. Under our law, the husband and wife are not one person in the sense that the possession of one is the possession of the other, or concurrent possession.

There is no conflict in the facts. The property was delivered to plaintiff, who was engaged in selling other similar property. The contract was between him and Mrs. Lucas. She had no understanding with her son James about it. No doubt, she felt greater confidence in parting with the property to plaintiff, knowing that her son would be employed to assist in the sale of the goods, but we cannot say from the fact that the son was employed by plaintiff that her three months' previous possession cannot be regarded as continued possession, under the statute. Lucas & Son continued in business after August 2d until in September, when they sold out en-

tirely to Lyons & Son, and gave up the store, and had no connection whatever with it. Lyons & Son continued until November 14th, when they sold out their fixtures and fittings to plaintiff; and he went into exclusive possession of the leasehold interest, and of the goods he put in. Both Lyons & Son and plaintiff published the change of proprietors in the usual way. The attaching creditor, Trafton, knew of these changes. We can see nothing in the statements made to him by Lucas, and in Lucas' failure to tell him of the sale to his wife, that should prejudice her rights, or as in the least bearing upon the question of change of possession or continued possession. The vendee knew nothing of these representations, and the vendors could not impeach her title by any such representations after sale to her. We think the employment of James Lucas by plaintiff did not in any just sense, under the facts in the case, indicate that there was not an actual and immediate and a continued change of possession of the goods from Lucas & Son to Mrs. Lucas. There is not the slightest evidence that he was there as a representative of the firm of Lucas & Son, and it is only because he was once a member of the firm that any such inference could be drawn.

2. Plaintiff offered in evidence an advertisement he had caused to be published in the Los Angeles Times on November 17th, announcing that he had purchased the jewelry business owned by S. Lyons & Son, "and will carry a fine stock of diamonds and opals; and J. H. Lucas, formerly of Lucas & Son, is now manager there." Plaintiff claims that it was relevant, as tending to show that the public was warned of the position occupied by James H. Lucas. Similar oral evidence was admitted to show Lucas' connection with the business, and we can see no reason why this public notice was not admissible.

3. The evidence offered by defendant, and objected to by plaintiff, of the report made to R. G. Dun & Co. in 1894 by Lucas & Son, was not admissible under any issue in the case. Actual fraud was not alleged. This evidence did not, as we can see, cast the faintest light upon the question of immediate and actual and continued change of possession of the goods sold long after the reports were made. Upon the essential facts in the case there is no substantial conflict, and hence the question as to whether there was such change of possession as satisfies the statute becomes one of law, and may be here reviewed. *Bell v. McClellan*, 67 Cal. 283, 7 Pac. 699; *Claudius v. Aguirre*, 89 Cal. 501, 26 Pac. 1077. The judgment and order should be reversed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.



122 Cal. 302

MCCABE v. JEFFERDS, Auditor. (Sac. 446.)  
(Supreme Court of California. Oct. 21, 1898.)  
COUNTY GOVERNMENT ACT—CONSTITUTIONAL LAW.

Whether the provision of Act April 1, 1897, § 170, relating to county governments, that the compensation of the public administrator of Tulare county was to be such fees as are now or may be hereafter allowed by law, was unconstitutional or not, because the last clause provided

that it should take effect immediately, it went into full operation and effect except as to salaried officers on June 1, 1897, as provided by the last section, since the unconstitutional clause giving said section 170 immediate effect was distinct from other provisions of the act, and could be stricken out without affecting it otherwise than to leave the time at which it should take effect to be governed by another provision of the same act.

Commissioners' decision. Department 2. Appeal from superior court, Tulare county.

Application for mandamus by J. C. McCabe against E. M. Jefferds, auditor. From a judgment awarding the writ, defendant appeals. Reversed.

F. B. Howard, W. W. Cross, and T. E. Clark, for appellant. C. G. Lamberson, for respondent.

HAYNES, C. Plaintiff is the public administrator of Tulare county. His term of office commenced January 7, 1895, and will expire on the first Monday in January, 1899. The defendant is the county auditor of said county, and this proceeding is prosecuted by the plaintiff to compel him to issue a warrant upon the county treasurer for \$83.33, the amount the plaintiff claims to be due him for his salary as such public administrator for the month of June, 1897. Defendant demurred to the complaint; the demurrer was overruled; and defendant answered. Plaintiff moved for judgment upon the pleadings; his motion was granted; and, from the judgment granting a peremptory writ of mandate, the defendant appeals.

Under the classification of counties by the county government act of 1893 (St. 1893, p. 384, § 162), Tulare was a county of the eleventh class, and the compensation of the public administrator in counties of that class was "such fees as are now or may hereafter be allowed by law." Under the county government act approved April 1, 1897 (St. 1897, p. 452), a new classification of counties was made, whereby Tulare county constituted the thirteenth class, and the compensation of the public administrator was therein declared to be (as before) "such fees as are now or may be hereafter allowed by law" (page 522, § 170, subd. 10); and by the last clause of said section it was provided: "This section shall take effect immediately." The concluding sections of the act (page 577) are as follows: Section 232: "All acts and parts of acts inconsistent with this act are hereby repealed." Section 233: "The provisions of sections 158 to 214, inclusive, of this act, so far as they change the compensation of any officer therein named, heretofore paid a fixed salary, or heretofore paid a fixed salary and commissions, and not fees or per diem, shall not affect incumbents, unless otherwise provided in any of said sections." Section 234: "This act, except as otherwise herein provided, shall take effect and be in force sixty days from and after its passage."

Respondent contends that the legislature, by

section 170, attempted to provide for the salaries of officers of the thirteenth class, but failed to do so, and that, therefore, the officers of Tulare county are entitled to the salaries provided for officers of counties of the thirteenth class by section 175 of the county government act of 1893, which was for the "public administrator one thousand dollars per annum." St. 1893, p. 421. His demand in this proceeding is based upon the theory that he is now entitled to that salary, instead of compensation by fees, as provided in the act of 1897. If we correctly understand respondent's contention, he bases the assertion that section 170 of the act of 1897 failed to provide for the salaries of officers of counties of the thirteenth class upon the last clause of said section, which purports to give it immediate effect; and this upon the ground that said clause "is special legislation and unconstitutional." I do not think it necessary to consider or decide whether that provision is unconstitutional or not, for, if it were, the whole act went into full operation and effect (except as to salaried officers) on June 1, 1897, as provided by the last section of the act; and respondent's demand is for his alleged salary for the month of June, 1897. It is therefore clear that he could have recovered his compensation for that month, as fixed by the act of 1897, unless it should be held that the clause giving said section immediate effect, being unconstitutional, vitiated the whole section. But it cannot be so held. This provision giving the section immediate effect is distinct and separable from all its other provisions, and may be stricken out without affecting it otherwise than to leave the time at which it should take effect to be governed by another provision of the same act. In *Cooley on Constitutional Limitations* (4th Ed. p. 215) it is said: "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section,—for the distribution into sections is purely artificial,—but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." Conceding, then, for the purposes of this decision, that the clause giving the section immediate effect is unconstitutional, and therefore void, that part of the section fixing the compensation of respondent and other officers is not affected thereby; and therefore, as to the respondent, whose compensation had not been changed, and was limited to "the fees allowed by law," the act took effect on June 1, 1897, and his compensation for said month was such only as is fixed by section 170 of the act of 1897, namely, such fees as were then allowed by law to



administrators. I advise that the judgment awarding a peremptory writ of mandate be reversed, and the proceeding dismissed.

We concur: CHIPMAN, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment awarding a peremptory writ of mandate is reversed, and the proceeding dismissed.

8 Cal. Unrep. 161

SPRIGG v. BARBER. (L. A. 311.)

(Supreme Court of California. Oct. 13, 1898.)

NEW TRIAL—STATEMENT ON APPEAL—SUFFICIENCY  
—REVIEW.

1. An order denying a new trial cannot be reviewed where the statement contains no specification of errors or the particular reasons relied on for the new trial.

2. On appeal from an order denying a new trial, the clerk cannot, by certificate, supply what is required to appear in the statement.

3. The notice of motion for a new trial constitutes no part of the statement on appeal, without being referred to in the statement as such.

4. Error assigned to the introduction in evidence of a judgment roll of another action can only be considered upon the review of the order denying a new trial.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

Action by Patterson Sprigg against C. L. Barber. From a judgment for defendant, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Withington & Carter, for appellant. Haines & Ward, for respondent.

CHIPMAN, C. Respondent submits, in limine, "that the record fails to disclose for review, either on the appeal from the judgment or from the order, any question arising out of any proceedings upon the trial, outside of the judgment roll, for the reason that the statement specifies no ground of alleged insufficiency of evidence, or of alleged errors of law argued before the court for the new trial." Judgment was entered March 20, 1896, and filed March 21, 1896. On March 28th plaintiff served notice of motion for a new trial. The transcript contains what purport to be minutes of the court, to show that on April 10th, the parties being present, plaintiff by his attorneys, and defendant in person, plaintiff moved the court to set aside the decision rendered March 20th, wherein judgment was given, and to grant plaintiff a new trial upon the grounds stated in the notice. The motion was made upon the minutes of the court, the record in the cause, and evidence taken. Motion was denied, and plaintiff excepted, and served notice of appeal April 17th. This part of the record (except notice of appeal) is not authenticated in any manner except by the clerk's certificate at the end

of the statement, and follows immediately after the judgment roll in the transcript. Then follows the statement, which was settled by the judge September 11, 1896. In the statement there is no copy of the notice of motion or its specifications, and no copy of the motion itself, and no reference made to them, and no specifications of error in any form. The statement contains only the evidence introduced at the trial, and the rulings of the court as they there occurred, the notice of appeal, and the clerk's certificate. The question is, can this court look beyond the judgment roll and the statement, and consider the motion and the grounds stated therein, and the specifications found with the notice of motion? These questions, we think, are answered in the negative in *Leonard v. Shaw*, 114 Cal. 69, 45 Pac. 1012. There, as here, there was a failure to embody in the statement any specifications whatever of the errors or particular reasons on which the moving party relied, and it was held that the motion could not be considered. The clerk certified, among other things, in the case now here, that certain original documents were of record and on file in his office "in said entitled case, \* \* \* to wit, judgment roll, notice of motion for new trial, order of court denying said motion, statement on appeal, notice of appeal, and service thereof." We do not think the clerk can supply by certificate what the law requires should be made to appear in the statement. The judge settles the statement, and in this case he certified to its correctness as it appears in the transcript. The clerk has no power to add to or take from that statement as thus settled. In *Leonard v. Shaw* it was said that, although the notice contained the required particular errors and objections relied upon, "this did not, however, obviate a specification of the errors and objections in the statement to be made in such cases after a hearing of the motion." This must necessarily be so, since the notice forms no part of the record. If appellant had made some reference to the notice and motion in the statement as constituting a part of the statement, and located or identified them at some place in the transcript so that it could be reasonably inferred that they formed a part of the statement as settled by the judge, this would, we think, have been sufficient; but without some such reference, or making them a part of the statement, this court cannot consider them.

Appellant's counsel say in their brief: "The language of the court in repeated cases would lead the practitioner to the conclusion that the place for the specifications was in the notice, and, if found therein, they had served their purpose, and need not be brought up in the record." In support of this statement we are cited to *Buckley v. Althorf*, 86 Cal. 643, 25 Pac. 134. That case held that, where a motion for a new trial is submitted on the minutes of the court, the

notice of the motion must specify the particulars wherein the evidence is claimed to be insufficient, and the errors of law relied upon; and that, failing in this, no subsequent statement is authorized, and, if made and settled, will not be considered on appeal. But it is nowhere intimated in the opinion that, having made the requisite specifications in the notice, they need not be restated in the statement. On the contrary, it was there said: "His motion for a new trial having been submitted on the minutes of the court, he could only bring to this court, on appeal, matters other than those appearing in the judgment roll, by bill of exceptions, or a 'statement of the case subsequently prepared'"; citing Code Civ. Proc. § 661. Subdivision 4 of section 659 prescribes that, if the ground of the motion, when made upon the minutes of the court, be for insufficiency of the evidence or errors of law, the notice must specify the particulars, failing in which the motion will be denied; but this subdivision does not dispense with the statement, or give the slightest intimation that the statement need not contain what subdivision 3 of the same section says the statement must contain, to wit, "the statement shall specify the particular errors upon which the party will rely." In *Re Westerfeld*, 96 Cal. 113, 30 Pac. 1104, cited by appellant, the question was only as to the sufficiency of the notice. *Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706, is also cited. That case would seem to be against appellant's contention. It was there held that the notice of intention to move for a new trial is not made a part of the record on appeal, and need not be embodied in the statement, or presented on appeal in any form, unless the respondent insists that it is insufficient. The notice was held to be the basis of the motion, "and that, upon the proper statement being filed, and the necessary motion made and passed upon by the court below, the notice has performed its functions, and is not a necessary part of the record on appeal, or to be presented in any form. When the case comes to us we look to the statement or bill of exceptions, and the specifications in which the court below is not sustained by the evidence, and the specifications of errors of law, as our guide in reviewing the case; and to these alone. If a question is presented by such specifications, and is properly saved in the statement or bill of exceptions, this court will look no further, but must presume that the question was properly presented to the court below, and passed upon in its rulings upon the motion for a new trial." *Southern Pac. Ry. Co. v. Superior Court*, 105 Cal. 84, 38 Pac. 627, is also cited. The opinion affirms *Pico v. Cohn* on the point as to the notice of intention above noted, and decides that the order denying the motion is deemed excepted to, and need not be embodied in the bill of exceptions. We find in the opinion no intimation that specifications of particular er-

rors may be dispensed with in the statement beyond this. We are unable to verify, from the decisions, the claim that this court has encouraged the belief that the only place for the specification of errors is in the notice. It seems to us that when it was held that the notice formed no part of the record the plain inference would be that the specifications must appear in the statement, for surely they should appear somewhere. Counsel claim that this court must presume, when the trial court has settled a statement showing the exceptions and the evidence pertinent thereto, that the ground was argued before the trial court. But this is to ask the court to supply by presumption what the Code says must be embodied in the statement. Code Civ. Proc. § 659.

2. Appellant claims that, even if the motion for a new trial cannot be considered, the whole case is open for consideration upon the appeal from the judgment upon the objection made by plaintiff to the introduction of the judgment roll as evidence by defendant in a certain case theretofore tried in the superior court of San Diego county. It was objected to by plaintiff as incompetent, irrelevant, and immaterial, and was admitted, plaintiff excepting. We are unable to see, and respondent fails to show, that this was more than an error of law occurring at the trial, which, like any other error arising in course of the trial, can only be heard upon a consideration of the motion for a new trial.

It results from the foregoing that the case is here on the judgment roll alone, and, as no question is raised as to the sufficiency of the findings to justify the decision, the judgment and order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

122 Cal. 284

ENGELBERT v. McELWELL et al. (L. A. 356.)

(Supreme Court of California. Oct. 15, 1898.)

MUNICIPAL IMPROVEMENTS—ACTION ON ASSESSMENT.

A complaint in an action to enforce a street-assessment lien must show a demand.

Appeal from superior court, San Diego county.

Action by J. Engelbert against Miles McElwell and another. Judgment was for plaintiff, and defendant McElwell appeals. Reversed.

V. E. Shaw, for appellant. Collier & Collier, for respondent.

PER CURIAM. Suit to enforce a street-assessment lien. The property sought to be charged was assessed to unknown owners.



The complaint does not show any demand on the premises. The court therefore erred in overruling the demurrer of the defendant. Judgment reversed.

122 Cal. 285

**FITCH v. BOARD OF SUP'RS OF CITY  
AND COUNTY OF SAN FRAN-  
CISCO. (S. F. 1,222.)**

(Supreme Court of California. Oct. 17, 1898.)

**MUNICIPAL BOARDS—FIXING WATER RATES—RE-  
MOVAL FROM OFFICE—CONSTITUTIONAL LAW.**

1. Under Const. art. 14, § 1, requiring water rates to be fixed by the governing boards of municipalities annually, by ordinances passed in February, to take effect July 1st, and subjecting any board failing to fix rates within such time to process to compel action at the suit of any party interested, and to such further processes and penalties as the legislature may prescribe, an ordinance passed after February is valid, though passed without process.

2. Const. art. 14, § 1, requiring water rates to be fixed by municipal boards annually by ordinances, passed in February, to take effect July 1st, and subjecting any board failing to fix rates within such time to process to compel action at the suit of any party interested, and to such further processes and penalties as the legislature may prescribe, does not authorize the legislature to remove supervisors from office for failure to pass such ordinances at the suit of any interested party, since article 6, § 20, requires the style of process to be "The People of the State of California," and all prosecutions to be conducted in their name and by their authority; and hence Act March 7, 1881 (St. 1881, p. 54), making supervisors so failing guilty of malfeasance, and subjecting them to removal from office "at the suit of any interested party," is so far invalid.

3. Act March 7, 1881 (St. 1881, p. 54), making supervisors failing or refusing to pass ordinances fixing water rates in February, to go into effect July 1st of each year, guilty of malfeasance, and subject to removal, was intended to provide a penalty for delinquency, and not to compel action by the supervisors, and hence was not authorized by Const. art. 14, § 1, subjecting supervisors so failing to process to compel action, and to such further processes and penalties as the legislature may prescribe.

4. A ratepayer is not a "party interested," under Act March 7, 1881 (St. 1881, p. 54), subjecting supervisors failing to fix rates in February, to go into effect July 1st of each year, to removal from office "at the suit of any interested party," where the rate was fixed after February, but before July, and the suit was not commenced until July 15th; since he was in no way injured by the failure to fix the rates in February.

In bank. Appeal from superior court, city and county of San Francisco.

Petition by one Fitch for the removal of the board of supervisors of the city and county of San Francisco. There was a judgment for plaintiff, and from the judgment and an order denying a new trial defendants appeal. Reversed.

G. W. McEnerney, E. S. Pillsbury, McGowan & Squires, and Henley & Costello, for appellants. W. T. Baggett and G. W. Schell, for respondent.

HARRISON, J. The constitution (article 14, § 1), after providing that the rates to be

collected by any person, company, or corporation for the use of water supplied to any municipality or its inhabitants shall be fixed annually by the governing body of such municipality, provides: "Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company or corporation collecting water rates in any city or county, or city or town, in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company or corporation to the city and county, or city or town, where the same are collected for the public use." Two courses of action are thus authorized to be pursued against the board of supervisors, or other governing body of the municipality, in case of its failure to pass such ordinances or resolutions as will enable any person or corporation to collect rates or compensation for the water supplied by it to the municipality, or its inhabitants therein, viz. a peremptory process to compel the board to pass the ordinances or resolutions, and a punishment for its failure to pass them. The first is given by the constitution itself, and may be invoked by any "party interested" without the necessity of any legislation therefor. The "party interested," who is thus authorized to invoke peremptory process to compel the board to pass an ordinance fixing the water rates, is a party who has an interest in having the rates fixed, and who would be injuriously affected if they were not fixed. The provisions that "the rates or compensation to be collected shall be fixed annually," and "shall continue in force for one year, and no longer," read in connection with the concluding sentence of the section, by which a company which shall collect water rates "otherwise than as so established" shall forfeit its franchises and waterworks for the public use, make it evident that the furnisher of water would be injuriously affected if the rates are not fixed, and is therefore a "party interested," who is entitled to such peremptory process.

The provision that the ordinance fixing the rates shall not take effect until July, although it is to be passed in February, is manifestly for the purpose of affording to the person or company supplying water ample time to adjust the individual rates for its consumers in accordance with the terms of the schedule fixed by the ordinance, and also to provide an opportunity, if necessary, in case the ordinance shall not be passed in February, to invoke process for compelling the board to pass an ordinance prior to July. The failure of the board to pass an or-

dinance in the month of February is by the terms of the section made a condition precedent to the right to ask for process to compel action by it, since it cannot be determined until after February has expired whether there will be a failure to pass the ordinance "within such time"; and, inasmuch as the right to process for the purpose of compelling action by the board cannot be invoked until after February, it must follow that an ordinance fixing rates, which is passed subsequent to February, is as valid as if it were passed in February, and that the rates fixed by such ordinance may be collected from the consumer, since the constitution would not authorize the issuance of process to compel action by the board if its action under such process would be vain and nugatory. Hence an ordinance passed subsequent to February without such process is equally valid as if passed under its mandate.

The provision in the section which renders the board "liable to such further processes and penalties as the legislature may prescribe," in case of its failure to pass the ordinances within the month of February, clearly indicates, not only that, in the absence of legislation, the board will not be liable to any penalty therefor, but also that it will be liable to only such processes and penalties as are within the power of the legislature to prescribe. In pursuance of this provision of the constitution, the legislature passed the act of March 7, 1881. St. 1881, p. 54. But, while the authority to prescribe a penalty for the failure of the board is referable to this section, the extent of the penalty and the proceedings for its enforcement must be in conformity with the legislative power elsewhere conferred by the constitution. Section 8 of this act is as follows: "Any board of supervisors or other legislative body of any city and county, city or town, which shall fail or refuse to perform any of the duties prescribed by this act, at the time and in the manner herein specified, shall be deemed guilty of malfeasance in office, and upon conviction thereof at the suit of any interested party, in any court of competent jurisdiction, shall be removed from office." To the extent that this section authorizes the penalty to be imposed "at the suit of any interested party," it is not within the provision of the above section of the constitution, unless it should be held that the provision for the penalty is a part of the process authorized to compel action by the board; but, after an ordinance has been passed, there is no occasion for invoking any process to compel action. The evident purpose of the section is to provide a penalty by way of punishment for the delinquency of the board. The term in which the delinquency is defined,—"malfeasance in office,"—and the declaration that, "upon conviction" of the delinquency, the board shall be deemed "guilty," and the penalty provided, "removal from office," all point to an offense

which has been completed, and are conclusive reasons for holding that the purpose of the section was not to compel action by the board, but to punish it for its failure to act. The provision in the section that the penalty may be imposed "at the suit of any interested party" is, however, inconsistent with section 20 of article 6 of the constitution, which is: "The style of all process shall be 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority." In whatever terms the failure of the board to pass the ordinance in February may be characterized, such failure, aside from the rights of a party who may compel action by the board, is an offense against the entire state, and not against any individual; and, under the above provision of the constitution, the legislature has not the power to authorize a prosecution for such offense in the name of and at the instance of any individual.

Moreover, irrespective of these considerations, the plaintiff herein is in no respect an "interested party" at whose instance the penalty may be imposed. He alleges in his complaint, as the basis of his right to maintain the action, "that said plaintiff is a citizen of the United States and of the state of California, and is, and for many years last past has been, a resident taxpayer, householder, and freeholder within the said city and county, and a user and consumer of water sold, distributed, and supplied by the Spring Valley Waterworks, a corporation, as hereinafter set forth, to said city and county and the inhabitants thereof, and therefore is interested in the rates or compensation collected and to be collected by said corporation for the use of water so supplied and to be supplied to said city and county of San Francisco and the inhabitants thereof." If it be assumed from the allegation that he is a user and consumer of water that he is also a ratepayer, it does not follow that he has any interest which authorizes a prosecution of the board for its alleged offense. It cannot be said that one citizen of the state or of the city more than another is interested in having a penalty inflicted for delinquency in official duty; and the use of the term "party interested," rather than "person," in the above section of the statute, indicates that the legislature intended the "suit" to be instituted by one who had some personal and individual interest in the subject-matter, and who had been injuriously affected by the failure to pass the ordinances. It is shown by the record herein that on the 2d of June, 1897, the board of supervisors did pass an ordinance fixing the rates to be collected during the year commencing on the 1st of July succeeding; and, as the present action was not commenced until the 15th of July, the plaintiff was not at that time a "party" in any respect interested by reason of the failure of the board to fix the rates in February. We have seen that an ordinance



fixing rates which is not passed until after February is as valid for the purpose of determining the rates to be collected as though passed in the month of February, and that the ratepayer is not interested in the time at which the ordinance is passed, provided there is at all times a legal ordinance under which he can know whether the amount demanded for the water supplied to him is correct. Prior to July 1, 1897, the rates to be paid by the plaintiff for the water supplied to him were fixed by the ordinance that had been passed in the previous year; and, on and after July 1st, they were fixed and capable of ascertainment by the ordinance passed on the 2d of June. It is not claimed that this ordinance is in any respect illegal, defective, or unjust; and, as the plaintiff was not therefore in any respect injuriously affected by the failure of the board to pass the ordinance in February, he was not an "interested party," within the meaning of the statute, and had no authority to institute the present proceeding. The court, therefore, when these facts were brought to its attention, should have dismissed the proceeding. The judgment and order denying a new trial are reversed, and the superior court is directed to enter an order dismissing the proceeding.

We concur: BEATTY, C. J.; VAN FLEET, J.; HENSHAW, J.; TEMPLE, J.; McFARLAND, J.

GAROUTTE, J. I have not concerned myself in the consideration of the question as to whether or not Fitch is a proper party to inaugurate this proceeding. My conclusion rests upon the broad proposition that the act is unsound legislation, and should be so declared. When this case was here some time ago, upon a preliminary proceeding, I had occasion to investigate the law bearing upon it, and gave my views in a few words as to the proper construction of the statute under which this prosecution is based. *Morton v. Broderick*, 118 Cal. 487, 50 Pac. 644. At that time I thought that the charge was essentially criminal, and, being so, no law could stand which punished innocent office holders because some other office holder may have been guilty of malfeasance in office. Upon such construction, the law impressed me as violative of fundamental principles, and necessarily unconstitutional. The time intervening since that decision was rendered has only served to more firmly convince me of the soundness of the views I then expressed.

As a civil proceeding, the judgment rendered can only stand upon the theory that the act of the legislature upon which the proceeding was based is in the nature of an act fixing the tenure of office of the various public officers of the state, whose duties under this statute demand the fixing of water rates in the month of February of each year. Such a

construction of the statute cannot be assented to for a moment. It is not an act purporting to fix or regulate the term of office, but rather an act to punish certain public officers for violation of official duty, by depriving them of the remaining portion of their terms of office. There is an express provision of the law declaring the official term of these officers to be two years. Construing this act as a tenure of office act would place it in direct opposition to this express declaration of the law. This statute was enacted under express authority and direction of that provision of the constitution of the state which declared that the legislature may prescribe penalties for a failure upon the part of boards of supervisors to fix water rates in the month of February. How can it now be held that the legislature, in pursuance of such authority granted by the constitution, passed an act fixing the tenure of office of the supervisors of the state? If such be the character and purpose of the act, it is neither authorized nor in line with this authority granted by the constitution. The fair, reasonable, and proper construction of the act is that the legislature, in pursuance of the authority and direction of the constitution, prescribed the penalty for failure of the supervisors to fix water rates as removal from office. This act would have been no more criminal in character if the legislature had prescribed the penalty for failure to fix the rates at imprisonment in the county jail for six months, or at a fine of \$500. It must be conceded by every one that the judgment of removal from office is a penalty. Yet all must recognize the fact that a penalty is but a punishment inflicted upon a wrongdoer. A party wholly guiltless cannot be made to suffer a penalty. And, if this removal from office is a punishment to be inflicted upon an officer for nonperformance of official duty, then this act is certainly not one pertaining to the tenure of office.

The legislature has the power to fix the tenure of office of the various county and municipal officers, and, in the exercise of such power, may declare the expiration of the term to take place upon the happening of some future event, which may or may not happen; but, if such event does happen, the office holder goes out of office, because his term of office has expired, under the law. His term has expired as absolutely as though the day fixed for its expiration had been known at all times. But there is no semblance of a penalty suffered by the office holder in such a case. No punishment is inflicted upon him. In other words, if the removal from office attaches as a penalty to the office holder, the act authorizing the removal can in no sense be treated as an act relating to the tenure of office. Again, there is nothing in the act in any way indicating that it was the purpose of the legislature to legislate as to the tenure of office of members of the boards of supervisors of the state. To the contrary, every paragraph, and almost every line, of the act, indicates that the

legislature intended by its provisions to punish supervisors by removal from office for failure to fix water rates in the month of February. The phrases "guilty of malfeasance in office" and "upon conviction," found in the act, are not harmless, innocent terms, and would be found in no act dealing with tenure of office. The attention of the court has been called to no act in this state or elsewhere, of general similar import, which has ever been construed as an act relating to the tenure of office. It is assumed there is none. A judgment that these supervisors have been guilty of malfeasance in office—and such is the judgment required to be entered by the act itself—cannot be justified under a purely innocent act relating to the tenure of office.

It is substantially conceded by counsel for respondent that, if the statute is essentially penal and the action essentially criminal, then this judgment cannot stand. That it is an act penal in character, that it is an act essentially and directly aimed at the punishment of supervisors for the nonperformance of official duty, must be conceded. Many reasons why the act does not contemplate a criminal action are suggested in the various briefs of respondent's counsel. These reasons are based largely upon the peculiar character of procedure to be followed. It is only necessary to say that every reason suggested was carefully considered in the very recent case of *Kilburn v. Law*, 111 Cal. 239, 43 Pac. 615, a case involving an attempt to remove the bank commissioners from office for the nonperformance of official duty. A single difference divides the two cases,—the fact that the prosecution was there commenced under section 772 of the Penal Code, and here brought under a general statute of the state. This difference is wholly insignificant. In that case it was declared that the proceeding was criminal, although it bore substantially all the marks of a civil action found in this case. As indicating that the particular character of procedure to be followed in a case like the present does not brand its character as either a criminal or civil action, it is sufficient to say that the constitution of the state (article 4, § 18), after providing for the impeachment of various state officers, declares: "All other civil officers shall be tried for misdemeanor in office in such manner as the legislature may provide." It is thus apparent that the doors are left wide open by the constitution for the legislature to provide for the trial of municipal officers for misdemeanor in office in any way that body may see fit. Under the very terms of the constitution, the power of the legislature in such matters is exclusive and supreme.

In conclusion, we find the principles involved in this case covered as by a blanket in the case of *In re Marks*, 45 Cal. 199. That case as authority has stood for a quarter of a century, quoted and approved by this court upon many occasions. It was the unanimous decision of the court,—a court composed of emi-

nent jurists. **Marks**, a harbor commissioner, was charged, at the instigation of a private citizen, with neglect of official duty, under an act of the legislature passed in 1853. In all essentials, the constitution of the state at that time was the same as we find it now. In its opinion, the court in that case, defining the scope of the act, declared: "It is provided in substance in the act of 1853 that any person holding any office in this state, who shall neglect to perform his official duty according to law, shall be deprived of his office." It will thus be observed that the act is mild and bland-like in its language, as compared to the act involved in this case, but at the same time it is equally apparent that it is entirely identical in principle. After exhaustive argument and consideration, the court there laid down certain principles of law which are absolutely controlling here. It was first decided that neglect of official duty amounted at common law to an impeachable misdemeanor in office, and upon conviction the officer must be removed. It is next declared: "There can be no doubt that the case made by the complaint is one directly within the provisions of the act of 1853. That act was designed to afford a remedy of a summary character against office holders who were guilty of extortion or neglect in the performance of official duty, and the case of *Marks* is brought by the complaint within the latter category." It is next declared: "The act of 1853 does provide how, in what manner, upon what procedure, in what court, officers not of the first class shall be tried for that misdemeanor in office known at common law and recognized in this statute as neglect of official duty. The power of the legislature to enact such a statute (under the latter clause of section 18) is plain,—as obvious as is the power of the assembly to prefer, and that of the senate to try, articles of impeachment under the first clause of the same section." It is next declared: "The power to remove certain officers for misdemeanor in office is exercised only by the assembly and senate under the name of impeachment. The like power to remove all other officers under like circumstances and for like causes is to be exercised 'in such manner as the legislature may provide.' The power to provide the manner in which a delinquent is to be tried in the second case is on a footing with the power to directly remove the delinquent by the judgment of the senate in the first case." In conclusion, and as absolutely controlling this whole question, the court declares: "It is the exercise by the district court of the power to remove from office upon conviction had, which is, in fact, the power of impeachment, and is impeachment in every respect except the mere form of procedure pursued."

It is thus apparent that the proceeding in the present case, upon principle and authority, is in all material respects a proceeding to impeach these municipal officers for a non-performance of official duty, by a procedure



laid down by the legislature under direct authority from the constitution; for that authority declares that these officers may be "tried for misdemeanor in office in such manner as the legislature may provide." The act before us provides a manner of trial for such officers. The proceedings under this act being in the nature of impeachment, it only remains to be said that the impeachment of a public officer for nonperformance of official duty is the highest form of criminal action. By this act of the legislature, nonperformance of official duty in fixing water rates in the month of February is declared to be malfeasance in office. These supervisors, under authority of this act, and by the judgment of the trial court, in effect have been impeached for malfeasance in office. The act provides that all supervisors comprising the board, innocent and guilty alike, must suffer such penalty of impeachment. In this very case the trial court declared that some of these defendants were wholly innocent of any violation of the law, and yet, in the face of that fact, removed them from office. The legislature has no power to pass an act visiting these serious consequences upon innocent men, and, as a necessary result, any act attempting to enforce such a power is unconstitutional. A determination as to the exact limits of the power of the legislature in declaring what acts of the individual shall constitute a crime is an interesting and possibly a difficult question, considered in the light of the constitution. But there is no difficulty in declaring, in the light of the constitution, that a legislature has no power to say that one man wholly innocent is guilty of crime, and shall be punished, because another man fails to perform his official duty. The power of the legislature reaches no such limit. It cannot be done under our form of government. I shall not concern myself in pointing out the particular provision of the constitution forbidding it. I find it between the lines. The whole spirit of the instrument denies the right to do it. I concur in the judgment and order of reversal.

(122 Cal. 296)

MITCHELL et al. v. COLGAN, State Comptroller. (S. F. 1,569.)

(Supreme Court of California. Oct. 18, 1898.)

REFORM SCHOOL—USE OF FUNDS FOR BUILDING PURPOSES—POWER OF TRUSTEES.

1. The provision of Act March 11, 1889 (St. 1889, p. 111), as amended by Act March 23, 1893 (St. 1893, p. 328), § 24, that money to be contributed by the counties of the state for the care and support of the inmates of the Whittier Reform School should be placed in the state treasury, in the "Whittier Reform School fund for the use of said institution," does not authorize the trustees to erect needed buildings therefrom, since the same section provides that the county funds were for "the keeping and taking care of each minor committed to said institution," and all the acts relating to the school divide the appropriations into two classes, one for buildings and equipment and the other for its support, and nowhere give

the trustees authority to erect buildings, except as specially empowered thereby.

2. The fact that the trustees of the Whittier Reform School, established by Act March 11, 1889, were, by section 3 thereof, constituted a body corporate and politic, with the right to exercise all the powers usually belonging to such corporations, does not authorize them to divert funds dedicated to particular uses to some entirely different use.

Commissioners' decision. Department 1.

Application for mandamus by Adina Mitchell and others, trustees of the Whittier State School, against E. P. Colgan, state comptroller. Denied.

John W. Mitchell, for plaintiffs. W. F. Fitzgerald, Atty. Gen., and W. H. Anderson, Asst. Atty. Gen., for defendant.

CHIPMAN, C. Petition for writ of mandate. The petition sets forth that by the act of March 11, 1889 (St. 1889, p. 111), as amended March 23, 1893 (St. 1893, p. 328), there was established for the use of the Whittier State School a fund, known as the "Whittier Reform School Fund," under which law there has been paid into the state treasury, to the credit of said fund, \$86,012.61, which will be increased by other payments to the sum of about \$125,000; avers the purposes of the school, and that there are now therein about 250 boys and 50 girls; that among the various buildings is one called the "Trades Building," which, as originally constructed, was for temporary use only, describes the building, and avers that by reason of its temporary nature, and the jarring of the machinery used therein, it has become dangerous, and liable to collapse, and has been condemned by a competent engineer, and to prevent injury to the life and limb of inmates a necessity has arisen to close and abandon the building; that there is no other building belonging to the school which can be used for the trade departments, and that these departments and buildings for their accommodation are necessary for the purposes of the institution, to provide for which plaintiff invited architects to furnish competitive plans for needed buildings, notices of such invitation being published in certain newspapers. For the advertising of notices plaintiff agreed to pay certain sums, and to the successful architects a first premium of \$4,000.50; to the other competing architects a second and third premium of \$150 and \$100, respectively. Claims duly verified for these amounts were presented to plaintiffs, and duly audited, allowed, and ordered paid out of the Whittier Reform School fund, and were duly certified to defendant as required by section 30 of the act of 1893, supra, and he was requested to draw and deliver to plaintiffs his warrant on the state treasurer payable out of said fund. Said claims were also presented to the state board of examiners, and the claims for advertising notices were allowed, and certified by said board to defendant, but the claims of the architects were not allowed by said board. The defendant refuses to draw his warrant for

any of said claims. Prayer that defendant be directed to forthwith draw and deliver his warrant to plaintiffs payable out of said fund. Defendant demurs to the petition for insufficiency of facts.

Plaintiffs claim that by section 24 of the acts referred to there was created a special fund in the state treasury, now designated as the "Whittier Reform School Fund"; that this fund is subject to any use to which plaintiffs may desire to apply it, if for the benefit of the institution; and that they have the power to expend this fund for the erection of needed buildings. Accordingly, plaintiffs proceeded under the act of April 1, 1872 (St. 1871-72, p. 925), as stated in the petition. As the power to erect the building is not conferred by this act, we must look to the acts creating the board in this case. It is claimed that this power is derived from the reform school acts, *supra*, and that by section 30 of the act of 1893 it is made the duty of the comptroller to draw his warrants for moneys expended by the board without reference to the board of examiners. This reform school was established by the act of 1889, *supra*, and has continued under that act and the amendatory act of 1893, *supra*. The act of 1889 appropriated \$200,000 out of the general fund of the state "for the erection, equipment and maintenance of the building or buildings and grounds of said reform school, as herein provided, for the two years commencing April 1, 1889." The act provided for the commitment to this school of infant boys and girls between certain ages, the expenses for their care to be borne equally by the state and by the county from which such infant is committed, the county money to be paid into the state treasury, and "paid directly by the state treasurer to the superintendent of the reform school for the use of said institution, as herein provided." Section 24. April 6, 1891 (St. 1891, p. 484), the legislature appropriated \$120,000, mainly for equipment of the various department buildings and other permanent improvements; and by another act appropriated \$60,000 "for the support of the Whittier Reform School" (General Appropriation Act, p. 502); having at the same session provided by still another act for a deficiency for like purposes of \$10,000 (Id. p. 131). March 23, 1893 (St. 1893, p. 296), the legislature appropriated \$100,000 for the erection of certain buildings and "improvements on the lands belonging to the state at Whittier," and some small expenses of the school; and also by a separate act appropriated for "support" \$106,000. Id. p. 192. By a further act it amended the act of 1889 in many particulars. Id. p. 328. There was no change made as to the division of expense between the state and county for maintenance of the inmates, except that it was provided that the amount to be charged to the county for the support of the minor was to be "exclusive of the use of the permanent

property of the institution"; and all moneys paid by counties were to be placed in the state treasury in the "Whittier Reform School fund, for the use of said institution," and were not to be paid to the superintendent by the state treasurer, as by the act of 1889. There is nothing in either act to indicate that the county funds were to be used to construct permanent buildings or make permanent improvements, but, on the contrary, much to show that the state was to provide all necessary buildings and equipment, and the counties to pay only one-half of the cost of the support or maintenance of the inmates, and each county was to pay only in proportion to the number of its commitments. The legislation, we think, shows quite clearly that it was to be a state institution, and its realty to be the property of the state; and the purpose was to furnish an asylum for the correction and reform of certain minors, for whose support and maintenance, and not for the erection of buildings, the counties were to contribute. *Cochran v. Los Angeles Co.*, 117 Cal. 534, 49 Pac. 570, was an action to recover for the care and keeping of children committed from defendant county. In all the acts of the legislature the appropriations made were of two classes, one for buildings and equipment and the other for the support of the school. Section 24 of both acts directs that the trustees, with the approval of the governor, shall "estimate and determine as near as may be the actual expense per month of keeping and taking care of each infant (minor), \* \* \* not including the use of the grounds and buildings." This is the method of ascertaining what the county shall pay, and it is the expense or cost of taking care of the inmates of which alone the county is to pay one-half. We can discover nowhere in any of the acts any authority given to the trustees to enter upon the erection of buildings except as they are specially empowered by the acts themselves, and out of the funds appropriated for building purposes. It does not appear from the petition that the trustees propose to use any unexpended building fund, or to erect any of the buildings referred to in any of the acts; nor does it appear that the funds on hand are any other than such as have been created for the care and support of the inmates. The act of 1889 required the county to pay into the state treasury, and the act of 1893 did the same, but provided that the fund should be designated and known as the "Whittier Reform School Fund"; but in both cases "for the use of said institution." Such use, however, we do not think can be made to include the erection of new buildings, for the act in terms provides that the county funds are for "the keeping and taking care of each minor committed to said institution." The general appropriation act of April 1, 1897 (St. 1897, pp. 363, 366), carries \$108,800 "for support of Whittier State School," and provides that



"not more than five hundred dollars of this money shall be used for permanent improvements," and points out how it shall be used. Of course, the word "support," as plaintiffs claim, may be said to mean "for the use of said institution"; but, conceding this, it does not, in our opinion, aid plaintiffs' construction. On the contrary, as we view it, it is strong proof that the legislature never intended to give the trustees unlimited power to divert the county and state money to the erection of buildings, which money was appropriated by the state and contributed by the counties for the "support" and the "care and keeping" of the children committed to the school.

It is claimed by plaintiffs that section 3 of the act of 1889 creates the trustees "a body corporate and politic," with the right "to exercise all the power usually belonging to said corporations," with the right "to receive, hold, use and convey or disburse moneys or other properties, real and personal," and with the "power to make contracts, to sue and be sued, plead and be impleaded"; whence it is contended that the trustees are endowed with "almost plenary powers for the control and direction of the assets and affairs of the institution," subject only to the exceptions in that section prescribed. One of these is "that they shall not have power to bind the state by any contract or obligation beyond the amount of the appropriations which may at the time have been made for the purposes expressed in the contract or obligation." Plaintiffs say in response to this provision that the contracts they have made and propose to make are "for the use of the institution," and do not exceed the amount of the fund on hand; and, as "use of the institution" includes the erection of buildings, the trustees are thus using the fund "for the purposes expressed in the contract or obligation." But this assumes that the terms "use of the institution" are as broad as claimed by plaintiffs, in which we cannot concur. These trustees are given no unusual and extraordinary powers. The fact that they are constituted a body corporate and politic, with the powers above stated, does not authorize them to divert funds dedicated to particular uses to some entirely different use. We cannot believe from anything expressed in the various acts that the legislature intended by the phrase "use of the institution" to say that moneys contributed by counties and appropriated by the state for the "care and keeping" of the inmates of this school and the "support" of the institution might be used to rebuild a structure. It may be that, should a building be destroyed by fire, or, as in this case, become unsafe and dangerous, and liable to collapse, and for that reason be abandoned, the usefulness of the school may thereby become greatly embarrassed; still we cannot find that the legislature has given the trustees power in such a case to divert funds provided for the support and maintenance of the

school to the erection of new buildings. A construction which would permit this use to be made of the county and state funds under the clause "the use of the institution" would be far more likely to lead to abuses than would the construction we give offer "the temptation of having the fund expended for extravagant maintenance and higher salaries," as suggested by plaintiffs. Besides, it would take from the legislature the power we think it has reserved to itself of determining what buildings the state requires for its public institutions. Our conclusion is that the Whittier Reform School fund referred to in the statutes cannot be resorted to by the trustees for the erection of buildings, and that the contracts made looking to that end were unauthorized. Whether claims such as are here involved should be presented to the board of examiners need not be, and is not, decided. The writ should be denied.

We concur: BELCHER, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the writ is denied.

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122 Cal. 305

**WHITE v. SOUTHERN PAC. CO.** (Sac. 450.)

(Supreme Court of California. Oct. 27, 1898.)

**RAILROAD—COLLISION—CONTRIBUTORY NEGLIGENCE.**

Plaintiff, driving at a walk, approached from the east defendant's railroad tracks, running north and south. On reaching the tracks, his view was interrupted towards the south by box cars blocking his passageway over the street to the width of about 15 feet. He looked and listened, and saw and heard no train approaching. His view towards the north was clear, and, if a train with an engine at its head had been coming from the south, he could have seen the smokestack of the engine. A person driving from the opposite direction, having a complete view towards the south, passed him, and did not indicate that a moving train was approaching. He then drove past the first track at the end of the box cars, and was injured by a freight train backing from the south, before he could avoid it. *Held*, that plaintiff was not guilty of contributory negligence.

Department 1. Appeal from superior court, San Joaquin county.

Action by James M. White against Southern Pacific Company. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

Dudley & Buck, for appellant. Nicol & Orr, for respondent.

GAROUTTE, J. Defendant appeals from a judgment and order denying its motion for a new trial. The action was brought to recover damages for personal injuries. Plaintiff was in the act of driving across the railroad track of defendant, when a train approached, and, in attempting to save himself from a collision, he was thrown out of



his vehicle, and injured. The matters involved in this appeal are few, and not of great importance. The negligence of defendant at the time of the accident is substantially conceded by its attorneys. Indeed, the testimony of its principal witnesses—employees—indicates a degree of negligence upon its part in the handling of its train of cars closely approaching recklessness. But, to defeat plaintiff's right of action, it is insisted that he was guilty of contributory negligence, and for that reason it is claimed the evidence fails to authorize and justify the verdict of the jury. By reason of this contention we are brought to an examination of the salient facts of the case. Plaintiff, in a one-horse vehicle, was traveling westward upon Market street, a well-traveled street in the city of Stockton. He arrived at Sacramento street, which intersects Market street, and extends north and south. This street is covered by various railroad tracks of defendant, and is used constantly for railroad purposes. When plaintiff approached Sacramento street, he found a detached train of box cars resting upon the track nearest to him. These cars extended to the south upon the street, and blocked his passageway over Market street to the width of about 15 feet. He passed over this first track at the end of these box cars, and at the moment his horse stepped upon the next track, which was but a few feet distant, a freight train, backing from the south, was upon him, and in his efforts to escape he was injured. There is some conflicting evidence as to the ringing of the bell of the engine at the time of the accident, or, to be more exact, it may be said there was some conflict in the evidence as to whether or not plaintiff heard the engine bell ringing. But we attach no special importance to this matter. The ringing of a bell or the blowing of a whistle upon a train that is traveling backward is calculated to deceive a traveler upon the highway. The distance of the alarm from the real point of danger well serves the purpose of lulling the traveler into a false sense of security. This is essentially true where the traveler upon the highway, by reason of obstructions near the track, cannot see the approaching train, and therefore is compelled to depend largely upon his sense of hearing alone. In this case a sight of the approaching train was entirely denied plaintiff by reason of the stationary cars and other obstructions. If he had heard the bell upon the engine, which even at the moment of the accident was distant more than 50 yards, he would probably have felt secure, and made the attempt to cross the track. And as matter of law this court would not say that it was contributory negligence, under such circumstances, to rely upon the alarm given by the bell, and attempt to cross. By reason of these views we attach little importance to the true solution of the contested fact as to whether or not the bell was ringing at the time of the accident, or whether

or not plaintiff heard the bell ringing, if it did ring.

Was the plaintiff, as a careful, prudent man, justified in attempting to cross the street at the time he made the attempt? He was driving one horse, hitched to a light vehicle. Upon arriving at the crossing, he traveled at a walk. He looked and listened. He saw no moving train. He heard no noise of an approaching train. He had a clear view towards the north, and there was no danger from that direction. His view towards the south was obstructed, but, if a train with an engine at its head had been coming from that direction, he would have seen at least the smokestack of the engine. A moment before he drove upon the track, a party driving from the opposite direction, having a complete view of existing conditions towards the south, passed over the track, and in no way indicated by his actions that a moving train was approaching. The foregoing facts appear by the evidence of the plaintiff, and many of them are corroborated by the evidence of other witnesses. Upon these facts the case was one eminently proper to go to the jury. As matter of law we cannot say this evidence discloses contributory negligence upon the part of the person injured. The other evidence in the record depicting the circumstances surrounding the accident may create a conflict as to certain facts, but it does no more, and therefore avails nothing in the consideration of a question similar to the one at bar. It is contended by appellant that the "physical facts and circumstances" absolutely disprove plaintiff's testimony in all essential respects. Counsel's argument directed to this point has not convinced us of the soundness of this contention.

There is no ground furnished by the two instructions, of which appellant complains, that demands a reversal of the judgment. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

(122 Cal. 260)

In re BYRNE'S ESTATE. (Sac. 478.)<sup>1</sup>

(Supreme Court of California. Oct. 8, 1898.)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—  
APPEAL—COMPENSATION—ATTORNEYS' FEES.

1. An administrator's expenses preliminary to applying for letters are not chargeable to the estate.

2. Where an item in an administrator's final account is allowed by the court, but inadvertently omitted from its order, it does not justify an appeal, since it could no doubt be corrected by calling the court's attention to it.

3. An administrator is entitled to traveling expenses necessarily incurred in legitimate efforts to preserve the estate, and properly incurred in distributing its assets.

4. The disallowance of an item in an administrator's final account for expenses claimed to have been incurred in efforts to preserve the estate will not be disturbed, where it was

<sup>1</sup> For opinion on rehearing, see 54 Pac. 1015

not clearly shown that the expense was necessary.

5. Where an item of \$20 in an administratrix's account for traveling expenses, claimed to have been incurred in preserving the estate, was cut to \$5; and it appeared by her own testimony that, for one trip which she made, no claim could be made, and that she had been separately allowed \$17.10 for a trip relating to the same matter; and it was not clearly shown that the expense incurred was necessary and proper,—the refusal to allow the full amount will not be disturbed.

6. Expenses of an administratrix in contesting an order for her removal, and in endeavoring to recover the appointment after the order was made, cannot be charged to the estate.

7. That an administratrix lives some distance from the county in which the estate is probated will not justify her burdening it with the fees of two attorneys.

8. Where litigation relating to administration was not complicated nor excessive, and the attorney first employed was competent, the reduction of the administratrix's claim for the services of an additional attorney will not be disturbed.

Department 2. Appeal from superior court, Placer county.

In the matter of the estate of Joseph Byrne, deceased, an order was made settling the final account of Maggie G. Barrett, administratrix, and she appeals. Modified.

W. B. Lardner (Geo. B. Merrill, of counsel), for appellant. Taber & Taber and Pollen & Wallace, for administrator. J. M. Fulweiler, for absent heirs.

**HENSHAW, J.** This is the appeal of Maggie G. Barrett from the order settling her final account as administratrix of the estate of Joseph Byrne, deceased.

1. The first rejected item is for \$7.70. It represents the railroad fare and expenses of appellant incurred upon a trip from San Francisco to Auburn, before she had applied for letters of administration, but when she was taking steps so to do. It was properly rejected. It has been decided that the compensation of an attorney to aid an applicant in securing letters, whether the application be successful or not, is no proper charge against the estate. In *re Simmons' Estate*, 43 Cal. 543. This item of expense incurred in the same manner stands upon no different plane.

2. For the same reason, the rejection of the second item, also for \$7.70, for traveling expenses in attending the hearing of the contest over letters of administration, was also proper.

3. This item of \$8.25 was allowed by the court in its findings, but, by some inadvertence, its allowance was not inserted in the order. If the attention of the trial court had been directed to the oversight, it would undoubtedly have been corrected. It should be allowed as of course, but the circumstances do not justify an appeal, since the administratrix should have first called them to the attention of the probate court.

4. The court retired this item of \$12.75. It represented the expenses of the administratrix in traveling from San Francisco to

Iowa Hill in her effort to dissuade Patrick Byrne, the only heir at law of the deceased residing in the state of California, from petitioning for the sale of a piece of realty belonging to the estate, and called the Irish and Byrne Mine. The administratrix was strongly opposed to parting with this property, and Patrick Byrne seems to have as strongly favored its sale. Upon his application, a sale was decreed, which decree, upon the administratrix's appeal, was set aside by this court, as having been based upon an insufficient petition. *Estate of Byrne*, 112 Cal. 176, 44 Pac. 467. The administratrix is entitled to her traveling expenses necessarily incurred in her legitimate efforts to preserve the estate, and properly incurred in distributing its assets. But we will not disturb an order rejecting such an item as this, except upon a clear showing that the moneys were thus necessarily and properly expended. Such a showing is not here made.

5. Of this item of \$20, but \$5 was allowed. In support of it, the administratrix testified that, when she went to Iowa Hill, she stopped at Mr. Watt's house. He accompanied her to the mine and other places. She sent him \$20 for his services and for her board. The first time she was there was when her intestate died. She supposed she stayed there altogether two days and more. It thus appears that one of these visits was before she was appointed administratrix, and still another when she went to dissuade Patrick Byrne from his attempt to procure an order of sale of the property. Moreover, in the succeeding item her expenses to Iowa Hill for one trip, aggregating \$17.10, were allowed. It may not be said that the court was not justified in thus refusing to allow the full amount.

6. This item of \$17.10 was allowed in the finding, and omitted in the order. It stands precisely as does item 3, *supra*, and, it is conceded, should be credited to appellant.

7. Item 7 is for \$20 expenses of George B. Merrill in visiting Auburn. Item 8 is for \$7.50 paid as clerk's fees in the supreme court upon filing the administratrix's application for a writ of prohibition. Item 9 is for \$100 moneys paid to George B. Merrill upon account of legal services rendered the administratrix. It was allowed for \$50. Item 10 aggregates \$78.80. It represents moneys expended for clerk's fees, printing, and the like in the matter of the administratrix's application for a writ of review, the decision in which will be found reported in 111 Cal. 154, 43 Pac. 519. Item 11 is for \$10, moneys paid as expenses to George B. Merrill to argue before the supreme court at Sacramento the appeal from the order of sale of real property. See *Estate of Byrne*, 112 Cal. 176, 44 Pac. 467. Item 12, for \$6.75; item 13, for \$66.95; and item 14, for \$22.10,—were incurred after the administratrix's removal from office. They represent, for the most part, expenditures made in her unsuccessful



attempt to secure her reinstatement. Item 15 is for \$600, the value of legal services rendered by W. B. Lardner as attorney for the administratrix. It was allowed for \$200. Item 16 is for \$1,800, the value of the services of George B. Merrill as attorney for administratrix. It was rejected in toto, saving that \$50 was allowed of the \$100 paid in item 9, *supra*. These items may be considered collectively. The expenditures represented by them were incurred under the following state of facts: The administratrix was not an heir of the deceased. She was the sister of his deceased wife. The only heir at law residing in the state of California was Patrick Byrne, a brother. The administratrix lived in San Francisco, while the estate was in probate in Placer county. She was opposed to selling the interest of the estate in the Irish and Byrne mine, which in reality was not a mine at all, but consisted of 116 acres of land patented under a mineral entry, but wholly undeveloped. Adjacent placer mines were being successfully worked, and she believed that by delaying the sale a much greater price could be obtained. Upon petition of Patrick Byrne, the estate's interest was ordered sold, notwithstanding the opposition of the administratrix. At that time W. D. Lardner was her attorney. He resided at Auburn, Placer county. No question arises as to his skill and ability to conduct all the proceedings and litigation on behalf of the administratrix. After the order of sale, the administratrix desired to appeal. She says she talked to Lardner, and did not think he favored an appeal, but Lardner offers no evidence pro or con upon the matter. Returning to San Francisco, she consulted Mr. Merrill. He made a trip to Auburn, for the expenses of which \$20 were charged in item 7, and rejected. Mr. Merrill examined the papers in the case, and consulted Mr. Lardner, with the result that an appeal was taken terminating in a reversal of the order for insufficiencies in the petition. Estate of Byrne, 112 Cal. 176, 44 Pac. 467. Both Lardner and Merrill appeared as attorneys of record in the appeal. The latter went from San Francisco to Sacramento, to argue it before the appellate court; and the claim of \$10 for his expenses upon that trip constitutes the rejected item No. 11. As to the need of employing Mr. Merrill, in addition to what has been said, the only further evidence in the record is that of the administratrix, who states that, since she resided in San Francisco, she thought she needed counsel in that city, as she could not have Mr. Lardner running back and forth.

After the appeal from the order of sale was perfected, the administratrix refused to carry out its terms. Upon a showing of this fact made to the court by the petitioning heir at law, Patrick Byrne, she was ordered to show cause, upon a day set, why she should not comply with the order. Without making any showing before the probate court, and without consulting Mr. Lardner, Mr. Merrill sued

out in the supreme court an alternative writ of prohibition, directed to the trial judge, to restrain the proceedings which it was alleged he was about to take and to order. Prior to this, however, the probate court had become convinced that the order of sale was suspended under the appeal, and had vacated the order to show cause, and dismissed the application upon which it was based. This was known to Mr. Lardner, who, in turn, notified Mr. Merrill. Notwithstanding, the judge was served with process from the supreme court under the application for the writ of prohibition; and, upon the day set for its hearing, his answer was presented, showing that long previously the proceeding in his court had been dismissed. The matter thus terminated in the supreme court by the discharge of the writ. Rejected item No. 8 is for fees in the matter of this application. The probate court holds that the expenses attending these matters were not proper charges against the estate, because the proceeding in the probate court would have been annulled if that court's attention had been directed to the authorities bearing upon the question; that, in fact, the court examined the authorities, and of its own motion dismissed the citation before the proceeding in the supreme court had been filed; and, finally, because appellant's attorney insisted upon serving the judge of the court with the citation from the supreme court, after knowledge that the proceeding in the probate court had been dismissed.

While the appeal from the order of sale was pending in the superior court, steps were taken against this administratrix which terminated in her removal, and in the appointment of another as administrator. After her removal, she unsuccessfully contested these orders and decrees under petition for writs of review in the supreme court. See *Barrett v. Placer County Superior Court*, 111 Cal. 154, 43 Pac. 519, and the unreported case of *Barrett v. Placer County Superior Court* (S. F. 539) 115 Cal. xvii., "Cases not Reported." <sup>1</sup> The other items above set forth represent expenditures that she made after she had been removed from office, and while she was contesting the order of removal. She had been required to give additional security upon her bond as an administratrix, and had failed to do so within the time limited in the court's order. Some of the charges represent expenditures which she incurred in her efforts to procure another undertaking. The court was certainly justified in its refusal to allow each and all of these items.

There is thus left for consideration the items of attorneys' fees. Of these, Mr. Lardner's charge, of \$600, is reduced to and allowed for \$200. Mr. Merrill's charge, amounting to \$1,400, is allowed for \$50. It is to be remembered that neither the personal representative in employing an attorney, nor the court in allowing compensation for that at-

<sup>1</sup> Reported in full in 47 Pac. 592.—Ed.

torney, is dealing with or expending any moneys of their own. They both stand in the position of trustees managing the property of the heirs at law or devisees, for their benefit, and for the benefit of the estate's creditors. It is their duty, as it is the duty of all trustees, to exercise the highest diligence and to limit the expenditures with a wise prudence and economy. They have no right to be liberal with the money of the heirs of the dead man. They have no right to incur, or to allow, any item of expense which would not be incurred by a prudent man in the proper management of his own affairs. Too often this court has viewed with grave perturbation the action of trial judges in allowing enormous fees to attorneys from moneys over which they were charged with the high duties of trustees. It has frequently expressed its extreme regret that, under the usual conflict of evidence upon the question, it has been unable to correct a manifest abuse. It is a new departure when, instead of the heirs complaining that their estates have been looted by excessive attorneys' fees, the attorneys themselves come before the court complaining of inadequate compensation. Every attorney should be fully and fairly paid for his services, having in mind their nature, their difficulty, the value of the estate, and the responsibility thus cast upon the counselor. But upon the other hand, as has been said before, no judge has the right to be liberal with the moneys of an estate. *Freese v. Pennie*, 110 Cal. 467, 42 Pac. 978. Circumstances might arise where the administrator would be justified in calling into consultation and in employing additional counsel; but the court in this case determined that no such necessity existed, and we are not disposed to question that conclusion. The fact that the administratrix resided some distance from the county in which the estate was probated did not justify her in burdening the estate with the fees of two attorneys. The court finds that Mr. Lardner, who was first employed, and who continued in the employment until the removal of the administratrix, was thoroughly competent to transact all the legal business necessary for the protection of the estate, and further declared that the legitimate business was not complicated nor excessive. By far the greater part of the services rendered by Mr. Merrill, it will be observed, was in unsuccessful attempts to retain for her her position, and to recover it for her after it had been lost. Where a personal representative has been removed for cause, it can scarcely be held that her attorneys' fees in preventing her removal should be made charges against the estate. For the rest, the court allowed Mr. Merrill \$50 for his services upon an appeal from the order of sale, while declaring that Mr. Lardner was fully able to have perfected the appeal, and prosecuted it to its outcome. We cannot say, under the circumstances, as matter either of law or fact, that the court should have award-

ed a greater sum. The order appealed from will be modified in accordance with the findings of the trial court in the indicated particulars. In all other respects it stands affirmed. Each party will bear his respective costs upon this appeal.

I concur: TEMPLE, J.

McFARLAND, J. (concurring). I concur in the judgment solely on the ground that the matter of compensation of attorneys was within the discretion of the court below, and that, under former decisions, a case is not here presented which warrants us to interfere with that discretion. Personally I think that the amount allowed Mr. Merrill for services as attorney was too small.

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The court in bank, upon rehearing, orders that the order appealed from be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. The appellant will recover her costs of appeal. In other respects the judgment of the department will stand.

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122 Cal. 260

In re BYRNE'S ESTATE. (Sac. No. 478.)  
(Supreme Court of California. Nov. 7, 1898.)

On rehearing by court in bank. Modified.

For former opinion in department, see 54  
Pac. 957.

PER CURIAM. The appellant in this cause petitions for a rehearing after judgment in department. As the appeal was submitted without oral argument, and has been reconsidered by the court in bank upon the briefs and petition, we have concluded to modify the judgment of the department without further delay in those slight particulars in which we think it is erroneous.

In addition to those items of the account which were approved by the findings, but omitted from the order settling the account, we are of the opinion that the charge of \$20, designated in the opinion heretofore rendered as "item 7," should have been allowed. The evidence does not support finding 36, upon which it was rejected. It appears very clearly and without contradiction in the evidence that Mr. Lardner, the local attorney at Auburn, was not in favor of appealing from the erroneous order directing the sale of the real estate, and that the administratrix was in favor of appealing. She consulted Mr. Merrill, whose advice coincided with her views, and he took and successfully prosecuted the appeal. Whatever advantage accrued to the estate from the reversal of that order was due to Mr. Merrill's professional services. To enable him to perform these services intelligently and properly, a visit to Placer county, where the estate was in process of administration, and where the papers and records were, was proper and expedient. The reversal of the order of sale entirely justifies the appeal and every step taken in its prosecution, irrespective of the claim that the estate profited largely by the postponement of the sale.

For the same reasons, the charge of \$10, designated in the department opinion as "item 11," ought to have been allowed. Finding 45, that it was unreasonable and unnecessary, is not supported by the evidence. The allowance to Mr. Merrill of only \$50 for his services in prosecuting that appeal is certainly extremely meager, and far less than the sum we should have been willing to approve; but there is no ground upon which we can hold that the superior court abused its discretion in fixing his allowance in that amount.





the value thereof. Section 1476 limits the value of a homestead selected by the debtor to \$5,000, and provides for a division and sale thereof in case it exceeds that sum. *Held*, that premises exceeding \$5,000 in value, selected by insolvent, cannot be set apart as his homestead.

2. Code Civ. Proc. § 1476, limiting the value of a homestead created by declaration made and recorded to \$5,000, and providing for a division and sale thereof in case it exceeds such sum, applies only to homesteads created by declaration made by the debtor and recorded.

3. In determining the value of premises set apart as a homestead, incumbrances thereon cannot be deducted.

McFarland, J., dissenting.

In bank. Appeal from superior court, Santa Clara county.

John B. Herbert, an insolvent debtor, petitioned to have part of his property set apart as a homestead, and from an order so setting aside certain property the assignee of insolvent appeals. Reversed.

Jas. R. Lowe and Chas. Clark, for appellant. J. R. Welch, for respondent.

GAROUTTE, J. John B. Herbert, an insolvent debtor, applied to the court for an order setting apart a homestead; a declaration of homestead upon the property sought to be set apart having been duly made and recorded prior to the insolvency proceedings. Upon the hearing the court found the value of the homestead property, both at the time that the declaration of homestead was filed and at the date of the hearing, to be \$10,000, and that mortgage liens rested upon the property to the extent of \$5,500. Based upon these facts, the court made an order setting apart the premises as a homestead. The assignee of the insolvent's estate now attacks the validity of this order upon the ground that the court had no power to set apart a homestead of the value of \$10,000.

Section 60 of the insolvent act of 1880 provides: "It shall be the duty of the court \* \* \* to exempt and set apart for the use and benefit of said insolvent such real and personal property as is by law exempt from execution; and also a homestead in the manner as provided in section 1465 of the Code of Civil Procedure." Section 1465 authorizes the homestead selected, designated, and recorded to be set apart, and it is the duty of the court to make the order when application is made; but this section is silent as to whether such homestead can be set aside if of greater value than \$5,000, and the insolvent act, as well, makes no provision for such a case. Section 1476, Code Civ. Proc., provides, however, that, if the homestead "as selected and recorded be returned in the inventory appraised at more than five thousand dollars, the appraisers must before they make return ascertain and appraise the value of the homestead at the time the same was selected, and, if such value exceeded five thousand dollars \* \* \* the appraisers must determine whether the premises can be divided without material injury"; if they can, they must pro-

ceed to admeasure and set apart a portion not to exceed in value five thousand dollars; otherwise provision is made for sale. By virtue of the foregoing sections of the Code, the homestead of the insolvent debtor should be dealt with exactly like that of a deceased person. If Herbert had died, and this application had been made to the court in probate to set apart the homestead, the course to be followed by the court is clearly outlined by these sections of the Code; and under the authority of these sections the court would have had no power to set apart these premises as a homestead, but either should have required a portion thereof to be set apart, or, if such course had been deemed impracticable, then have ordered a sale of the entire property, with the direction that the proceeds be applied as provided in section 1476. The insolvent act substantially declares that the probate procedure should be followed in a case presenting the facts here disclosed, and under such procedure the action of the trial court in this case was not justified.

It is contended upon the part of respondent that section 1476, supra, does not apply to homesteads created by declaration made and recorded. This contention is unsound. The section applies alone to such character of homesteads. Again, the fact that mortgage liens amounting to \$5,500 rested upon the homestead property was a matter wholly immaterial. In fixing the valuation of the homestead premises, liens or incumbrances of any character are not an element entering into the question. For the foregoing reasons the order is reversed, and the trial court directed to proceed in accordance with the views here expressed.

We concur: TEMPLE, J.; HENSHAW, J.; VAN FLEET, J.; HARRISON, J.

I dissent: McFARLAND, J.

122 Cal. 332

HENDERSON v. HART. (Sac. 358.)

(Supreme Court of California. Nov. 18, 1898.)

REPLEVIN—AMENDING COMPLAINT—CONVERSION—REOPENING CASE—EXECUTIONS—WRITTEN CLAIMS OF THIRD PERSONS—FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION—EVIDENCE—DECLARATIONS OF SELLER.

1. In replevin, where it is shown that defendant wrongfully disposed of the property before the commencement of the action, it is not an abuse of discretion, after the evidence is closed, to permit an amendment so as to support a recovery for the conversion of the property, where it is not shown that plaintiff knew, when the action was brought, that defendant no longer had possession of the property.

2. It is proper to refuse defendant's motion to reopen a replevin case in which the complaint was amended at the close of the evidence so as to support a recovery for conversion, where defendant fails to show or even claim that any evidence exists, in addition to that before the court, which is relevant to the case as it stands on the amended complaint.

3. A written claim of property in goods about to be levied on under execution, which states the claimant's "grounds of title," pursuant to Code Civ. Proc. §§ 549, 689, to be by purchase from S. and the judgment debtor, is not defective, as indicating a purchase from said persons jointly.

4. The seller's possession of hogs when they were levied on does not show a want of immediate and continued change of possession, where such possession was as an agister for hire on leased premises different from those on which the hogs had ranged before the sale.

5. Declarations of a seller concerning the sale are inadmissible against the buyer, where made after the sale, when not in possession of the property, and when the buyer was not present.

Commissioners' decision. Department 1. Appeal from superior court, Tehama county.

Replevin by Mary E. Henderson against Wilson Hart. From a judgment for plaintiff, and from an order refusing to reopen the case, defendant appeals. Affirmed.

Johnson & Chase, for appellant. A. N. McCoy and H. P. Andrews, for respondent.

BRITT, C. 1. In its original form, this was an action in the nature of replevin to recover possession of 146 head of swine, alleged to be the property of plaintiff, and wrongfully taken and withheld by defendant. In his answer, besides denying generally the allegations of the complaint, defendant justified the taking in his capacity of township constable under a writ of attachment issued in a certain suit against one W. M. Ham. He alleged that the hogs were the property of said Ham, and also that before the commencement of this action he had sold them under execution to satisfy the judgment obtained in said suit against Ham, and delivered possession thereof to the purchaser. At the trial the defendant's averments concerning the sale of the animals under process, and that he had not possession thereof at the commencement of this action, were established by proof. After the evidence was closed, but before the final submission of the case, by leave of the court granted over defendant's objection, plaintiff amended her complaint so as to transform the action virtually into one of trover, charging defendant with converting the property, and claiming damages accordingly. On defendant's request it was ordered that the answer to the original stand as the answer to the amended complaint, and defendant then moved the court to set down the cause for trial on the issues thus raised. The record shows that this motion "was heard on the papers and evidence in the case," and was denied. It was not an abuse of discretion in the court to allow plaintiff to amend her pleading so that it might support a recovery for the conversion of the property, when it was shown that she could not have judgment for its possession because defendant had disposed of the same before the action was begun. *Riciotto v. Clement*, 94 Cal. 105, 29 Pac. 414. If it appeared that plaintiff knew when she brought



her action that defendant no longer had possession of the property, the conclusion might be different, but it was not shown that she had such knowledge. Nor did defendant, in support of his motion to reopen the case, show or even claim that any evidence existed, in addition to that already before the court, which was relevant to the case as it stood on the amended complaint. On the contrary, he submitted his motion on the papers filed and evidence previously taken. The court could not assume that additional evidence was at his command. Its denial of the motion was therefore not improper.

2. While the hogs were yet held by defendant, plaintiff served on him a verified written claim thereto, pursuant to sections 549, 689, Code Civ. Proc., in which "the grounds of her title" were stated as follows: "Affiant acquired title to said property by purchase of certain hogs on or about April 1, 1895, from E. W. Saunders and W. M. Ham; and the said hogs levied upon are the same so purchased, and the increase of the same," etc. At the trial it appeared that she had bought some of the animals from Saunders, and others from Ham; and it is objected that the statement in said verified claim is defective and false, in that it indicates a purchase from those persons jointly. We consider that the statement sufficiently apprised the officer of the source of plaintiff's title, whether she had acquired all the hogs from Saunders and Ham jointly, or some from each of them severally. *Dubois v. Spinks*, 114 Cal. 289, 46 Pac. 95; *Marble Co. v. Brow*, 109 Cal. 241, 41 Pac. 1031.

3. It is urged that the sale of hogs by Ham to plaintiff was not accompanied by immediate and continued change of possession. It seems unnecessary to detail the evidence on this point. The animals were in Ham's custody when attached, but he had them, together with hogs of other persons, as an agister for hire, not on the premises where they ranged before plaintiff bought them, but on lands he rented for the temporary purpose; and there was evidence of such previous delivery and continuous change of possession as, in our opinion, sustains the finding in plaintiff's favor. See *Levy v. Scott*, 115 Cal. 48, 46 Pac. 892, and cases cited. Defendant sought to prove a declaration of said Ham, made some months after the purchase of the hogs by plaintiff, to the effect, as defendant understands it, that he was yet the owner of them; but the statement was not uttered in the presence of plaintiff, nor when the hogs were in Ham's possession, and was rightly excluded from the evidence. *Cahoon v. Marshall*, 25 Cal. 198, 202. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

6 Cal. Unrep. 165

BANK OF LEMOORE v. GULART et al.  
(Sac. 460.)

(Supreme Court of California. Nov. 18, 1898.)

CONTRACTS—ALTERATION—CONSTRUCTION—ASSENT.

1. B. agreed in writing with R. to pay a note of R. and G. out of the proceeds of sheep mortgaged to B. by G. B. telephoned the payee that he had agreed to pay the note, and asked for 30 days' extension, which was granted on consideration of his promise. He sold the sheep, and shortly after "guaranteed full payment," and asked for another extension, and subsequently paid some interest. The sheep were attached in an action against G., and, to secure their release, B. paid the attachment debt, after deducting which, and expenses, the proceeds of the sheep were insufficient to pay the note. *Held*, that B. had obligated himself unconditionally to pay the note in full, and had not limited his liability to the proceeds remaining after all claims against the principal were satisfied.

2. Where a person who agreed to pay another's note, which was payable to a bank, telephoned the cashier that he had agreed to pay it, and thereby secured an extension, the bank's acceptance of the new agreement is inferred.

3. An agreement of the maker of a note, restricting the liability of one who had promised to pay it, is ineffectual, as against the payee, where it was made after the payee had accepted the promise.

Commissioners' decision. Department 1. Appeal from superior court, Kings county.

Action by the Bank of Lemoore against Manuel S. Gulart and others. From a judgment for plaintiff, defendant Joe D. Biddle appeals. Affirmed.

H. L. Smith, for appellant. M. J. Short, for respondent.

BELCHER, C. This is an action to recover the amount due on a promissory note for \$600 executed by defendants Gulart and Rose to the plaintiff on November 22, 1892, payable six months after date, and bearing interest at the rate of 1 per cent. per month. It is alleged in the complaint that on July 24, 1893, defendant Biddle signed and delivered to defendant Rose a written agreement whereby, for a good consideration expressed therein, he promised and agreed to pay to the plaintiff the said promissory note sued upon, out of the proceeds of a band of sheep that day mortgaged to him by defendant Gulart,—the payment to be made in about 30 days, or as soon as the sheep should be sold; that on or about the same day plaintiff agreed to and did accept the promise made by Biddle to pay the said note, and that Rose performed all the conditions of the said agreement to be by him performed; and that the said sheep were delivered to Biddle, and had long since been sold by him, but he had not paid any part of the principal of the said note, or any of the interest due thereon, except the sum of \$40, which was paid by him about February 3, 1894. Rose answered, admitting all the averments of the complaint, and alleging that shortly after the execution and delivery of the said agreement the plaintiff, for a good and sufficient consideration,

promised to and did release and discharge him from all liability for or on account of the said note, or any part thereof. Biddle answered, denying his liability upon the said agreement, because Rose and he had, subsequent to the execution thereof, entered into other agreements which took the place of the one sued upon, and which had been fully executed by him before the commencement of this action, and that, if liable to the plaintiff for any sum, it was for \$121.35 only; that being the amount of the proceeds of the sale of the sheep mentioned in the said agreement. The cause was tried by the court without a jury, and the court found, among other things, that all the allegations of the complaint were true, and all the allegations and denials of the said answers were untrue. Judgment was accordingly entered in favor of the plaintiff and against the defendants Rose and Biddle for the amount claimed in the complaint. From that judgment Biddle alone appeals, and the case is brought here on the judgment roll and a bill of exceptions.

Appellant contends that the findings were not justified by the evidence, but we think they must be sustained. By the agreement of July 24, 1893, appellant promised unconditionally to pay the note in suit to the plaintiff out of the proceeds of a band of sheep, when they were sold; and on or about the same day he called up, by telephone, D. O. Carr, the cashier and secretary of the plaintiff bank, and told him that he had made an agreement by which he agreed to pay the note of Rose and Gulart (the note in suit), and that he would pay the interest up right away, and would like 30 days on the note. In answer, Carr told him that, in consideration of his saying he intended to pay the note, they would not press the matter for 30 days. And Carr testified: "What caused me to extend the time to pay the note was the fact that Joe D. Biddle agreed to pay it." Appellant sold the said sheep in September, 1893, for \$1,875, and on December 16, 1893, he wrote to the Bank of Lemoore, saying: "Say, Friend Carr. \* \* \* Can't you let the note run, say, a little longer? Will send you the interest, and pay up at once. The note is strictly A 1. Will guaranty full payment." And about February 3, 1894, he paid \$40 on account of the interest due on the note.

It is claimed, however, that, if appellant is liable to the plaintiff to pay the note sued upon, the extent of his liability is the proceeds of the sale of the sheep, and that by the word "proceeds," as used in the agreement, was meant the net sum remaining after all other claims against them should be satisfied; that, at the time the said agreement of July 24th was executed, the said sheep were the property of Gulart, and were held by the sheriff under a writ of attachment issued in an action commenced against him by one Dickey; that, to obtain possession of the sheep, appellant had to and did pay the claim of Dickey, amounting to about the sum

of \$1,300; and that the expense of keeping the sheep from the time he received them until the sale, and the expense of the sale, amounted to the sum of \$454, leaving in his hands, as the net proceeds of the sheep, the sum of \$121.35, for which sum only he could be held liable. The obvious answer to this position is that when appellant signed the agreement to pay the said note, and telephoned Carr that he had made an agreement by which he was to pay it, he knew of the attachment and the conditions under which the sheep were held, and yet placed no limitation or restriction upon his liability to pay the note in full; and that he did not then mean that the "proceeds" should be what might be left after paying off Dickey's attachment claim is quite conclusively shown by his letter of December 16th, by which he admits his liability to pay the note, and expressly guaranties full payment thereof. It therefore, we think, clearly appears from the evidence that appellant obligated himself unconditionally to pay to the plaintiff the full amount due on the said note; and the court having, in effect, so found, the findings cannot be disturbed on this ground.

Appellant also contends that there is no evidence to support the finding that the agreement of July 24, 1893, was accepted by plaintiff on or about its date. Carr testified that for nearly six years he had been the cashier and secretary of the plaintiff corporation, and that he extended the time to pay the said note at appellant's request, and because he had agreed to pay it. The cashier of a bank is an executive officer thereof, and is charged with large powers and duties in the management of its financial business, and "notice to the cashier of a bank relative to any matter falling within the scope of his official employment is notice to the bank." Boone, Banking, § 134. It appears, therefore, that Carr, as cashier, had notice of the said agreement, and acted upon it in granting the extension, and this notice must be held to be notice to the bank. Under these circumstances it should be assumed, in the absence of any evidence to the contrary, that the bank knew of and approved the action of Carr in regard to the note, and also knew of and accepted the agreement.

Appellant further contends that the court erred in certain rulings upon the admission of evidence. When appellant was on the stand as a witness in his own behalf he testified that in August, 1893, the said sheep were held by the sheriff under attachment issued in the suit of Dickey v. Gulart, and that he released the attachment by paying Dickey's claim of about \$1,300, and that at the time he paid the said claim he received the sheep from the sheriff, and thereafter kept them until some time in September, when he sold them. He was then asked by his attorney: "What agreement, if any, did you have with Gulart and Rose in regard to the repayment of money which you paid to Dickey for the



release of the sheep from the attachment?" Plaintiff objected to the question as irrelevant, incompetent, and immaterial, and a variation of a written contract, and the objection was sustained. The attorney then said: "I offer to show by this witness that on August 22, 1893, the time he paid the thirteen hundred dollars to release the sheep from the attachment in the case of Dickey v. Gulart, it was agreed between Rose and Gulart and this witness that if the witness, defendant Biddle, would pay the money to release them from the attachment in the case of Dickey v. Gulart, that when the sheep were sold he could retain out of the proceeds of the sale the amount of money which he paid for the release of the attachment, and that he could also retain out of the proceeds of the sale the amount of money which it cost to run the sheep, and the amount of money to cover the expense of the sale, and the balance of the proceeds were to be applied in satisfaction of the contract of July 24, 1893." Plaintiff objected also to this offered evidence, upon the ground that, if received, it would be irrelevant, incompetent, and immaterial, and a variation of a written contract; and the objection was sustained. The rulings complained of were, in our opinion, proper, and should be sustained. Having entered into an agreement in July to pay the note to the plaintiff, and that agreement having been accepted and acted upon by the plaintiff, appellant could not in August, without the knowledge or consent of plaintiff, make any new agreement with Rose and Gulart whereby his liability to plaintiff would be limited, changed, or modified in any respect. And that appellant did not himself consider that he had to any extent been released from his obligation to the plaintiff to pay the note is shown by his letter of December 16th, in which he again guarantees the full payment of it. The record, in our opinion, discloses no valid ground for reversal, and we advise that the judgment be affirmed.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

122 Cal. 308

IRISH v. SUNDERHAUS et al. (Sac. 356.) (Supreme Court of California. Nov. 9, 1898.)

ASSIGNMENTS—PURPOSE—SUFFICIENCY OF TRANSFER—PLEADING—REVIEW.

1. Plaintiff, suing as an assignee, alleged that the claim sued on was assigned to him before the commencement of the suit, but did not aver that he was then the owner. *Held* that, in the absence of a special demurrer and after judgment, the pleading should be sustained.

2. In an action against the stockholders by an assignee of claims against the corporation, defendants claimed that one E. had purchased the claims and released them. E. and one S., attorney for the creditors, entered into an agreement, whereby S. was to become the

owner of the claims by assignment, and, on payment of a consideration, transfer them and the corporate assets to E. The contract was not carried out, but at E.'s request S. sold the assets of the corporation, and received and applied the money according to the agreement, which defendants claimed was a substantial compliance therewith, and entitled E. to the transfer of the claims. *Held* that, even if E. became the equitable owner, defendants, to sustain their claim, must show that S. was able to perform his part of the agreement.

3. An attorney for creditors of an insolvent corporation procured assignments of their claims, which he transferred. The creditors were not told when the attorney procured the assignments that he intended to transfer the claims. No creditor supposed that by his assignment he was doing anything more than enabling his attorney to realize the value of the claims. *Held*, that a finding that the assignments were made for collection only would not be disturbed.

Department 2. Appeal from superior court, Sierra county.

Action by John B. Irish against John Sunderhaus and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

F. R. Wehe, for appellants. John B. Irish, in pro. per.

TEMPLE, J. This action was brought against the stockholders of a corporation by plaintiff as assignee of certain claims of creditors. In the complaint, after setting out the debt of each creditor, and after an averment that the debt is still due and unpaid, plaintiff avers "that said claim was duly assigned to this plaintiff before the commencement of this action," but it is not averred that he is still the owner of the assigned claim. The complaint was not demurred to, but appellants in this court for the first time object that the complaint in that respect fails to state a cause of action, and *Holly v. Heiskell*, 112 Cal. 174, 44 Pac. 466, is relied upon as authority. That was an action of "claim and delivery," and it was held that the complaint must show that the plaintiff was entitled to the possession at the time of the commencement of the action; and it was said: "It is not sufficient to merely aver that he was the owner or entitled to the possession at some period prior to that time." *Williams v. Ashe*, 111 Cal. 180, 43 Pac. 595, is referred to. In that case the averment was to the effect that "on and after a day named plaintiff was the owner," etc. The cases of *Affierbucker v. McGovern*, 79 Cal. 268, 21 Pac. 837, and *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750, are differentiated from that case as follows: "But in both of these cases the radical error was in pleading ownership upon a day certain, and upon no other day, and there was no implication which could be construed as a pleading of continued ownership or right of action at the time of the commencement of the suit." The complaint was held to be not obnoxious to a general demurrer, because "there is still by fair intendment to be gathered from the complaint that he claimed ownership and right of pos-

session at the time of the commencement of his action. *Amestoy v. Transit Co.*, 95 Cal. 311, 30 Pac. 550; *Alexander v. McDow*, 108 Cal. 25, 41 Pac. 24."

Unless they can be placed upon the proposition that averment of ownership upon a day named rebuts the presumption of continuance, the cases relied upon are inconsistent with the cases cited in the above quotation. If plaintiff had proven an assignment to him prior to the commencement of the action, he would not have been required to show the negative fact that he had not subsequently parted with his title. The presumption is a rule of evidence, and cannot take the place of an allegation of an essential fact. Therefore, before a special demurrer, such a pleading would be found wanting. But after judgment, or upon a general demurrer, if the facts are found in the complaint, though not logically stated, the pleading will be sustained. Plaintiff's ownership is, by "fair intendment," shown at the time the action was commenced.

The stockholders in answer aver, in substance, after denying plaintiff's ownership of the claim, that one Henry Epstein had purchased all of the claims sued upon, and after suit brought, but before the answer was filed, had released all the stockholders from such indebtedness. In proof a written contract between Epstein and one F. D. Soward, dated September 21, 1895, is shown. In this contract it is recited "that Soward was attorney for the petitioning creditors in the insolvency of the Alaska Milling & Mining Company, and attorney in fact for all the creditors who have filed claims; that Epstein, party of the second part, desired an option for sixty days to purchase and become the owner of said claims." The party of the first part agreed "to become the owner by assignment and transfer of all said claims," and, in consideration of \$8,000, "to execute and deliver to said party of the second part good and sufficient assignments, transfers, and conveyances of all said claims," and to pay costs of the proceeding, and at the option of the party of the second part to procure a dismissal of the proceeding in insolvency or a sale of the assets by the assignee and a conveyance to Epstein. As soon as Soward should procure transfers to himself of the claims, "and upon the execution and delivery by said party of the first part of a good and sufficient agreement of said party of the first part agreeing to transfer to said party of the second part the claims," Epstein was to pay to the party of the first part \$500, upon which payment the party of the second part was to have the option for 60 days to become the owner of all said claims, upon paying the remaining \$7,500. Before that time, however, Soward was to perform all the conditions of the contract and of the additional agreement to be made; it being understood that these were conditions precedent to the payment of the \$7,500 by Epstein. Yet it was "distinctly understood and agreed" that Epstein "shall in no respect be

obligated to pay said sum of seventy-five hundred (\$7,500) dollars, but that the payment of said sum of seventy-five hundred (\$7,500) dollars shall be optional with said party of the second part, and that said payment of five hundred (\$500) dollars is made in consideration of the option and privilege hereby given." Attached to the written instrument are exhibits containing lists of the claims and demands referred to, followed by an agreement signed by Soward to the effect that the \$8,000, if paid, shall be applied as follows: (1) To pay certain costs; (2) to pay attorney's fees; (3) to pay laborers in full; (4) to pay other creditors a pro rata proportion.

It will be seen that by the extraordinary agreement Epstein bound himself to nothing except to pay \$500 "when the party of the first part shall have procured the necessary assignments and transfers to him," and upon the execution and delivery of another agreement by Soward. And thereon Epstein had an option to pay \$7,500, and become the owner of said claims; before which, however, Soward was to perform all the conditions of the contract as a condition precedent to the payment by Epstein, which, it is distinctly stipulated, Epstein need not make, notwithstanding entire performance on the part of Soward. The \$500 was never paid, and the additional agreement called for was not entered into. In fact, Soward was unable "to become the owner by assignment and transfer of all the said claims and demands," until the assets of the insolvent corporation were sold by the assignee. The contract was never carried out, but in lieu of it, at Epstein's request, Soward procured a private sale of the assets of the insolvent corporation to certain persons who had contracted with Epstein to purchase the mine. Upon the sale of this mine and another, in which the same parties were interested, the purchasers paid to the assignee \$8,000. Soward, as attorney for the assignee, received the money, and distributed it in the manner agreed upon. It is contended that this was a substantial compliance with the written agreement, and that Epstein, under the terms of that contract, was entitled to have the "said claims and demands" transferred to him by Soward. This Soward refused to do, but did assign them to plaintiff, who thereupon commenced this action against the stockholders.

Defendants contend that Soward took the assignments from the various creditors for collection merely, and not as absolute owner; and while they expected him to realize as much as possible from the assets of the corporation, and to divide the same as the law would direct, they did not understand that they sold their demands to him, nor did they authorize him to sell them. If the controversy were only between Epstein and Soward, there would certainly be much plausibility in the contention of the defendants. But admitting that they are right in their



construction of the contract made between Epstein and Soward, and that under that contract Epstein is the equitable owner of the demands, they must still show that Soward was able to perform by transferring the demands. Plaintiff represents the rights of the creditors, and defendants must not only establish their contention as against Soward, but also as against the creditors. That it was not supposed by Epstein or Soward that the latter would purchase the claims outright is shown by the agreement itself. Soward was to pay the creditors pro rata. They were still creditors to be paid. The creditors were not told by Soward when he procured the assignments that he intended to transfer their claims and obtain money in that mode. They were simply told that the mine had been sold, and that, after paying the costs, fees, and lienors, he would be able to pay them about 50 per cent. upon their demands. Evidently this was a representation by him that he would procure for them the value of the assets of the corporation. Why, in order to do that, it was necessary to assign to him does not appear. But he was their attorney, and naturally they did whatever he advised. Soward testified that no mention of the stockholders was ever made. No creditor supposed, or had reason to suppose, that by this assignment he was doing anything more than to enable his attorney to realize for his benefit the value of the assets. There was no other evidence upon the point. The "understandings" of Low do not constitute evidence at all, and should not have been received. We cannot disturb the findings of the court to the effect that the several assignments were made to Soward for collection only. The exceptions to rulings in regard to the admission of evidence have reference to the case of the defendants as against Soward. But, if the finding that the claims were assigned to Soward for collection only must stand, that is immaterial. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

122 Cal. 314

KOFOED v. GORDON et al. (L. A. 353.)

KOFOED et ux. v. COSBY et al. (TOWNSEND, Intervener. L. A. 354).

(Supreme Court of California. Nov. 16, 1898.)

TENDER—OBJECTIONS—WAIVER—FORECLOSURE SALES—REDEMPTION—EVIDENCE—INTEREST ON JUDGMENT—TRUSTEES.

1. Civ. Code, § 1501, providing that all objections to the "mode" of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor if not then stated, is not restricted to objections to the thing offered, and the time and mode of offering it, but applies also to objections to the conditions on which the tender is made.

2. A judgment creditor of a mortgagor did

everything necessary to redeem under a foreclosure sale, and paid to the sheriff a sum which the latter received as the proper amount of redemption money, which he paid over to the attorney for the mortgagee, who received it without objection as to the amount. After the judgment creditor's right to redeem had expired, the mortgagee informed the judgment creditor that in addition to the amount paid to the sheriff there should have been paid a certain sum on account of taxes paid by him on the property before the foreclosure. The parties agreed that a redemption had not been effected, but the mortgagee's attorney said that, as the creditor had attempted in good faith to redeem, he would have mortgagee assign the certificate of purchase to the creditor, if the amount of the taxes were paid to him, which was duly carried out on both sides. *Held*, that the land was redeemed under the judgment, since equity would have relieved the redemptioner from the mistake, and have allowed him to perfect the redemption.

3. On an issue as to whether the reason for refusing a tender was stated at the time to the person tendering, it is not error to require the person to whom the tender was made to answer if, under any conditions, he would have accepted the tender.

4. Where a decree provided that defendants, as judgment creditors, should convey to plaintiffs, as judgment debtors, property which the former, as such creditors, had redeemed from a foreclosure sale, on a payment or tender of a certain amount, it is not error to fail to allow interest on the sum to be paid from the time of the decree up to the time for payment or tender, where such payment could be enforced by defendants at any time.

5. The attorney for a judgment debtor, purporting to be acting for himself, agreed to buy the judgment from the judgment creditor for a certain sum; and it was agreed that execution should be issued in the creditor's name, and that the property realized should afterwards be transferred to the attorney on payment of the agreed sum. Part of the property sold under the execution and bid in by the creditor was the debtor's undivided half in certain property. Afterwards the vendor of said property obtained a decree requiring the vendees, including the debtor, to pay the balance of the price before a certain date, or be barred of all their rights in the premises. On the motion of said attorney, who was attorney for all of the vendees in said suit except said debtor, the decree was amended so as to provide that, if any of the vendees failed to pay their share, their co-vendees, or any of them, might pay the same, and be entitled to a conveyance of such share. Thereafter the debtor obtained a decree adjudging that the attorney was a trustee for the debtor of all rights under the agreement to purchase the judgment, and requiring the creditor to reconvey to the debtor the property purchased at execution sale, on payment or tender of the agreed price of the judgment. The tender was wrongfully rejected. Subsequently the debtor made an effort to raise his part of the balance to be paid the vendor, but said attorney, with the purpose of depriving him of his interest in such lands, deterred and discouraged persons willing and able to do so from advancing the necessary amount to the debtor, whereby he was unable to procure said moneys within the time specified in the decree. The attorney and the judgment creditor procured one of the co-vendees to permit them to use his name to take for themselves the title to the share coming to the debtor, and in his (co-vendee's) name they paid the moneys due from the debtor, taking a conveyance to the co-vendee of the debtor's share, and afterwards procuring his conveyance of the same to the creditor, who in all the transactions was acting in the interest and for the benefit of said attorney. *Held*, that the attorney and the credit-

or are trustees of the debtor as to the debtor's undivided half of the property purchased.

Department 2. Appeals from superior court, Los Angeles county.

Action by John C. Kofoed against Samuel B. Gordon and another to compel defendants to convey to plaintiff certain real property formerly belonging to the latter, and which defendants, as judgment creditors of plaintiff, had redeemed from a foreclosure sale. From an interlocutory decree, a final judgment for plaintiff, and an order denying a new trial, defendants appeal. Appeal from interlocutory decree dismissed. Affirmed.

Action by John C. Kofoed and his wife against James F. Cosby and Samuel G. Gordon to recover certain property held by defendant Gordon as an alleged trustee. Sarah H. Townsend intervened to quiet her title to part of the property in controversy. From certain interlocutory decrees, from a final decree for plaintiffs, and from an order denying a new trial, defendants appeal. Appeal from interlocutory decrees dismissed. Affirmed.

John D. Pope and Murphey & Gottschalk, for appellants. T. M. Stewart and Bicknell & Trask, for respondents.

BEATTY, C. J. These two cases arise out of the same transactions, and the questions involved depend to a great extent upon the same state of facts. They were tried together in the superior court, and were argued and submitted together here. A brief general statement will suffice to show the nature of the main controversy. A more particular statement will be made in connection with the points in which the cases differ.

On the 30th of June, 1891, a judgment was entered and docketed in the superior court of Los Angeles in favor of the defendant Cosby and against the plaintiff John C. Kofoed for about \$2,500, for which sum a lien thereby attached to all of the real property of said Kofoed in Los Angeles county, consisting of numerous parcels. Kofoed was at that date, and thereafter continued to be, involved and embarrassed in his pecuniary affairs. In this situation he employed the defendant Gordon, an attorney at law, in his professional capacity, to assist him in extricating himself from his difficulties, and authorized him, among other things, to negotiate with Cosby for a compromise and release of his judgment of June 30, 1891. Gordon seems to have acted in the interest of Kofoed up to the summer of 1892, when he claims to have been discharged from his employment without having been paid for his services. Acting upon the theory that he was no longer bound by any professional obligation to Kofoed, on the 25th of October, 1892, he entered into the following contract with Cosby:

"In the Superior Court of the County of Los Angeles, State of California. James F. Cosby, Plaintiff, vs. John C. Kofoed, Defendant. Judgment in favor of James F. Cosby

against John C. Kofoed, June 30, 1891, \$2,504.83. James F. Cosby and Samuel B. Gordon agree thus: Cosby agrees to sell and Gordon agrees to buy the judgment above named at and for the price of two hundred dollars, to be paid out of moneys that shall be collected thereon, and not otherwise, as follows: Collections on said judgment are to be applied thus: First, to reimburse Gordon for all cash expenses incurred in enforcing said judgment, which expenses it is expected will include costs of only one or more abstracts, sheriff's fees, and expenses of execution, and costs of advertising, but nothing for Gordon's services; second, to pay to Cosby said sum of two hundred dollars, the purchase price of said judgment, to be paid to said Cosby as fast as collected; and, third, the residue of such collections, if any, to belong to Gordon, and to be in full payment of his services in the premises. Until paid for as above, Cosby retains the ownership of said judgment, but gives Gordon entire control thereof for all purposes of enforcing the collection thereof. When paid for as above, Cosby is to assign and transfer said judgment, or so much thereof as shall be unpaid, to Gordon. Gordon is to take immediate steps to enforce collection of said judgment, and continue the same with energy and diligence, all at his own cost, expense, and labor, to be repaid only as above provided, and without cost, expense, or liability to Cosby. Dated Los Angeles, October 25, 1892. [Signed] J. F. Cosby. S. B. Gordon.

"It is also understood and agreed that in case of sale of land or other property on execution on the above judgment, or in case of redemption, by virtue of said judgment, of lands sold on prior judgment or lien, if the same shall be done for the benefit of the parties hereto, the same shall be done in the name of Cosby, who shall hold the same until payment to him of said two hundred dollars, when he shall transfer the same to Gordon, or his order, but all without expense to said Cosby. October 25, 1892. J. F. Cosby. S. B. Gordon."

Immediately after the date of this contract, Gordon caused an execution to issue on the Cosby judgment, which was levied upon a number of parcels of real estate belonging to Kofoed. This property was sold under the execution on December 13, 1892, and bid in by Gordon in the name of Cosby. The price bid was credited on the judgment, leaving a balance still unsatisfied. A short time thereafter an action, numbered 19,201, was commenced by Kofoed and wife against Cosby and Gordon in the superior court of Los Angeles, for the purpose of having Gordon decreed to be a trustee of the plaintiffs as to all rights acquired by him under and by means of the contract of October 25, 1892, whereby the judgment of June 30, 1891, was assigned by Cosby to Gordon, and to compel Cosby to accept from plaintiffs \$200 in full satisfaction of said judgment. On July 25,



1893, a decree was entered in this action in which it was ordered and adjudged that Gordon was a trustee for plaintiffs, and for their use and benefit, of all the rights or interests he had acquired by the contract of October 25, 1892, and that plaintiffs be subrogated therein in Gordon's place and stead, provided they paid or tendered to him on or before the 31st day of July, 1893, the sum of \$79.50, on account of certain expenses incurred by him. It was further decreed that the defendant Cosby, on payment or tender to him of the sum of \$200 on or before July 31, 1893, should receive the same in full satisfaction of his said judgment, and should convey to John C. Kofoed certain parcels of the land purchased by him at the execution sale of December 13, 1892, and to Lily H. Kofoed, his wife, the remaining parcels so purchased by him; the right to the same having been theretofore assigned to her by her husband. And it was further specially provided that unless the plaintiffs should pay or tender said sums to Gordon and Cosby on or before the 31st day of July, 1893, all their right, title, and interest in and to said contract and premises should cease and determine, and that thereafter neither Cosby nor Gordon should be held as their trustee, or trustee of either of them. Appeals were afterwards taken by the defendants from this decree, and from an order denying their motion for a new trial, but by stipulation these appeals were subsequently dismissed, so that the decree remains in full force, and, so far as it goes, is a final determination of the rights of the parties.

For the purpose of complying with this decree, an assignee of plaintiffs on the 31st of July, 1893, made a tender of the proper sums of money to be paid to Gordon and Cosby, respectively, but, in tendering the money, presented for execution by both of them an instrument purporting to transfer, release, and assign the Cosby judgment, and to quitclaim the various parcels of land sold under the execution and specified in the decree. This instrument so presented to Cosby and Gordon for signature at the time of the tender of the money was not such an instrument as they, or either of them, were by the terms of the decree required to execute; that is to say, the decree did not require them, or either of them, to assign or transfer the Cosby judgment, but only required Cosby to accept \$200 in full satisfaction, and it did not require Gordon to join in the transfer of the lands sold to Cosby at the execution sale. The tender so made was rejected by Gordon and Cosby,—rightfully as they claim, wrongfully as claimed by the plaintiffs and found by the court. This contention presents the principal question in both cases, for all the rights of plaintiffs to the lands here in controversy depend upon the decree in case No. 19,201; and, if they did not make a tender in compliance with that decree, they must fail in both actions. In the complaints it is alleged that when the tender was made it was

rejected, with no statement of objection thereto other than that the defendants intended to appeal from the judgment. This the defendants, by their answers, deny; and they allege the fact to be that, at the time said tender was made, it was coupled with a demand that the defendants should jointly execute said deed, and that the attorney of the defendants, in their presence, not only stated that they intended to appeal from the judgment, but also stated that the judgment did not require them to execute a deed such as demanded. The court fails to find whether or not the tender was coupled with a demand that the deed presented should be executed by the defendants jointly; and, if the fact is material, it must be assumed, for the purposes of these appeals, to have been found in favor of the appellants. The court does find expressly that the tender was rejected, with no statement of objections thereto, other than that the defendants intended to appeal from the judgment. The facts above stated, and all statements of fact hereinafter contained, are taken exclusively from the admissions in the pleadings, and the findings of the superior court; and this because, in our opinion, there is sufficient evidence to sustain the findings in all particulars, and not because we hold ourselves precluded from any consideration of the evidence by the objection of respondents that the motions for new trial were not noticed in time,—an objection which we find it unnecessary to consider.

Was the tender of July 31, 1893, sufficient to preserve the rights of the plaintiffs under the decree in case No. 19,201? An offer of performance must be free from any conditions which the creditor is not bound on his part to perform. Civ. Code, § 1494. Here the offer of performance was coupled with conditions which Cosby and Gordon were not bound to perform. But all objections to the mode of an offer of performance which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated. Id. § 1501. Cosby and Gordon had full opportunity at the time to state their objections to the conditions coupled with the tender, but failed to do so; and the objections, if stated, could easily have been obviated by plaintiffs. Therefore the objections were waived, if section 1501 of the Civil Code applies to the conditions accompanying the offer, and is not restricted, as appellant contends, to objections to the thing offered, and the time and mode of offering it. This precise question has never been necessarily involved in any previous case in this court, or, if so, it has never been considered and expressly decided, so that we are called upon for the first time to determine what is the true construction of the statute upon this point. Taking all the sections of the Code relating to the subject of tender together, it is evident that the intention of the legisla-

ture was to do away with many of the objections by which rights dependent upon offer of performance had been theretofore defeated, and to establish more reasonable and more liberal rules upon the subject. It is therefore the duty of the courts to construe any doubtful language of the statute in harmony with the legislative policy. A tender is not required to be unconditional. On the contrary, it is expressly provided (Id. § 1498) that, when a debtor is entitled to the performance of a condition precedent to or concurrent with performance on his part, he may make his offer to depend upon the due performance of such condition. He is forbidden, it is true, to make his offer dependent upon any other conditions; but his obligation in this particular is no more imperative than the obligation to tender the full sum of money due, or the precise personal property or written instruments called for, and there is no more reason for imposing upon the creditor the duty of stating his objections to the thing tendered than there is for requiring him to state his objections to the conditions coupled with the offer. If the person offering to perform is acting in good faith, and makes the mistake of demanding something to which he is not entitled, he ought to be given the same opportunity to recede from such demand that he is allowed for tendering the correct amount where he has tendered too little, or the right thing when he has tendered the wrong thing. There is no consideration of justice or convenience that applies with any greater force to one case than to the other. This principle is the necessary basis of the numerous decisions in which it has been held that an express objection to a tender upon one ground is as clearly a waiver of unauthorized conditions as of other objections not mentioned.

The only real question, therefore, to be considered, is whether the language of section 1501 of the Civil Code, "All objections to the mode of an offer," etc., is brought enough to include, not only the thing offered, but the conditions of the offer; and upon this point we think it is doing no violence to the language of the statute to say that the "mode" of an offer to perform includes the condition upon which the offer of performance is made to depend. We can conceive of no case in which this construction would work an injustice to a creditor seeking only his due, while an opposite construction might in many instances—as in the case before us—deprive a party offering and intending in good faith to perform his obligation of all means of enforcing valuable rights.

Two decisions of this court are cited by appellants which it is claimed are in conflict with this view. *Cosby v. Superior Court of Los Angeles Co.*, 110 Cal. 45, 42 Pac. 460, was certiorari to review a judgment convicting these defendants of contempt for refusing certain tenders made subsequent to July 31, 1893, in pursuance of an attempted

amendment of the original decree in case No. 19,201, extending plaintiff's time for making tender. The only question involved in that case was the validity of the amendatory order, but the writer of the opinion, in reviewing the various proceedings in the case, took occasion to remark, obiter, that the tender of July 31st was clearly insufficient. This expression of opinion was perhaps justified, if it then appeared, as stated in the opinion, that the tender was refused by reason of the condition. But, even if the evidence in that case was the same as the finding here, the point we are considering was not involved, and could not have been decided. In *Woody v. Bennett*, 88 Cal. 243, 26 Pac. 117, the action was upon a contract providing for an exchange of horses, and the question was whether plaintiffs had made a proper demand for the exchange before commencing their action. It was held unnecessary to decide that question, because the defendants had positively and repeatedly refused to exchange, except upon condition that the plaintiffs would take an imported mare at a valuation of \$2,000, which mare they had never agreed to take. The demands and counter demands in that case were made by letter. It does not appear how many letters were written, but two at least were written by defendants; and, first and last, they insisted that plaintiffs should take the mare. It does not appear from the report that the plaintiffs specified their objections to this condition, but presumably they did; for the point was not made that they had failed to object, and the case was decided without reference to the effect of such failure. If the point was in the case, it was not made by counsel or considered by the court. It was simply held that the conditional offer of defendants was equivalent to a refusal to exchange, and justified plaintiffs in suing, whether their previous demand for the exchange had been proper or not. We think it clear that neither of these cases sustains the contention of the appellants, or precludes the court from giving to section 1501 of the Civil Code and section 2076 of the Code of Civil Procedure the liberal construction which we think they were intended to bear.

The superior court did not err in holding that the rights of plaintiffs were preserved by the offer of July 31, 1893. Having thus disposed of the only important question common to both cases, it now becomes necessary to consider them separately with reference to the questions peculiar to each.

In the case numbered on our docket L. A. 353 there are three appeals,—one from an interlocutory decree, one from the final judgment, and one from the order of the superior court denying a new trial. The interlocutory decree is not appealable, and the appeal therefrom must be dismissed. Respondent objects to any consideration of the appeal from the order, upon the ground that the notice of intention to move for a new trial was not in



time. We do not decide the point raised by this objection, because we are satisfied that the evidence set out in the bill of exceptions is sufficient in any event to sustain the findings of fact; and all other points made by appellants may be considered on the appeal from the judgment.

The action in this case was commenced for the purpose of compelling the defendants to convey to Kofoed certain real property formerly belonging to him, which he had mortgaged to one Pinney, and which had been purchased by Pinney January 6, 1893, under a decree of foreclosure. The Cosby judgment of June 30, 1891, had been transferred, as above stated, to Gordon, and only partially satisfied by the proceeds of the execution sale of December 13, 1892. The unsatisfied balance gave Cosby, as trustee for Gordon, the right to redeem from the sale under the Pinney foreclosure. This right would expire with the expiration of the lien June 30, 1893, although the six months from the foreclosure sale would not elapse till July 6, 1893. This, it will be observed, was all prior to the decree in case No. 19,201, and, of course, prior to the tender made pursuant to that decree. On the 30th day of June, then (his last day to redeem), Cosby did everything else necessary to effect a redemption, and paid to the sheriff \$1,634.13, which sum was received by the sheriff as the proper amount of redemption money, and paid over to Pinney's attorney, Jones, who received the same without objection as to the amount, and receipted to the sheriff. But a few days afterwards, and after Cosby's right to redeem had expired, Pinney informed his attorney, Jones, that, in addition to the amount paid to the sheriff by Cosby, there should have been paid \$5.60 more on account of taxes paid by him on the mortgaged premises subsequent to the foreclosure sale. In consequence of this information, Jones had an interview with Gordon, who was acting for Cosby and himself in the matter, in which he claimed that redemption had not been effected,—a claim in which Gordon, after some discussion, acquiesced. Whereupon Jones said, in substance: "You have attempted in good faith to redeem, and, if you will pay those taxes, I will have Pinney assign you his certificate of purchase." This proposition was accepted, the money paid, and the certificate of purchase duly assigned by Pinney to Cosby. Upon evidence substantially to this effect, the superior court found that the land was redeemed by Cosby and Gordon under the Cosby judgment, and consequently that it was held by them as trustees for Kofoed. The defendants contend, on the contrary, that it was not redeemed under the judgment, but was purchased by Cosby after the time for redemption had expired. We think the court correctly held that the land was redeemed under the Cosby judgment. It is, no doubt, true that the right to redeem property sold under execution is purely statutory, and that,

in order to effect a redemption, the statute must be fully complied with. Many cases may be cited in which purchasers have successfully resisted attempts to redeem upon the ground that some requirement of the statute has been overlooked. But it has been held by this court that when a qualified redemptioner makes an attempt in good faith to redeem within the proper time, and is only prevented from perfecting a valid redemption by an innocent mistake, equity will relieve him from the consequences of such mistake, and allow him to perfect the redemption. *Pownall v. Hall*, 45 Cal. 193. That was a case in which the redemptioner had by mistake given along with the balance of the redemption money a counterfeit legal-tender note for \$100. His payment was therefore pro tanto no payment, and by strict law the redemption was not effected; but his attempt in good faith to redeem, which was only prevented by his innocent mistake, was held to give him a right in equity to perfect the redemption by making up the deficiency. We can see no difference in principle between that case and this. The mistake here was an innocent mistake. Gordon made an attempt in good faith to redeem. Neither he, nor the sheriff, nor Jones, the agent and attorney of Pinney, knew of the small amount of taxes that Pinney had paid. The sheriff accepted the amount tendered as the proper amount, and Jones accepted it without objection on behalf of Pinney. Upon discovery of the mistake, Gordon and Cosby could have enforced their right to perfect the redemption; and the voluntary offer of Pinney, by his attorney, to transfer the certificate of purchase upon payment of the taxes, was only another way of perfecting a right enforceable in equity. These conclusions with regard to the effect of the evidence dispose of the contention of appellants that the court erred in overruling the demurrer to the complaint, and in failing to find upon the allegations of the answer. The only fact alleged in the answer, and not found, is the failure to pay the \$5.60 of taxes. That fact also appears from the complaint, as it does in the evidence, and our conclusion is that in spite of that fact the redemption was effected.

It is next contended by appellants that the decree of the superior court cannot be sustained except upon the theory that Kofoed owned the judgment against himself at the time of the redemption. We do not see the force of this contention. The theory of the case is, and the fact is, that, at the time of the redemption, Cosby owned the judgment, as trustee for Gordon, who was in turn trustee for Kofoed; and whatever Cosby got under the judgment he held in trust for Kofoed, the ultimate beneficiary, with only a lien thereon for his reasonable expenses incurred in the preservation of the property.

We do not think the superior court erred in requiring Gordon and his counsel to answer

on cross-examination the question whether they would have accepted the tender of July 31, 1893, even if it had not been coupled with a demand for a deed. In view of the conflict in the evidence as to what passed at that interview, the determination of Gordon and his counsel not to accept the tender in any case was of some weight in determining what was actually said. And, besides, the fact elicited was in itself wholly immaterial, in the view we take of the transaction, and therefore entirely harmless.

Finally, we think the court did not err in failing to allow interest subsequent to the judgment upon the amount which the defendants were found entitled to receive upon a conveyance of the land to plaintiff. They were allowed interest on all their expenditures up to the date of the judgment, which, in view of the fact that they have deprived the plaintiff of the use and possession of the land, was a liberal allowance. After the decree, they had only to comply with it, to get their money.

#### L. A. 354.

The case presented by appeal numbered L. A. 354 relates to the real property sold December 13, 1892, under the execution issued upon the Cosby judgment, as above stated. Of the property sold at that time a portion stood, as to the title, in this way: It had formerly belonged to one Hubbell, who had contracted to sell it to Kofoed and others,—Kofoed to have one-half undivided, and the remaining half to go to the other vendees, in various proportions. Under this contract one-half of the purchase money had been paid by the vendees, and an action was pending between them and Hubbell, in which the vendees were seeking damages on account of his alleged inability to make a good title, and he was asking a decree of specific performance or foreclosure of their contract of purchase. In May, 1893, a decree in favor of Hubbell had been entered in this action, whereby the plaintiffs were required to pay to him on or before the 9th day of August, 1893, the sum of \$7,720, in default of which they were to be forever barred and foreclosed of all their right, title, and interest in the premises. On July 15th, on motion of Gordon, attorney for all the plaintiffs except Mrs. Kofoed (who had been substituted for her husband under an assignment of his interest), this decree was so amended as to provide that, in case any of the vendees of Hubbell should fail to contribute their proportions of the sum found due him, their co-plaintiffs, or any of them, might pay the same, and should thereupon be entitled to a conveyance of the share of the vendee so defaulting. This was the situation when the decree of July 25, 1893, in case No. 19,201, was entered, and when the tender to Cosby and Gordon was made in pursuance thereof on July 31, 1893. That tender, as above shown, was rejected, and the title to the Kofoed interest acquired

by Cosby at the execution sale of December, 1892, was retained by him. In this complicated condition of affairs, Kofoed and wife made an effort to raise half of the money to be paid to Hubbell on August 9th, but failed in their efforts. The superior court finds that on August 5, 1893, the defendant Gordon had the purpose to deprive plaintiffs of their interests in the lands described in the Hubbell judgment, and that with the intent to embarrass them, and prevent them from raising money to pay their proportion of the amount due Hubbell, they did deter and discourage persons willing and able so to do from advancing said necessary money to said plaintiffs, whereby said plaintiffs were unable to procure said moneys within the time specified in the decree. It is further found that Gordon and Cosby procured one George W. Burton—one of the vendees of Hubbell, and a co-plaintiff of the Kofoeds in the Hubbell suit—to permit them to use his name to take for themselves the title to the share coming to Mrs. Kofoed, and that they did use Burton's name, and in his name paid the moneys due from Mrs. Kofoed, taking a conveyance to him of her share, and afterwards procuring his conveyance of the same to Cosby, who in all these transactions was acting in the interest and for the benefit of Gordon. Upon these findings of fact the superior court made an interlocutory decree declaring the defendants trustees of Mrs. Kofoed as to an undivided half of the Hubbell lots, and of John C. Kofoed as to the other lots sold under execution December 13, 1892, and thereupon ordered an accounting of the expenses incurred by defendants in preserving the trust property. The account of these expenses was subsequently settled, in the sum of about \$8,000; and thereupon a final decree was entered, requiring defendants to convey said property to Kofoed and wife, according to their respective rights, upon payment of the sum found to have been expended in preserving the trust estate. The defendants appeal from the interlocutory decrees, from the final decree, and from an order denying a new trial. The appeal from the interlocutory decrees are dismissed for the reason that they are not appealable. The appeal from the order need not be considered, further than to say that the evidence in the bill of exceptions supports the findings. All other assignments of error are reviewable on the appeal from the final judgment.

As to the contention of appellants that the findings do not cover the material issues, we think it sufficient to say that in the finding "that, in all their transactions tending to acquisition of title to the lands in controversy herein, defendants acted in the interest and for the benefit of defendant Gordon," the court has covered the whole ground of dispute. This finding, in connection with the others, negatives the allegation of the answers that Gordon had no interest in the lots except his fee as an attorney. Besides,



his fee as an attorney may have been the equivalent of the entire Kofoed interest. And the evidence supports the finding. Their whole course of conduct in relation to this property shows that Cosby and Gordon were acting in concert, and for the benefit of Gordon. The circumstances, without the aid of direct and positive evidence, were sufficient to warrant the court in finding that what Cosby did in the matter was for Gordon's benefit. He was Gordon's trustee as to the judgment which he had transferred, and necessarily also as to these lands which had been purchased at the execution sale under that judgment. The relation between him and Gordon was not merely that of vendor and vendee,—it was a relation of trust and confidence, voluntarily assumed; and they were both, when acting together in the effort to acquire the lands in controversy by means of that judgment, involuntary trustees of the Kofoeds. But appellants contend that they did not acquire the Hubbell lands by means of the Cosby judgment. They insist, on the contrary, that Burton acquired the Kofoed interest in those lands by advancing the money to pay for it in accordance with the terms of the decree in the case of Kofoed et al. against Hubbell, and that he thereupon conveyed that interest to Cosby, who holds it entirely freed of any claims of the Kofoeds. This conclusion might follow, if the substance of that transaction corresponded with its form. But the findings of the court and the evidence in the case show that Burton's name was a mere cover to conceal a purchase made by Cosby for Gordon's benefit,—a purchase in which he got the benefit of the first payment originally made by Kofoed to Hubbell. The court did not err in declaring Cosby and Gordon trustees of Mrs. Kofoed in the Hubbell lands. As to the other tracts and lots sold at the execution sale, the title to which stood in the name of Kofoed, there can be no question that the decree is correct.

#### Intervention of Townsend.

Sarah H. Townsend was allowed to intervene in this case (L. A. 354) for the purpose of quieting her title to one of the lots in controversy. Kofoed and others had sold and conveyed this lot to her in 1886, but her deed had not been recorded when the lot was purchased by Cosby and Gordon at the execution sale in 1892. It was, however, alleged and found that they had actual notice of the previous sale of the lot by Kofoed, prior to the execution sale, and this finding is supported by the evidence. There is no error in the decree quieting her title.

It is ordered that the several appeals from the interlocutory decrees be, and the same are hereby, dismissed in both cases; that the final decrees and the orders denying new trials be affirmed in both cases.

We concur: McFARLAND, J.; HENSHAW, J.

## MEMORANDUM DECISIONS.

**GOVE v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO et al.** (S. F. 765.) (Supreme Court of California. Sept. 3, 1898.) Department 1. Appeal from superior court, city and county of San Francisco. Action by Henry M. Gove against the board of supervisors of the city and county of San Francisco and others. From a judgment for defendants, plaintiff appeals. Dismissed. Mullany, Grant & Cushing and A. Everett Ball, for appellant. Harry T. Cresswell and Joseph F. Coffey, for respondents.

**PER CURIAM.** As bearing upon the motion to dismiss the appeal, the facts of this case are identical with the facts presented by the case of Horton v. City of Los Angeles, 119 Cal. 602, 51 Pac. 956. Upon the authority of that case the appeal is dismissed.

**MACHINERY SUPPLY CO. v. DUNCAN.** (L. A. 384.) (Supreme Court of California. Sept. 14, 1898.) Department 2. Appeal from superior court, Los Angeles county; J. S. Noyes, Judge. Action by the Machinery Supply Company against Blanton Duncan. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed. Blanton Duncan, in pro. per., and D. Allen, for appellant. M. L. Graff, for respondent.

**HENSHAW, J.** Plaintiff sued to recover the value of a pumping plant furnished by it to defendant, together with the value of the work and labor attendant upon the construction of the plant. Defendant answered, and by cross complaint averred a specific contract with plaintiff to furnish at an agreed price materials and labor necessary to the construction of the plant under a warranty that the plant, as constructed, would pump from 5,000 to 6,000 gallons of water per hour. He further pleaded a failure by plaintiff to perform, a breach of warranty, and consequent damages. Plaintiff, answering this cross complaint, set forth in precise words the contract, which was in writing, denied the warranty, averred performance, and charged that the failure of the plant to pump sufficient water was wholly occasioned by the presence in the well of large quantities of sand in suspension, which clogged the pump valves. Upon these issues trial was had. The court found throughout in favor of plaintiff and against defendant, and judgment passed accordingly. From the judgment, and from the order denying a new trial, defendant appeals. The findings are within the issues, and support the judgment. The evidence, though in sharp conflict upon many matters, is clearly sufficient to support the findings. No exception was reserved to any of the rulings in receiving or rejecting evidence. There is thus nothing left for review. Therefore the judgment and order are affirmed.

We concur: **TEMPLE, J.; McFARLAND, J.**

**In re MILLER'S ESTATE.** (S. F. 1,514.) (Supreme Court of California. Aug. 31, 1898.) In bank. Appeal from superior court, Alameda county; F. B. Ogden, Judge. In the matter of the estate of A. T. L. Miller, deceased, an appeal was taken, and dismissed without opinion on division in the department. Motion for rehearing denied. James T. Boyd and Timothy J. Lyons, for appellant. Lloyd & Wood and T. Z. Blakeman, pro se.

**PER CURIAM.** The appeal in this case was dismissed, and appellant asks for a rehearing. We are satisfied that the order of dismissal was properly made, upon the ground that the appellant had no interest in the proceedings for distribution. His claim is adverse to the title and

estate of the decedent, and the distributees take subject to such claim as he may have. Its extent and validity are questions which must be litigated in another forum. Rehearing denied.

**SAN FRANCISCO SAV. UNION v. LEE et al.** (Sac. 373.) (Supreme Court of California. Nov. 4, 1898.) Department 2. Appeal from superior court, Tulare county; William W. Cross, Judge. Action by the San Francisco Savings Union against J. W. Lee and others. From a judgment for plaintiff and an order denying a new trial, defendant A. C. Bowlin appeals. Affirmed. W. W. Middlecoff, for appellant. Bradley & Farnsworth, for respondent.

**PER CURIAM.** Action to recover possession of real property. Plaintiff had judgment, from which, and from an order denying a motion for new trial, defendant Bowlin appeals on bill of exceptions. Plaintiff claims title and right of possession by virtue of a sale of the premises made pursuant to the powers given to certain trustees in a certain deed of trust, executed by appellant to secure the payment of a certain promissory note made by appellant, and payable to plaintiff. This case is not distinguishable in its facts and in the principles of law involved from Bank v. Alcorn (Sac. 332) 53 Pac. 813. The questions presented by this appeal had very careful consideration in the case referred to. Upon the authority of that case, the judgment and order are affirmed.

**SPRIGG v. BARBER.** (L. A. 312.) (Supreme Court of California. Oct. 13, 1898.) Department 2. Action by Patterson Sprigg against C. L. Barber. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

**PER CURIAM.** The appeal in this case comes up on a record raising the same question presented in L. A. 311, between the same parties (54 Pac. 899). For the reasons therein stated, the judgment and order in this case are affirmed.

**WALLACE v. PERRIN.** (S. F. 820.) (Supreme Court of California. Oct. 7, 1898.) Department 1. Action by James H. Wallace against E. B. Perrin. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

**PER CURIAM.** This case involves the same matters, and by stipulation is submitted upon the same briefs, as Wallace v. Randol (S. F. 804) 54 Pac. 842. Upon the authority of that case, this day decided, the judgment and order are affirmed.

**WITTER v. SAN LUIS OBISPO BUILDING & LOAN ASS'N et al.** (L. A. 302.) (Supreme Court of California. Aug. 29, 1898.) Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge. Action by W. G. Witter against the San Luis Obispo Building & Loan Association and another. Judgment for defendants. Plaintiff appeals. Affirmed. G. F. Witter, Jr., for appellant. Unangst & Kemp, for respondents.

**PER CURIAM.** This case presents in all respects the same questions involved in Witter v. Andrews (L. A. 301, this day decided) 54 Pac. 276. Upon the authority of that case, the judgment herein is affirmed.

**WRIGHT v. SACRAMENTO COUNTY et al.** (Sac. 554.) (Supreme Court of California. Aug. 17, 1898.) In bank. Appeal from superior court, Sacramento county; E. E. Gaddis, Judge. Action by Charles E. Wright against Sacramen-



to county and others. Judgment for plaintiff. Defendants appeal. Affirmed. Frank D. Ryan, Dist. Atty., W. F. Fitzgerald, Atty. Gen., and Charles T. Hughes, for appellants. H. C. Ross, Jr., for respondent.

PER CURIAM. This appeal presents precisely the same question as that involved in *Devine v. Board* (Sac. 518, this day decided) 54 Pac. 262; and, upon the authority of that case, the judgment herein is affirmed. Chief Justice not participating.

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# **CALIFORNIA REPORTER**

**55 PACIFIC REPORTER**





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122 Cal. 352

MORTON et al. v. PACIFIC COAST S. S. CO. (S. F. 885.)

(Supreme Court of California. Nov. 19, 1898.)

STEAMSHIP COMPANIES—PUBLIC WHARVES—EXCLUSIVE PRIVILEGES.

The power of the board of state harbor commissioners to lease the piers on the coast to steamship companies was revoked by Pol. Code, § 2524, which empowers the board, *inter alia*, to set apart and assign suitable wharves for the "exclusive" use of vessels. The statute gives the commissioners power to make reasonable rules concerning the management of the property of the state intrusted to them. *Held*, that a steamship company which has been assigned a wharf by the board has no right to grant an exclusive privilege of soliciting thereon the carrying of baggage to and from its vessels, so as to prevent plaintiff from carrying on his business of a baggageman on such wharf, where it does not interfere with the proper conduct of the business of the steamship company.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Morton Bros. against the Pacific Coast Steamship Company to restrain defendant from interfering with them in the carrying on of their business on defendant's piers. From a judgment granting the relief sought, defendant appeals. Affirmed.

Geo. W. Towle, Jr., for appellant. Naphtaly, Freidenrich & Ackerman, for respondents.

GAROUTTE, J. The Pacific Coast Steamship Company is a common carrier by vessel. Under an agreement and understanding with the board of state harbor commissioners, the company uses piers Nos. 9 and 11 upon the water front in the landing of its vessels. By contract with the Pacific Transfer Company, it receives 25 per cent. of the gross receipts of that company for the exclusive privilege of soliciting upon their piers the carrying of baggage at the times when the passengers on the company's vessels arrive in port. Morton Bros., carrying on the same line of business as the Pacific Transfer Company, were denied the right by the Pacific Coast Steamship Company to solicit business upon these piers or wharves from passengers landing thereat. Thereafter they brought this action against

the Pacific Coast Steamship Company to restrain that company from interfering with them in the carrying on of that particular business upon these piers. The trial court granted the relief sought, and that decision is now attacked by appeal.

There are a few minor and incidental questions raised by the appeal and discussed by counsel, but we pass them by, and take hold of the broad proposition, to wit, what, are the rights of the Pacific Coast Steamship Company to and over piers Nos. 9 and 11, under the assignment it has from the board of state harbor commissioners? The authority and control of the harbor commissioners over the water front are found in section 2524 of the Political Code, and, among the many things enumerated in that section, it is declared that the board of harbor commissioners are empowered to "set apart and assign suitable wharves, berths and landings for the exclusive use of vessels." Under this grant of power from the state, the harbor commissioners, by resolution, ordered that piers Nos. 9 and 11, commonly known as Broadway wharves Nos. 1 and 2, be assigned to the exclusive use, occupancy, and control of the Pacific Coast Steamship Company, and to the exclusive use and occupancy of the vessels operated by that company. The language of that resolution may be broader than is justified by the power vested in the harbor commissioners under this section of the Political Code. If so, any attempted grant of authority over these piers to the steamship company in excess of the power vested in the harbor commissioners under the aforesaid section would be void and of no effect. Hence we are not specially concerned in the consideration of the length and breadth of the resolution assigning these piers to the steamship company, but will concede that the resolution gives to the company all the right to and over these piers which the board of harbor commissioners had the power to grant. These commissioners had power to grant to the steamship company only those rights and interests which the statute declares they may grant; for the power and control over the water front delegated by the statute to the commissioners may be exercised by them

alone, and they can delegate none of those powers, and no part of that control, to third parties.

If the steamship company has the right to let the use of these piers to a transfer company for the purpose of soliciting from passengers the carriage of baggage, it has the same right to let the privilege to an hotel proprietor to solicit for his business. If it has authority to let these privileges, it has authority to let privileges to persons to carry on upon these piers any and all kinds of legitimate business. If it has the power to sell a single privilege, it has the power to sell any and all privileges. Neither is the question of the right of the company to grant a monopoly to conduct any particular kind of business upon these piers material here; for if, in effect, it were a lessee of these piers, it would have a control that would authorize the granting of exclusive privileges. As against the business world, this company either has the control of these privileges or it has not. It either has the same rights over these piers as it has over the decks of its vessels, as far as the business world is concerned, or it has no rights over them except a use for the loading and unloading of freight and passengers. There can be no half-way station; no divided authority. If the assignment to the company has the legal effect of a lease, these privileges to do business upon the piers are matters solely with the company, and exclusive privileges may be granted at its option. Again, the fact that the privilege granted to the Pacific Transfer Company may be said to relate to the convenience of passengers landing upon the piers is a matter wholly immaterial as in any way assisting to support the company's right to grant it. The power to grant this privilege implies the power to grant any and all legitimate privileges for the conduct of business at that point. While the direct question before the court is not as to the right of the steamship company to grant a privilege to the Pacific Transfer Company to do business upon these piers, yet the solution of that question would seem to solve the issue made in this case; for, if the right to grant that privilege vested in the company, then the right to exclude these plaintiffs from the privilege also vested. The power to grant the one is inseparably connected with the power to deny the other.

Until of recent date the harbor commissioners had power to lease these piers to steamship companies, but by express enactment of the legislature that power was revoked, and in lieu thereof they were authorized to "set apart and assign" them. Upon the face of this legislation, it is apparent that the state intended to curtail the power of the commissioners in dealing with the water front. Again, it is apparent, upon an inspection of the many provisions of this section of the Political Code, that by the assignment or setting apart of these piers to the steamship company the commissioners did not relinquish authority over them, and that under such

assignment the relation of landlord and tenant in no sense existed; for, as we have seen, the commissioners were expressly forbidden to create such relation. The section of the Code declares: "The commissioners shall have power to make reasonable rules and regulations concerning the control and management of the property of the state intrusted to them by virtue of this article." This power still remained in them over piers Nos. 9 and 11, after the assignment of the use to the steamship company.

We pass to a consideration of the power vested in the commissioners by the particular language found in the section of the Code,— "set apart and assign suitable wharves, approaches or landings for the exclusive use of vessels"; and, as necessarily involved in such consideration, we must ascertain the signification of that language. The meaning of this provision revolves around the word "exclusive," and we are clear that this word refers to an exclusive use by certain particular vessels. It can hardly be said to refer to the exclusive use of vessels in general, for the whole water front is substantially set apart for the exclusive use, indirectly at least, of vessels. In other words, the provision means that the harbor commissioners may set apart to particular parties wharves and landings for the exclusive use of their vessels. Other vessels have no right to use such wharves and landings. By such construction, the word "exclusive" makes the assigning and setting apart of a use of the wharves and landings exclusive as against other vessels, but could not be construed as giving the entire control and occupancy of these wharves and landings to the assignee. The measure of the power of the harbor commissioners is found in this language, and, such being its construction, the assignment to the steamship company only gave that company the exclusive privilege of using these piers in the loading and unloading of freight and passengers. In all other things these piers are under the control and authority of the harbor commissioners, and subject to all reasonable rules and regulations they may promulgate.

The trial court made a finding of fact to the effect that the proper conduct of the business of the steamship company in the use of these piers does not demand that these plaintiffs should be excluded therefrom upon the arrival of vessels. In other words, the presence upon those piers of these plaintiffs, soliciting business upon the arrival of the defendant's vessels, is not an infringement upon defendant's use. This finding is supported by the evidence. The evidence may be said to disclose the fact that, if these plaintiffs are allowed the privilege, then all other transfer companies must be allowed the same privilege, and the presence of all these parties upon the piers would interfere with defendant's use; but it is sufficient to say that as to the result, to the defendant's use, of the presence of all these persons upon the piers soliciting busi-



ness, we are not now concerned. We are dealing with the plaintiffs alone, and, if the interference or noninterference of plaintiffs with the defendant's use is a material question here, then plaintiffs have the finding of fact to their credit. But it may be said, in conclusion, that this matter of granting or refusing privileges of the kind here involved is a matter with the harbor commissioners alone, and a matter which they should control and manage by reasonable rules and regulations.

Various cases are cited by opposing counsel to support their respective views. We find none of them directly in point. The question here is one largely of statutory construction, and general principles of law aid us but little in declaring the true conclusion. We are satisfied plaintiffs are authorized to bring this action. For the foregoing reasons the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

122 Cal. 341

SIMONS v. BEDELL et al. (L. A. 429.)

(Supreme Court of California. Nov. 18, 1898.)

EQUITY—SPECIFIC PERFORMANCE—PLEADING—MARRIED WOMAN'S AGREEMENT—ACKNOWLEDGMENT—STATUTE OF FRAUDS—CONVERSION—EVIDENCE.

1. Where all the parties have gone before the court on the theory that equity had power to determine who was entitled to the distribution of an estate, the court, on appeal, will treat the matter as within the jurisdiction of the court below.

2. A complaint alleging that decedent expressed a desire to devise certain property to plaintiff, but was told by her father that it was unnecessary, and that she could deed certain other property to her mother, who, with her father and plaintiff, were sole heirs, and that her parents would then deed the property in question to plaintiff on decedent's death, and that, relying thereon, she made no will, but deeded the property as advised, which conveyance her mother accepted, sufficiently alleges that she would have made a valid will, and devised said property to plaintiff, but for the action of her parents, as against an objection that it pleads evidentiary, and not ultimate, facts.

3. In an action by a husband to recover proceeds of real estate, where his wife, on her father's inducement, made no will, but conveyed certain real estate to her mother, on condition that her parents deed the realty in question to her husband after her death,—he and her parents being sole heirs,—it is unnecessary to prove that her father was agent of her mother in inducing the action taken, since the mother could not accept the conveyance without the condition.

4. An oral agreement by decedent's parents, as a condition of a conveyance of certain property made to the mother to obviate making a will,—decedent's husband and parents being her sole heirs,—that they would convey certain real estate to the husband, is not within the statute of frauds, requiring trusts of lands to be in writing.

5. Civ. Code, § 3390, subd. 4, providing that obligations to do a thing which the party has not lawfully power to perform, or (Id. subd. 5) to procure the consent of the contracting party's wife or a third person's wife, cannot be

specifically enforced, has no application to a promise by a father that, as a condition of a conveyance to his wife which was made, they would convey other realty to decedent's husband, since the mother, after accepting the conveyance and retaining the benefits, would be compelled to carry out the conditions.

6. Civ. Code, § 1093, providing that no estate passes in the real property of a married woman, unless by a grant separately acknowledged by her as provided in sections 1186 and 1191, does not apply to prevent specific performance, where she has accepted a voluntary conveyance made to her on condition that she convey to grantor's husband other realty to which she shall succeed as the grantor's heir.

7. Where one heir was entitled to a conveyance by others of certain realty, but by order of the probate court it was sold, the proceeds are impressed with the trust in the realty.

8. Decedent's mother had deeded her certain realty in contemplation of the daughter's marriage; and she before her death deeded part of it back to her mother, on condition that her mother and father, as her heirs, should make a conveyance to decedent's husband of another part of her said realty. *Held*, that a conversation regarding such property had with the mother before the daughter's marriage was admissible in an action by the husband to compel a conveyance.

9. A father induced his daughter, in order to obviate a will, to convey realty to her mother on condition that the parents should convey other realty to the daughter's husband after her death; her parents and husband being sole heirs. *Held*, that what the daughter said at the time was admissible, notwithstanding the mother was not present, to prove the conditions imposed.

Beatty, C. J., and Henshaw and Temple, JJ., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county.

Action by James J. Simons against Jane Bedell and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Wm. E. Cox, for appellants. Jesse F. Watterman and C. C. Wright, for respondent.

CHIPMAN, C. Plaintiff brought this action to obtain the judgment of the court that he was entitled to certain funds in the hands of the administrator of his deceased wife's estate. Plaintiff prevailed in the action, and this appeal is from the judgment in his favor, and from the order denying motion for a new trial, and is presented by statement. A general demurrer to the complaint was overruled. The complaint and a supplementary amended complaint allege, and the court found: That defendants Otis T. and Jane Bedell were husband and wife, and the parents of deceased, Jennie R. Simons. July 10, 1890, one Julius Collins conveyed to said Jennie R. (before her marriage to plaintiff) lot 9 of the Abbott Kinney tract, in the city of Los Angeles, for the consideration of \$2,500, which was paid by the said Jane Bedell. Thereafter, to wit, about January 1, 1892, and in contemplation of the marriage between the said Jennie and plaintiff, in addition to whatever right she had derived by said deed, Mrs. Bedell gave to her said lot 9. Soon thereafter, to wit, about January 18, 1892, in con

templation of said marriage, said Jane executed and delivered to her said daughter Jennie a deed conveying to her certain real property in the city of New York, of the value of about \$15,000. Thereafter, to wit, about February 15, 1892, the said Jane informed her said daughter Jennie that it was not just to her sister that she (Jennie) should have both the New York City and the Los Angeles property; and it was thereupon agreed between the said Jane and her daughter Jennie that the latter should execute and deliver to said Jane her obligation for \$2,500, secured by mortgage on the New York property, and that by such execution of said obligation she (the said Jennie) would subsequently become the owner of said properties, by free and unincumbered title. The note and mortgage were accordingly executed about February 15, 1892. On March 18, 1892, plaintiff and the said Jennie intermarried. The said Jennie paid on account of said indebtedness the sum of \$400, and all interest to March 1, 1893. During the summer of 1892 she became afflicted with consumption, and died on April 18, 1893. After plaintiff's said marriage he conveyed to his said wife certain real property situated in the city of Los Angeles, being certain lots in block C, Thomas tract. Prior to the death of the said Jennie she "exhibited much solicitude and anxiety concerning the disposition of her property, and expressed the desire to said defendants Bedell to make a will and bequeath said lot 9 and said lots in block C to this plaintiff, and said New York property to her mother, the said defendant Jane." The said Otis, father of deceased, represented to her that it was unnecessary to make a will, and that it would incur unnecessary cost and expense and delay in its probate, and that, if she would execute and deliver a deed to her mother of said New York property, it would accomplish the same object, to which the said Jennie replied that she wanted plaintiff to have the Los Angeles property, to which the said Otis replied that, if she would make a deed to her mother of the New York property, they (the defendants Bedell) would convey to plaintiff the Los Angeles property. Relying upon the said representations of her father, she on February 15, 1893, did make and deliver to him a deed conveying the New York property to her mother, and he agreed to hold the said deed during the lifetime of the said Jennie; and, relying upon said promises of her said father, she made no will. Shortly after the death of the said Jennie, which occurred April 18, 1893, the said Otis delivered said deed to the said Jane, and she accepted the same. The court found (though it is not alleged in the complaint) that she was fully informed of said agreement made by the defendant Otis as aforesaid. It was alleged and found that both she and said Otis have ever since the death of said Jennie refused and neglected to execute to plaintiff a deed to said Los Angeles property, though often requested so to do. It further appears from the complaint and the findings that plain-

tiff was appointed administrator of his wife's estate November 27, 1893, and that as such administrator he sold, under order of the court in 1895, all the said Los Angeles real property, the subject of the estate, and received the consideration paid; that in July, 1896, he resigned his trust, and defendant Bonebrake was appointed administrator; that plaintiff paid over to defendant Bonebrake the funds received for the sale of said property, who now holds the same as such administrator. The judgment of the court was "that all the funds in the hands of the said administrator \* \* \* derived from the sale of property described in the complaint is the sole and separate property of plaintiff; deducting first therefrom all debts which have been duly presented and allowed against the estate of said Jennie R. Simons, deceased, and all costs and expenses to which said fund may be legally subjected during the course of administration," etc. It is conceded by defendants and found by the court that plaintiff and defendants Bedell are the sole heirs at law of deceased. There is much conflicting evidence, and, upon certain facts found, the court might have reached a different conclusion. But we think there was evidence tending to justify the findings, and we cannot say that the court erred in its adoption of the facts as found.

1. Defendants contend that the demurrer should have been sustained, as no cause of action was stated. The question was not presented by the demurrer, nor is it argued in the briefs, as to the right of plaintiff to go into a court of equity to determine who is entitled to distribution,—a question which it seems to us was clearly within the powers of, and should have been determined by, the court sitting in probate. *Siddall v. Harrison*, 73 Cal. 560, 15 Pac. 130. We are not prepared to say, however, that the court was without jurisdiction; and, as all parties seem to have treated the matter as properly brought before the court, we shall so treat it. Defendants urge that there is nothing in the complaint to show that said Jennie "intended to and would have made a valid will bequeathing to plaintiff all her interest in the Los Angeles property," had it not been for the action of her parents, nor "that she would have bequeathed any part of her property to plaintiff, if she had made a will"; that the complaint states the evidence, instead of the ultimate facts; and that "evidentiary facts cannot be substituted in a pleading for an allegation of the facts to be put in issue,"—citing *Green v. Palmer*, 15 Cal. 415; *Thomas v. Desmond*, 63 Cal. 426; *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984; *Harris v. Hille-gass*, 54 Cal. 463. It is not distinctly alleged that the said Jennie abstained from making a will devising her Los Angeles property to plaintiff in consideration of the promise made to her by her father, that he and her mother would convey their interest in that property to plaintiff should she die;



but we think it sufficiently appears from the complaint that the parties so regarded the agreement, and that she conveyed the New York property upon the understanding that her parents were to convey their interest in the Los Angeles property to plaintiff. We do not think that the rule with regard to pleading ultimate facts, instead of the evidence of those facts, is so far violated as to bring the pleading within the cases cited, and to make it obnoxious to a general demurrer.

2. It is objected that there is no finding of fact that Otis T. was the agent of his wife, Jane, nor is there any allegation of such agency in the complaint; and it is claimed that the finding that she was fully informed of the agreement made by Otis is not a finding that she had such knowledge when she accepted the deed to the New York property, and the finding is outside any issue raised in the pleading. It is not disputed that Mrs. Bedell was at her home in New York when the alleged agreement was made in Los Angeles, and that the knowledge came to her after the death of her daughter, plaintiff's wife. And Mrs. Bedell testified that her husband did not communicate to her the agreement as it is testified to by plaintiff and found by the court, but that the agreement was subject to her approval. There was evidence tending to support the finding as to the agreement, and the question is, could the mother retain the title to the property, and refuse to carry out the agreement under which it was conveyed? We do not see that it was at all necessary to allege or prove an agency in the husband from his wife. The New York property had been conveyed to plaintiff's wife by her mother. So, also, had the Los Angeles property been conveyed by her direction, and plaintiff had conveyed to her some property. In anticipation of death, plaintiff's wife desired that the New York property should in that event go back to her mother, and the Los Angeles property should go to her husband. Her father was there with her during her last illness, and to him she communicated her wishes, and to him she committed their execution. It was his duty to correctly inform his wife of the conditions upon which his daughter had made the deed, and he could not deprive plaintiff of the benefits of the agreement by misrepresenting its conditions to the grantee of the deed. If she did not know the conditions at its delivery, she did later, which was the same in contemplation of law; and it was her duty either to comply with them, or surrender the property conveyed. We think the foregoing views are sustained by ample authority. Some of the cases will be found in notes to the text in *Devl. Deeds*, §§ 1073, 1074, 1077. See, also, *Lady Superior of Congregational Nunnery of Montreal v. McNamara*, 3 Barb. Ch. 375.

3. It is claimed by appellant that the agreement upon which plaintiff relies is void under the statute of frauds, not having been in

writing; citing *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300. It is also urged that, even if Otis T. could make such agreement for himself, he could not bind his wife; citing § 3390, Civ. Code. The case cited was where a resulting trust not in writing was set up. Mrs. Cass had purchased the property with her own money, and taken the title in her own name. Her agreement was to make a deed to her son, and leave it in escrow until her death, in consideration of certain things to be done by him. It was held that no such trust arose. We do not think that case similar to the one here. Plaintiff's wife executed her deed, of property owned by her, to her mother, without consideration, and delivered it in escrow to her father, to be delivered upon certain conditions and agreements. The condition of delivery happened, to wit, her death. She omitted to make provision for her husband by will, and made no conveyance of the Los Angeles property to him, relying upon the conditions being performed upon which she made the conveyance to her mother. She owned both properties, and in fact conveyed to her mother property worth \$15,000, subject to a mortgage to secure \$2,100, the amount then due; reserving to her husband lot 9, of the value of \$2,500, and the lots conveyed to her by him, which were sold at probate sale for the mortgage lien on them. The section of the Code above referred to has no application to such a case; for there was here neither an obligation "to perform an act which the party had not the power lawfully to perform," nor "an agreement to procure the act or consent of the wife of the contracting party, or of any third person," in the sense there understood. It may be conceded that Mrs. Bedell could not be compelled to carry out the agreement, but she accepted the benefits and retained them, and equity will compel her to comply with the terms upon which such benefits were bestowed. She cannot profit by the act of one party to the agreement, and repudiate her own obligation in respect of it. Her acceptance and retention of the consideration, after learning all the facts, was a ratification of the agreement by which it was paid. Equity and good conscience demand that the defendants Bedell either convey the New York property to the estate of Jennie Simons, deceased, or relinquish all claim upon the proceeds of the Los Angeles property.

4. It is further urged that under section 1093, Civ. Code, Mrs. Bedell cannot be compelled to convey her interest, because she did not execute and acknowledge any instrument as prescribed by section 1186 and section 1191 of the same Code; citing *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695, where it is held that "specific performance cannot be compelled of an unacknowledged executory contract of a married woman to convey her separate property." *Olson v. Lovell*, 91 Cal. 508, 27 Pac. 765, is cited, where *Jackson v. Torrence* is commented upon. The governing

principles of those cases are so obviously dissimilar from the principles underlying the case before us, that we deem it unnecessary to say more than that the sections of the Code and the cases cited do not apply. Had this action been brought for specific performance, and before the Los Angeles property was sold by the probate court, we cannot see that any essential element would have been lacking. The contract was concluded, certain, unambiguous, mutual, and for valuable consideration. It was fair in all its parts; free from misrepresentation or misapprehension, fraud or mistake, imposition or surprise. It was neither an unconscionable nor hard bargain, nor was its performance oppressive upon the defendants. And it was such contract as was capable of execution through a decree of the court. Pom. Eq. Jur. §§ 1404, 1405, and notes. It is true that the Los Angeles property was sold by the probate court, and a conveyance by the Bedells to plaintiff of their interest could not well be decreed; but the proceeds of the sale remain within the control of the court, and it is within its power to make the alternative decree directing payment to plaintiff, or that he is entitled to distribution thereof, subject to the payment of debts, charges, and expenses of the estate.

5. The only errors claimed in the admission of testimony are two: (1) A witness was called by plaintiff to relate a conversation she had with Mrs. Bedell, at Los Angeles, about the property, just before the marriage of her daughter. The ground of the objection was that "it had no relevancy to the case, and the nature of the conversation was not shown." We think the question was relevant. (2) A witness was asked to state what plaintiff's wife said in the presence and hearing of her father with relation to the property matters between herself and her husband. The objection made at the trial was that the question was incompetent and immaterial. The objection now made is that Mrs. Bedell was not present. Mr. Bedell was present. The testimony was admissible, as tending to prove the conditions upon which Mrs. Simons made the deed to her mother, even though the latter was not present. Counsel falls into error here, as elsewhere, in assuming that the previous knowledge and consent of Mrs. Bedell were necessary to bind her. We discover no error in the judgment or order of the court, and therefore advise that they be affirmed.

We concur: HAYNES, C.; BELCHER, C.

For the reasons given in the foregoing opinion, the judgment and order are affirmed. McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.

I dissent: BEATTY, C. J.

TEMPLE, J. I dissent. Conceding the validity of the contract stated in the principal opinion, it is nothing more than this. In con-

sideration that Mrs. Simons would deed to her mother the New York property, and would not make a will, defendants Bedell would convey to plaintiff, after the death of Mrs. Simons, the Los Angeles property. As Mrs. Simons owned the Los Angeles property, and under the contract was expected to die such owner, the title which defendants were to convey was what they would inherit from their daughter. Had they conveyed this to the plaintiff, their deed would not have authorized plaintiff to recover the property from the administrator. He would take as heir, and an heir cannot recover the property from the administrator before distribution. Bonebrake is administrator, and holds the property as such. The estate has not yet been distributed. *McDaniel v. Pattison*, 98 Cal. 86, 32 Pac. 805; *Siddal v. Harrison*, 73 Cal. 560, 15 Pac. 130. After the death of his wife, plaintiff was appointed administrator, and had the Los Angeles property sold, and then resigned. A successor was appointed, and this suit was brought. In a suit for specific performance,—which this is,—it seems clear to me that the money must take the place of the real estate. Such it was when the alleged contract was made, and it seems quite obvious to me that, even conceding that Otis T. was authorized to contract for his wife, the contract was within the statute of frauds. *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300, seems altogether in point, except that this is a much plainer case than that was. There is not, and cannot be, a pretense of part performance here. Supposing, therefore, that Mrs. Bedell did ratify the agreement by accepting the deed, the contract is void. Nor do I think there is any evidence to sustain the finding that Mrs. Bedell accepted the deed with full knowledge of the alleged contract. To the contrary, all the evidence upon the subject is to the effect that she was told that her husband had only told Mrs. Simons that they would convey the property if his wife, Mrs. Bedell, approved of it, subject to a mortgage for the amount of the debt on the New York property. Plaintiff's testimony and his letters all tend to show this. I also think the case is, in principle, within the decision in *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695, and that there was grave error in the admission in evidence of the statements of plaintiff's wife—not made at the time of the alleged contract, but subsequent thereto—as against Mrs. Bedell. It is assumed that the property had all belonged to Mrs. Bedell, as her separate property. Suggestion is made, however, that the evidence discloses that all the property was community property of Mr. and Mrs. Bedell. If so, then title to the New York property did not pass by Mrs. Bedell's deed to Mrs. Simons, and there was no consideration for the alleged agreement. It might be argued with some plausibility that upon the facts found a suit might be maintained to cancel the deed to the New York property, but I am unable to comprehend any relief to



which the plaintiff is entitled, under those facts, in regard to the Los Angeles property.

I concur: HENSHAW, J.

(6 Cal. Unrep. 170)

**SAN DIEGO COUNTY v. RIVERSIDE COUNTY.** (L. A. 391.)

(Supreme Court of California. Nov. 19, 1898.)

COUNTIES—PRESENTATION OF CLAIMS—NEW COUNTIES—APPORTIONMENT OF PROPERTY AND DEBTS.

1. St. 1893, p. 346, §§ 43, 44, requiring a second presentation of claims allowed in part to the board of supervisors before bringing suit for the balance, do not apply to claims wholly rejected.

2. Act March 11, 1893 (St. 1893, p. 158), erected a new county out of existing ones, and provided that commissioners should apportion the property and indebtedness of the old county and the new one. At that time certain railroad taxes were delinquent for each of eight years, and the railroad company paid the first six years' taxes, but left the taxes for 1886-87 unpaid. Under the reassessment act of March 23, 1893 (St. 1893, p. 290), the state board of equalization reassessed the latter taxes, and apportioned the valuation and taxes between the two counties according to the mileage in each. After the passage of the reassessment act, but before the reassessment, the commissioners apportioned the property of the old county, including taxes due, and fixed a ratio for the division of said taxes, excepting the taxes for 1886-87, and adjusted the indebtedness between the counties. The latter taxes were afterwards paid into the treasuries of the old and new counties in the ratio established by the state board of equalization. *Held* that, the commissioners having made no adjustment of the respective rights of the counties in them, an action by the old county to recover the amount of said taxes paid to the new county would not lie.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by the county of San Diego against the county of Riverside. There was a judgment for plaintiff, and defendant appeals. Reversed.

L. Gill, Charles R. Gray, and E. W. Freeman, for appellant. A. H. Sweet, Alexander Hughes, and Goodrich & McCutchen, for respondent.

CHIPMAN, C. Action to recover certain taxes paid by the Southern Pacific Railroad Company upon reassessment by the state board of equalization for the years 1886 and 1887, under the provisions of the act of March 23, 1893 (St. 1893, p. 290), paid by that company to the state treasurer, and by him to defendant county. Defendant interposed a demurrer to the complaint, which was overruled; and, defendant declining to answer, plaintiff had judgment for \$9,104.65, from which defendant appeals. The demurrer challenges the jurisdiction of the court as to both the person of defendant and the subject-matter of the action, and the sufficiency of the facts alleged.

1. It is contended that the complaint is insufficient in showing that the claims sued upon were presented but once to the board of supervisors; citing sections 43 and 44 of the county government act (St. 1893, p. 346); *Arbios v. San Bernardino Co.*, 110 Cal. 553, 42 Pac. 1080. In the case cited this court construed these sections to require a second presentation of a claim before suit where the board has allowed a portion of the claim presented and rejected the remainder; and the reason stated was that the board should have an opportunity to again consider the claim, if the amount allowed was not satisfactory to the claimant, so as to avoid, if the board should change its mind, the cost of litigation which might be imposed by section 44. Where the whole claim is rejected, as in the case here, the statute does not require a second presentation.

2. Riverside county was carved out of San Diego county and San Bernardino county by act of March 11, 1893 (St. 1893, p. 158). The railroad company at that time was a tax delinquent for the years 1880 to 1887, inclusive. It appears from the allegations of the complaint that the company paid the tax to these counties for the years 1880 to 1885 some time during the year 1893; but for the years 1886 and 1887 the tax was levied upon the reassessment made under the act of March 23, 1893, and was not paid until 1894. The action relates to the tax for these last two years. The act of March 11, 1893, creating Riverside county, contains a section, apportioning the public property and debts of the counties concerned, not unlike the one found in the act of March 11, 1889 (St. 1889, p. 123), creating Orange county. Section 9 of the act of March 11, 1893, *supra*, provides for the appointment of commissioners, and among their duties were the following: "Said board of commissioners shall, immediately after its organization, ascertain the indebtedness of San Diego county existing at the time this act takes effect, and also the total value of all property at that time belonging to said county of San Diego. They shall ascertain the assessed value of all property in San Diego county, as it stood before this act takes effect, according to the assessment made for San Diego county in the year eighteen hundred and ninety-two; also the assessed value, under the same assessment, of all property in the territory hereby set apart from San Diego county and embraced in the county of Riverside. They shall find the difference between the amount of the indebtedness of San Diego county and the value of the property belonging to San Diego county at the time this act takes effect, and, if such indebtedness exceeds the value of such property belonging to San Diego county, the county of Riverside shall pay San Diego county a due proportion thereof, to be determined as follows." Directions are given how to find this "due proportion," and the commissioners are directed to report the amount constituting this propor-

tion to the boards of supervisors of the respective counties; "also, the value of any property belonging to San Diego county at the time this act takes effect which is situated in the county of Riverside. The sum of said ascertained value of said last mentioned property, added to the ascertained proportion of said excess which the county of Riverside is to pay to San Diego county, shall be an indebtedness from the county of Riverside to the county of San Diego. Said property, situated as aforesaid in the county of Riverside, shall, upon settlement therefor as provided in this act, become the property of the county of Riverside, and San Diego county shall pay the entire indebtedness of San Diego county." Provision is further made for adjusting accounts after the excess in the value of the property over the indebtedness in either county is ascertained, and then follows a provision authorizing a tax by Riverside county should it, upon final settlement, be found indebted to San Diego county. The corresponding section found in the act organizing Orange county is set out quite fully in *Los Angeles Co. v. Orange Co.*, 97 Cal. 329, 32 Pac. 316, and *Orange Co. v. Los Angeles Co.*, 114 Cal. 390, 46 Pac. 173. It is alleged in the complaint that this board of commissioners was duly organized under the act, and to carry out its directions, and that "they proceeded to discharge their duties under said act"; that "they reported their proceedings to the boards of supervisors of San Diego county and Riverside county in October, 1893, ascertaining the sum of \$2,782.86 to be due the county of San Diego by the county of Riverside on account of the matters which were considered by said commissioners." Among other things, it fixed a ratio of apportionment, "which ratio was subsequently ratified and accepted by the respective boards of supervisors of said counties, and adopted by them in the division of the taxes for the years 1880, 1881, 1882, 1883, 1884, and 1885, which had been reassessed against said railroad company, and paid over to the officers of the two counties, as hereinafter explained. But the taxes for the years 1886 and 1887 were not considered or in any manner adjusted by the said board of commissioners or the boards of supervisors of the two counties." The complaint then alleges that on August 24, 1894, while the taxes for these two years remained duly levied, but uncollected, the state board of equalization, "under and by virtue of the act of March 23, 1893, reassessed said railroad company for taxation" for these years, and improperly apportioned the amount to be paid to each county at the rate of \$10,000 per mile,—\$877,000 to San Diego county and \$926,000 to Riverside county,—and reported the same to the auditors of the respective counties as the basis for taxation of the railroad company by them, and the property of the company was taxed in accordance with such apportionment. It is further alleged that the railroad company

paid the tax to the state treasurer, and he paid the same to the respective counties as apportioned by the state board of equalization. The commissioners made the adjustment in October, some months after the reassessment act was passed, and presumably knew of its provisions, and that a reassessment for the years 1886-87 would be made.

These allegations of the complaint sufficiently show the nature and foundation of the action. No explanation is given as to why the commissioners did not adjust and apportion the taxes for the years 1886 and 1887. They did adjust the unpaid taxes for the years 1880 to 1885, inclusive, which had remained unpaid; and the commissioners evidently regarded (and properly, we think) the matter of adjusting these taxes as coming within the jurisdiction conferred upon the commissioners by the act under which they were constituted. These "back taxes" were treated as property formerly belonging to San Diego county; and if, for some unexplained reason, the railroad company paid the taxes to the counties for the years 1880-85, and refrained at that time from paying for the years 1886-87, until reassessed under the act of 1893 (if such be the fact), we cannot see that the question as to whether the matter properly belonged to the commissioners to adjust was affected thereby. The claim against the company for these taxes may have been in "abeyance" because "some question arose as to the validity of the provision of the act of the legislature for the collection of said taxes," as is alleged in the complaint; but it was a claim as much as was the claim for the back taxes of the other years, and was, we think, one of the matters confided to the commissioners for adjustment by the legislature. In *Orange Co. v. Los Angeles Co.*, supra, the action was for a claim that had been omitted by the commissioners because they were ignorant of its existence, but was such a claim as the commissioners could have taken into account and apportioned. This court said: "In creating the county of Orange, the legislature determined how the debts and property of Los Angeles county should be divided and apportioned, as it had full power to do. The act prescribed the limits of each county's rights, and the methods by which they were to be ascertained. In performing their duties the commissioners doubtless intended to make the division as required, and, if they failed to do so, the failure arose through mistake. The mistake was one, however, which in our opinion can be corrected by legislative action only, and not by the courts." A similar claim to the one now before us was presented by the county of Colusa to the county of Glenn, arising upon the division of the latter county and under the reassessment act of 1893. In the act dividing these counties no provision was made for any apportionment of the public property or of the debts or credits of Colusa county between it and Glenn county. It was held on demurrer in such case that the whole thereof belonged to Colusa



county, citing *Los Angeles Co. v. Orange Co.*, 97 Cal. 329, 32 Pac. 316; *Tulare Co. v. Kings Co.*, 117 Cal. 195, 49 Pac. 8. But the point as to whether the tax paid in 1894 was upon the original assessment, or upon a reassessment, and what effect, if any, that question would have in the case, was not decided, but left open to be pleaded by defendant. *Colusa Co. v. Glenn Co.*, 117 Cal. 434, 49 Pac. 457. In the present instance the legislature provided a board of commissioners to determine how these matters should be adjusted, and we think in such case the courts cannot be called upon to perform its duties. *Sedgwick Co. v. Bunker*, 16 Kan. 498; *Orange Co. v. Los Angeles Co.*, supra.

From this view of the case, it becomes unnecessary to pass upon the questions, so fully discussed by the respondent, namely: When was the obligation to pay this tax incurred? Did San Diego county lose her right to this tax by the mere segregation of a portion of her territory? Did the act of March 11, 1893, deprive her of the right to receive this tax? These are questions not necessary to be decided in this case, and are therefore not now passed upon.

Respondent states in its brief that all the facts were set forth in the complaint in order to have the right of action determined on the demurrer, from which we infer that the complaint cannot be amended so as to obviate the objections made to it. The judgment should therefore be reversed, with directions to dismiss the action.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, with directions to dismiss the action.

122 Cal. 364

DAVIS v. GREEN. (Sac. 424.)

(Supreme Court of California. Nov. 19, 1898.)

HUSBAND AND WIFE—COMMUNITY PROPERTY—BURDEN OF PROOF—HARMLESS ERROR.

1. The wife of an insolvent husband leased land, and bought seed barley to plant, for the price of which she gave her individual note. She testified that she planted the barley because her husband intended to go away; that they thought that she had better have it in her name; that she had her husband buy the barley, and help plant it, which he did under her direction; that he did the work in the field, and she worked in the house. The husband did not go away, but remained, and took charge of the work. *Held*, that the crop raised was community property, and liable for the husband's debts.

2. The burden is on the party claiming that property acquired by either husband or wife after marriage is separate property, to prove it by satisfactory evidence.

3. The admission of evidence, immaterial, but not prejudicial to a party, is harmless error.

Commissioners' decision. Department 1. Appeal from superior court, Madera county.

Action by Lizzie B. Davis against J. W.

Green. From a judgment for defendant, and an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Searles & Child, for appellant. Francis A. Fee, for respondent.

BELCHER, C. This is an action to recover the possession or value of 610 sacks of barley, which were levied upon and sold by the defendant, as constable, to satisfy a judgment against one W. E. Davis, the husband of plaintiff. The plaintiff claims that the said barley was her separate property, and as such was not liable for the debts of her husband. The defendant denies that the barley was the separate property of the plaintiff, and alleges that it was the community property of herself and husband. The case was tried by the court without a jury, and the findings and judgment were in favor of the defendant. From that judgment, and an order denying a new trial, the plaintiff appeals.

The only question presented is, was the finding that the barley was community property justified by the evidence? Mr. and Mrs. Davis were married in 1892, and thereafter, up to the time of the trial, continued to live together as husband and wife. At the time of the marriage Mrs. Davis had no property, real or personal. In 1894, Mr. Davis was insolvent, and in the fall of that year Mrs. Davis thought she would engage in some farming business in her own name. To that end she leased certain land, and bought seed barley of a Mr. Scheffing to plant upon it, for the price of which she gave him her promissory note. The seed barley was planted, and in June, 1895, the crop was harvested, the 610 sacks in controversy being a part of that crop. Mrs. Davis, as a witness in her own behalf, testified: "Mr. Davis and Mr. Scheffing did the work in planting the crop under my direction. Mr. Davis bought the seed grain for me, under my direction, from Mr. Scheffing. I have not paid for it. I gave Mr. Scheffing my note for it in the amount of two hundred and fifty dollars. I signed and delivered the note to Mr. Scheffing in payment for the seed which I bought from him. The seed for which I gave my note is the same seed that was planted on the land referred to. The note has not yet been paid. Mr. Healy and Mr. Dyer harvested the crop. I agreed to pay them, but have not done so yet. \* \* \* I planted the barley because Mr. Davis intended to go away, and he and I talked it over, and we both thought I had better have it in my own name, and he told me to do just as I pleased about it. There was other barley harvested besides this six hundred and ten sacks, which I sold. I took the funds, and used them as my own money. There were about twelve hundred sacks raised in the entire crop, and one-fifth went for rent. There were somewhere near three hundred sacks which I disposed of by sale, myself. I used

the money realized from the barley sold. I used it in the house for living. \* \* \* I had Mr. Davis help put this barley in. He and Mr. Scheffing did the work. My husband did the work in the field, and I did the work in the house. \* \* \* All these acts which Mr. Davis performed I had him do. I authorized him to act as my agent in all these matters." The above is, in substance, all the evidence on which appellant's claim that the crop of barley raised was her separate property is based; and in support of this claim the case of *Wren v. Wren*, 100 Cal. 276, 34 Pac. 775, is cited and relied upon. In that case the plaintiff, who was a married woman, and living with her husband, brought the action to recover for personal services rendered by her as nurse to the defendant, who was an inmate of their house; neither she nor her husband, however, being under any natural or legal obligation to care for him without charge. And, prior to the rendition of the services mentioned, it was orally agreed between plaintiff and her husband that she should have and receive all moneys earned by her in nursing defendant as her sole and separate property. The right of the plaintiff to recover was upheld by this court, and it was said that under the provisions of sections 158 and 159 of the Civil Code "there can be no doubt that a husband and wife may agree between themselves, without any other consideration than their mutual consent, that money earned by the wife in performing any work or service which does not devolve upon her by reason of the marriage relation shall belong to her as her own." Obviously that case is not in point here. In this case it does not appear that there was ever any agreement between the plaintiff and her husband that the crop raised on the leased land should be her separate property. She simply stated that she planted the barley "because Mr. Davis intended to go away, and he and I talked it over, and we both thought I had better have it in my own name." This is entirely consistent with the idea that they so thought because, during his expected absence, she could manage the business better if it was conducted in her own name; but it comes far short of constituting an agreement that the proceeds of the business should be her separate property. Besides, Mr. Davis did not go away, but remained, and took full charge of the work. He "did the work in the field," and she "did the work in the house." In this state all property acquired after marriage by either husband or wife, except that acquired in certain specified ways,—of which this is not one,—is presumed to be community property, and the burden is upon the party claiming that it is separate property to prove it to be such by clear and convincing evidence. *Meyer v. Kinzer*, 12 Cal. 248; *Morgan v. Lones*, 78 Cal. 58, 20 Pac. 248; *Dimmick v. Dimmick*, 95 Cal. 323, 30 Pac. 547; *Jordan v. Fay*, 98 Cal. 264, 33 Pac. 95. Under the showing made here, it must, therefore, be held

that the seed barley purchased, and the crop raised therefrom, were community property, and liable for the debts of the husband.

The point is made that the court erred in admitting in evidence, over the objection of plaintiff, the proceedings in insolvency on the part of Davis, filed June 24, 1895, and showing him to be indebted to various persons in the aggregate sum of \$6,581.38. But, conceding that this evidence was irrelevant and immaterial, still we fail to see that the plaintiff was, or could have been, prejudiced by it. If it had been excluded, we think the result of the trial must have been the same. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

122 Cal. 335

PEOPLE ex rel. WAUGH v. AUBURN & Y. J. TURNPIKE CO. (Sac. 391.)

(Supreme Court of California. Nov. 18, 1898.)

TURNPIKE COMPANIES—REINCORPORATION—EFFECT ON RIGHT TO COLLECT TOLLS—CORPORATIONS—STATUTES.

1. A company, organized to construct a turnpike in 1853, in due time elected to continue its existence as a corporation under Civ. Code, §§ 287, 401, for the term of 50 years, and continued to take tolls up to the present time. Section 287, allowing such extensions, provides that "thereafter the corporation shall continue its existence under the provisions of this Code which are applicable thereto, and shall possess all the rights and powers, and be subject to all the obligations, restrictions and limitations imposed thereby." Section 288 expressly repeals the former laws under which such corporations were formed. Section 514 permits wagon-road corporations to take such tolls only as are fixed by the board of supervisors. *Held*, that the extension of the existence of the corporation carried with it the right to collect tolls.

2. Act April 22, 1853 (St. 1853, p. 114), in regard to the incorporation of wagon-road companies, which was, in effect, an amendment of the corporation act of 1850 (chapter 4), which was expressly repealed by Act May 12, 1853 (St. 1853, p. 169), is also repealed, as "inconsistent" with the later act.

3. Civ. Code, §§ 287, 401, permitting corporations to continue their existence for 50 years, on certain terms, is not limited to private corporations as distinguished from quasi public corporations.

Beatty, C. J., and Henshaw and Temple, JJ., dissenting.

In bank. Appeal from superior court, Placer county.

Action by the people, on the relation of one Waugh, against the Auburn & Yankee Jim's Turnpike Company, to enjoin defendant from collecting tolls. From a judgment for plaintiff, defendant appeals. Reversed.

F. P. Tuttle, for appellant. Atty. Gen. Fitzgerald, L. L. Chamberlain, and Tuttle & Wright, for respondent.



PER CURIAM. When this cause was in department the following opinion was prepared by Mr. Commissioner HAYNES. Upon further consideration of said cause in bank we are satisfied with the views therein expressed, and for the reasons therein given the judgment is reversed, with directions to the court below to dismiss the action:

"The defendant was incorporated in 1853, under an act approved May 12th of that year, entitled 'An act to authorize the formation of corporations for the construction of plank or turnpike roads' (St. 1853, p. 169), for the purpose of constructing and operating a turnpike toll road between Auburn and Yankee Jim's. The corporation fixed the term of its existence at twenty years, which was the longest period permitted by the statute, and constructed the road within the time fixed by law, and thereafter, and until the month of May, 1873, continued to exist and to take tolls on said road, under the said act; and at the date last mentioned, which was less than twenty years from the date of its organization, it elected to continue its existence as a corporation, under the provisions of sections 287 and 402 of the Civil Code, for the term of fifty years, and continued to take tolls as before until April 10, 1896, when the board of supervisors, on the application of the defendant, fixed the rates of toll to be charged on said road, by adopting the rate fixed on that and other roads the year before; and the defendant still and now claims the right and franchise to take tolls thereon by virtue of its original organization, and its continued existence under the provisions of the Civil Code. This action was commenced in June, 1896, the prayer of the complaint being for a decree adjudging that the defendant has no warrant or authority to collect tolls on said road, and that it be perpetually enjoined therefrom. The plaintiff had judgment, and the defendant appeals.

"The facts were stipulated, and stand as the findings, and the foregoing statement is condensed therefrom. Respondent concedes that the defendant is now, and ever since 1853 has been, a corporation, but contends that the franchise to exist as a corporation and the franchise to collect tolls are separate and distinct; that the latter franchise is simply a right granted by the board of supervisors under the law; and then states the question thus: 'Did the mere existence of the corporation, which happened to be called a turnpike company, confer upon the board the duty and right to give it the further franchise?' It must be true that by the terms of the act of 1853, under which the defendant became incorporated, the existence of the corporation, as well as its right to take tolls, was limited to twenty years; and, if that act had continued in force, the question before us would be easily determined. It is conceded, however, that, before the expiration of the term of its existence, the codes were adopted, and under the provisions of the Civil Code the term of its existence was not only extended, but its

existence was continued 'under the provisions of this code which are applicable thereto, and shall possess all the rights and powers, and be subject to all the obligations, restrictions and limitations prescribed thereby.' Civ. Code, § 287. So far as I am informed, there has never been any question that, as to a corporation electing to continue its existence under the provisions of the code applicable to it, the former laws under which it was formed and existed, and which were applicable to it, were expressly repealed by section 288 of the Civil Code; and if it be true, as conceded by respondent, that the term of defendant's existence has been extended by its compliance with the code provisions, at least that part of the act of 1853 which limited the term of its existence to twenty years has been repealed. But the act of 1853 did not limit the time within which the franchise of taking tolls should be exercised, otherwise than by the term of its existence as a corporation, and hence, to support respondent's contention, the same provision of the statute which was repealed, as to the existence of the corporation, remained in force, and is now invoked as a living statute, under which the death sentence of the franchise to take tolls is pronounced. To illustrate: Suppose the codes had not been enacted, and the legislature had amended section 5 of the act of 1853 to the effect that the term of existence of all corporations formed under it should be extended to fifty years, and had left section 18 unchanged; could any one doubt that the right to take tolls given by that section would continue during the extended term? Though not destroyed by defendant's election to continue its existence under the code, its right to take tolls was not left unaffected. By section 18 of the act of 1853 the defendant had full power to regulate tolls and toll gates on its road; but by section 514 of the Civil Code wagon-road corporations are permitted to take such tolls only as are fixed by the board of supervisors. The act of 1853 made no provision as to the disposition of the road at the expiration of the franchise, or upon the dissolution of the corporation, while the Political Code (section 2619) provides: 'Whenever the franchise for any toll-bridge, trail, turnpike, plank or common wagon road has expired by limitation or non-user, such bridge, trail, turnpike, plank or common wagon road becomes a free public highway.' Section 2799 of the Political Code provides that the corporation may abandon the whole or any part of their road by a written surrender, acknowledged and recorded, and section 2800 provides for the purchase of toll roads by the county 'at any time after any toll road constructed, and under operation under any of the laws of this state, has been in existence for ten years or more, \* \* \* at a fair cash valuation, to be fixed by seven commissioners,' etc.

"It is further urged by respondent that under the act of April 22, 1853 (St. 1853, p. 114), the corporation was allowed to collect rev-

enue enough to recoup itself for the cost of the road, repairs, and running expenses, and, in addition, twenty per cent. on the investment, after which time its income was to be reduced. It is not clear that said act applies to any corporation organized under the act of May 12, 1853. The act of April 22d was brief and imperfect, and, while not referred to in the repealing clause of the later act, appears to have been repealed by it. The former act is entitled 'An act to provide for the incorporation of wagon-road companies. The first section provided that the provisions of chapter 4 of an act concerning corporations, passed in 1850, 'wherein the same does not conflict with the provisions of the following sections of this act, shall apply to the incorporation of companies formed for the purpose of constructing common wagon roads.' It was, therefore, in effect, an amendment of chapter 4 of the act of 1850, and that chapter was expressly repealed by the act of May 12th, which also repealed 'all other laws and acts inconsistent herewith.' It is also argued that it could not have been the intention of the legislature that by the continuance of the existence of corporations under section 287 of the Civil Code the valuable rights and privileges would be continued which would have otherwise ended under the provisions of the original charter. But the power of the legislature to extend the existence of these privileges upon the extension of the corporate existence cannot be questioned; while there would seem to be little reason for continuing the latter, if all its former rights and privileges were to be lost by its acceptance of the offer of continued corporate existence. Indeed, the simple and inexpensive process of organizing a corporation, thus creating a franchise to exist as such, shows conclusively that if that was the sole purpose of section 287 it was almost, if not quite, useless; and, therefore, its principal purpose must have been to continue corporate existence in order that corporate property, rights, and privileges might be preserved and enjoyed by complying with the provisions of section 401 or of section 402 of the Civil Code. (The latter of these sections authorized corporations to continue their existence for an additional period of fifty years, and was repealed March 30, 1874.)

"It is further argued that these code provisions were intended to apply to the numerous corporations doing business of a private nature, and not to quasi public corporations. Whether any reason existed which would have justified such a distinction, need not be considered. It is plain no ground for such distinction appears in either of the sections of the codes above considered, while section 403 of the Civil Code declares that: 'The provisions of this title [title 1] are applicable to every corporation, unless such corporation is excepted from its operation, or unless a special provision is made in relation there-

to inconsistent with the provisions of this title, in which case the special provision prevails.' It is, of course, conceded that a 'toll road' is a public highway, and that, when the right to take tolls ceases, it becomes a free public highway, and the board of supervisors has no authority to grant a franchise to collect tolls upon such a highway. *El Dorado Co. v. Davidson*, 30 Cal. 521; *Blood v. Woods*, 95 Cal. 78, 86, 30 Pac. 129.

"Respondent cites several cases, none of which affect the conclusions I have reached. In *People v. Railroad Co.*, 76 Cal. 190, 18 Pac. 308, defendants were granted a franchise by the board of supervisors under a special act of the legislature, which limited the term of franchises to be granted to fifteen years. Held, that tolls could not be collected after the expiration of that time. *People v. Davidson*, 79 Cal. 166, 21 Pac. 538, was entirely similar. There the road was constructed by a private individual in 1861 (upon what authority does not appear), and who kept it as a toll road. In 1878, the board of auditors of El Dorado county, on the owner's application, made an order fixing rates of toll, which order was repealed by the board of supervisors in 1886. On these facts two questions were considered: '(1) Did the defendant dedicate his road to a public use? (2) When his franchise expired, and he ceased to have a right to collect tolls on it, did it become a free public highway?' In *McMullin v. Leitch*, 83 Cal. 239, 23 Pac. 294, the defendants were incorporated under the act of 1853, but it was not renewed under the provisions of the Civil Code, and it was held that its right to collect tolls expired at the termination of the franchise, and that the stockholders were not entitled to compensation upon the road being declared a free public highway.

"Appellant cites *People v. Pfister*, 57 Cal. 532, a case directly in point. The defendant was incorporated as a turnpike company in 1857, and elected to continue its existence under the code, and complied with its provisions in that behalf. In the opinion it was said: 'The denial of the right of the corporation to collect tolls is based in the complaint exclusively upon the ground that no such corporation exists. If it exists, it has a right to collect such tolls as the board of supervisors may authorize it to collect.' Ross, J., dissented, contending that the extension of the existence of the corporation did not carry with it the right to collect tolls beyond the period of twenty years from its original organization. The learned counsel for respondent, commenting on that case, say that 'the sole contention of the plaintiff was that no such corporation existed.' The complaint in that case stated that among the franchises exercised by defendants was the following: 'To own and possess a certain highway, and to collect tolls thereon' (see reporter's statement). The public would not be likely to complain that the corporation



kept the road in repair at its own expense, and it would, therefore, seem somewhat probable that the exercise of the franchise aimed at was that of taking tolls, and therefore the pith and marrow of the decision was the conclusion that, as the corporation existed, it had the right to take tolls. As it is stipulated that the agreed statement contains 'all the facts concerning said action,' the judgment should be reversed, with directions to dismiss the action."

HENSHAW, J. I dissent. The only new rights obtained by the corporation were (1) to continue its corporate existence to the full term of fifty years; (2) to exercise its corporate franchise under the prescriptions and regulations of the Code. An analysis of *People v. Pfister*, 57 Cal. 532, will disclose that the sole objection there presented to the defendant's right to collect tolls was based upon the contention that it had ceased to be a corporation. That proposition having been resolved in the defendant's favor, the right to collect tolls was not decided, but conceded.

We concur: BEATTY, C. J.; TEMPLE, J.

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122 Cal. 370

## PEOPLE v. GLEASON. (Cr. 408.)

(Supreme Court of California. Nov. 19, 1898.)

CRIMINAL LAW — CHARACTER — INSTRUCTIONS —  
HOMICIDE—EVIDENCE—WITNESSES.

1. Where accused has offered no evidence of character, an instruction that an accused's character cannot be assailed, unless he himself has put it in issue by calling witnesses in its support, is erroneous, as raising the inference that the people, had they been permitted, might have shown that accused's character was bad.

2. Where accused on cross-examination testified that an exhibition of a pistol by him on the day preceding the homicide was accidental, it having fallen out of his pocket, it is competent to show that such exhibition was made deliberately and with a threat, though deceased was not present, and the threat itself was not directed against him in particular.

In bank. Appeal from superior court, Kern county.

T. M. Gleason was convicted of murder in the first degree, and he appeals. Reversed.

A. J. Bledsoe, for appellant. Atty. Gen. Fitzgerald, for the People.

HARRISON, J. The defendant was convicted of murder in the first degree, for having shot and killed one Cotton, in the town of Bakersfield, and, having been sentenced to state prison for the term of his natural life, has appealed to this court.

In its instructions to the jury, the court gave the following instruction at the request of the prosecution: "You are instructed that the people are not permitted to assail the character of a defendant on trial in a criminal case until the defendant has himself put his character in issue by calling witnesses and offering evidence in its support; and, unless put in issue by the defendant, the people can in no way attack his character." The object of the prosecution in asking this instruction is not apparent. The evident effect of the instruction was, however, to suggest to the jury that, if the prosecution had had an opportunity to do so, they might possibly have shown that the defendant was not a man of good character, and to excuse their failure to make such showing upon the ground that he had not offered evidence in support of his character. The law assumes that a defendant who is upon trial for an offense has a fair character, and, unless evidence to the contrary is given to the jury, he is entitled to the benefit of this presumption in their consideration of the weight to be given to the testimony bearing upon his guilt. In the present case there was no evidence at the trial in ref-

erence to the character of the defendant, and he had the right to have the jury, in considering the evidence before them, assume that his character was unimpeached. He was not required to offer witnesses in support of his character, but had the right to rely upon the above presumption; and it was error for the court to suggest to the jury the possibility that his character was not good, and give them the opportunity to indulge in a conjecture that this presumption might have been overcome, but for his failure to support it by evidence. The defendant had been a witness in his own behalf, and it was competent for the prosecution to impeach his credibility as a witness by the same means as it would impeach the credibility of any other witness. *People v. Hickman*, 113 Cal. 80, 45 Pac. 175; *People v. Mayes*, 113 Cal. 618, 45 Pac. 860. They did not, however, make any attempt to attack his credibility, and as a witness he stood before the jury in the same light as any other witness. The above instruction contains a correct rule of law, but it is a rule of law by which a court is to be governed in determining the admissibility of evidence, and is not for the guidance of a jury in determining the effect of evidence which has been admitted for their consideration. As there was no evidence before the jury relating to the subject-matter of this instruction, the court was not justified in giving it to them, even if there could be any occasion upon which the instruction could be properly given to a jury. A jury should be instructed upon the evidence which has been admitted for their consideration, and not with reference to what would be their duty if they had an opportunity to consider evidence which has not been admitted. Instructions upon abstract rules of law, which have no application to the evidence in a case, tend to confuse rather than enlighten a jury, and ought not to be given. *People v. Devine*, 95 Cal. 227, 30 Pac. 378; *Comptoir D'Escompte de Paris v. Dresbach*, 78 Cal. 15, 20 Pac. 28; *In re Calkins' Estate*, 112 Cal. 296, 44 Pac. 577.

At the trial the defendant testified that on the previous evening he had got the pistol with which he shot the deceased from a man named Percy, and had left it at Carroll's saloon early that morning; that after noon of that day he went to Carroll's place for his pistol, and "I told him to 'give me that gun, and I will put it away'; that after getting the pistol he went to the Brewery Saloon with it upon his person, and, being asked if he took it out there and exhibited it, he replied: "No, sir; it kind of fell out here, and I shoved it back again." He was then asked if he did not, while in the Brewery Saloon, in the presence of one Brown and others, take the pistol out and exhibit it to them, and say in their presence, "This is what I go heeled with," or words to that effect, to which he replied in the negative. In rebuttal the prosecution called Brown as a witness, who testified that he saw the defendant in the Brew-

ery Saloon a few minutes before the shooting, and was asked whether the defendant exhibited his pistol and said to him, in substance, "This is what I go heeled with for those fellows that are after me," or words to that effect. The question was objected to upon the ground that it was incompetent, irrelevant, and immaterial for any purpose, and that it had not been shown to have any relation to Cotton. The objection was overruled, and the witness answered that he heard the remark and saw the pistol. It is urged upon this appeal that it was error to admit this testimony, as it was not a part of the *res gestæ*, and was not made in the presence of Cotton, or shown to have any reference to him. It is not claimed that this remark was any part of the *res gestæ*, but it was competent for the prosecution to show by a cross-examination of the defendant what he did with the pistol after he got it, and thus refute any inference from his statement that he got it merely for the purpose of putting it away, and it was also competent to contradict his statements in reference thereto by the testimony of Brown. The presence or absence of Cotton when the remark was made was of no moment, since the testimony was not for the purpose of showing any threat towards Cotton, but to impeach the correctness of the defendant's previous statement of his purpose in getting the pistol.

The other errors assigned upon the appeal do not need any consideration; but for the error in giving the above instruction the judgment is reversed, and a new trial ordered.

We concur: TEMPLE, J.; McFARLAND, J.; HENSHAW, J.

122 Cal. 440

BRENNAN v. BRENNAN. (Sac. 505.)  
(Supreme Court of California. Nov. 26, 1898.)

BILLS AND NOTES—PAYMENT—EVIDENCE.

The production of a note by plaintiff, with no payments indorsed thereon, is *prima facie* proof of nonpayment.

Department 2. Appeal from superior court, Sierra county.

Action by John Brennan against Laura A. Brennan, administratrix of the estate of Thomas Brennan, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Frank R. Wehe, for appellant. F. D. Soward, for respondent.

McFARLAND, J. Action on a promissory note alleged to have been made by Thomas Brennan, deceased, to the plaintiff. The defendant in her answer, upon want of information and belief, denied that Thomas Brennan executed the note, and on the same ground denied that the whole or any part thereof had not been paid, but averred, upon information and belief, that the sum of \$600 thereof had been paid in coin, and the sum of \$200 in board and lodging. At the trial plaintiff's



attorney introduced the note sued on in evidence, which had no indorsement whatever of payment, and introduced a witness, William Ryan, who testified that the note was in the handwriting of the deceased. This evidence was introduced without objection. Plaintiff then rested; whereupon defendant moved for a nonsuit upon the ground that the evidence on the part of the plaintiff was not sufficient to show that the note had not been paid. The motion was denied, and, defendant declining to offer any evidence, judgment was rendered for plaintiff as prayed for in the complaint. Defendant appeals from the judgment.

The only point insisted upon by appellant here is that there was not sufficient proof of nonpayment of the note. At common law, and in many of the American states, payment is an affirmative plea on the part of the defendant, and the burden of proving it rests upon him. 2 Greenl. Ev. § 516. If a different rule prevails in California, still it is the law here that the production of the note by plaintiff in such an action, with no indorsement of payment on it, is sufficient prima facie proof of nonpayment. *Frisch v. Caler*, 21 Cal. 71, and *Bank v. Christensen*, 51 Cal. 573. The possession of the attorney for plaintiff was the possession of plaintiff. The judgment is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

122 Cal. 424

PEOPLE v. TUPPER. (Cr. 467.)

(Supreme Court of California. Nov. 26, 1898.)

CRIMINAL LAW—TRIAL—ARGUMENT—ABSENCE OF JUDGE.

A defendant is deprived of liberty without due process of law where the judge absents himself from the court room for 20 minutes during the argument of a case in which defendant is convicted of a felony.

Department 1. Appeal from superior court, Los Angeles county.

Colonel L. Tupper was convicted of a felony, and he appeals from the judgment, and from an order denying a new trial. Reversed.

Bernard L. Mills, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. Defendant was convicted of a felony, and, as ground for a new trial, he alleged by affidavit, which was not contradicted, that during the argument of the case to the jury the judge absented himself from the court room for the period of 20 minutes. It was also alleged by the affidavit that during such absence the judge was out of sight and hearing of the proceedings going on within the court room. The foregoing facts being undisputed, we are fully satisfied they demand a retrial of the case. The argument of the case to the jury is as much a part of the trial as the introduction

of evidence. And evidence may be introduced before the jury, in the absence of the judge, if the practice here pursued may be held justified within the law. It is hardly necessary to present either argument or authority to show that neither of these practices can be justified. The judge is a component part of the court. There can be no court without the judge. And all that was done in the absence of the judge was in fact done in the absence of the court. A defendant convicted under such circumstances has been deprived of his liberty without due process of law. As fully supporting these views, we cite *O'Brien v. People*, 17 Colo. 561, 31 Pac. 230; *Turbeville v. State*, 56 Miss. 798; *State v. Beuerman* (Kan. Sup.) 53 Pac. 874. The judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

122 Cal. 448

McDONALD v. AGNEW, Justice of the Peace. (S. F. 827.)

(Supreme Court of California. Nov. 26, 1898.)

JUSTICES OF THE PEACE—APPEARANCE—DEMURRER—PROHIBITION—SCOPE OF REMEDY.

1. A defendant filing a demurrer in a justice's court makes an appearance, within Code Civ. Proc. § 416, providing that a voluntary appearance is equivalent to personal service of summons, though his demurrer is prefaced with the statement that he does not submit himself to the jurisdiction of the court; section 1014 providing that a defendant appears when he demurs.

2. Prohibition will not lie to prevent a justice of the peace from proceeding with a case, on the ground of defective service of summons, as there is an adequate remedy by appeal.

Commissioners' decision. Department 1. Appeal from superior court, San Benito county.

Petition by W. W. McDonald for writ of prohibition against Gilmore Agnew, justice of the peace. From a judgment for plaintiff, defendant appeals. Reversed.

Scott & Dooling, for appellant. G. B. Montgomery, for respondent.

HAYNES, C. The defendant, a justice of the peace, appeals from a judgment of the superior court prohibiting him from further proceeding in an action brought in his court by one Wilds against McDonald, the plaintiff in this proceeding. The appeal is from the judgment, upon the judgment roll. The findings show the following facts: That summons in the action of Wilds against McDonald was regularly issued by the justice, and "a duplicate of said summons, attached to a copy of the complaint, was handed to said W. W. McDonald" by the attorney for said Wilds; that neither said summons nor complaint was marked "Copy," nor was any other summons shown or read to McDonald; that McDonald's attorney afterwards demanded of the justice per-

mission to inspect the original summons and proof of service, but this request was not complied with, for the reason that the summons had not been returned, and a similar request was made of Wild's attorney, who replied that he would file the summons and proof of service before he moved in the action. These requests, as well as a subsequent motion to quash the summons and dismiss the action, were made before his time to answer had expired. This motion to quash was denied by the justice, and the defendant in that action again moved the court to strike the complaint from the files upon the grounds that the summons had not been returned; that the originals, and not copies, had been served; and that no other complaint or summons had been shown to him; and this motion was also denied. For the purposes of each of these motions, McDonald appeared specially. He then filed a demurrer to the complaint, prefacing it with the following statement: "Comes now the above-named defendant, and not submitting himself to the jurisdiction of this court, nor waiving any of his rights, but appearing only for the purpose of demurring to the plaintiff's complaint filed herein." This demurrer stated three grounds: (1) Want of facts; (2) improperly joining two causes of action; and (3) for uncertainty. Defendant's attorney declined to argue his demurrer, and it was overruled, and, being called upon to answer, he declined to do so, and his default was entered; and, before judgment was entered thereon, McDonald procured from the superior court an alternative writ of prohibition. No return of the summons was at any time made to the justice, though it was attached to the answer of the justice in this proceeding, with a sufficient affidavit of service, made before the date of the default. Upon these facts the superior court concluded that the justice never acquired jurisdiction over the person of the defendant, and entered judgment awarding a peremptory writ of prohibition, from which the justice appeals.

As the default was entered without a return of the summons, or proof of its service, it is not necessary to decide whether due service was in fact made, nor whether, in the absence of an appearance by the defendant, the justice would have had jurisdiction to enter his default, since there was an appearance by the defendant before the default was entered. Section 416, Code Civ. Proc., provides that "the voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him"; and section 1014, Id., provides, "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." A special appearance may be made for the purpose of quashing the summons or proof of service, but a demurrer to the complaint, raising, as it does, an issue of law in the case, to be tried by the court, is necessarily a submission to its jurisdiction over the parties. But the statute is too plain to re-

quire argument or illustration. In *Voorman v. Li Po Tai*, 113 Cal. 302, 305, 45 Pac. 470, in speaking of section 1014, supra, it is said: "A defendant appears in an action when he answers, demurs, or gives written notice of his appearance, or where an attorney gives notice of an appearance for him, and he can appear in no other way. This statute was intended to settle all disputes upon the subject." Respondent cites *Deidesheimer v. Brown*, 8 Cal. 339, *Lyman v. Milton*, 44 Cal. 631, and *Kent v. West*, 50 Cal. 185, to the point that he did not waive his objections to the service of the summons by demurring to the complaint. These cases hold that, where the defendant has appeared specially to move to quash the summons, he does not waive the right to have the question reviewed upon appeal by answering after his motion is overruled. But granting that the defendant does not waive his objection to the service, and the ruling of the justice thereon, by demurring or answering, these cases show that he has "a plain, speedy, and adequate remedy in the ordinary course of law," by an appeal, and therefore prohibition will not lie. By demurring to the complaint the defendant appeared and submitted himself to the jurisdiction of the court, and the justice did not exceed his jurisdiction in entering his default, and could regularly proceed to enter judgment thereon. The judgment of the superior court should be reversed, the writ of prohibition, if issued, should be quashed, and the proceeding dismissed.

We concur: CHIPMAN, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions to the superior court to quash the writ and dismiss the proceeding.

122 Cal. 277

SPELLING v. BROWN, Secretary of State.  
(S. F. 1,653.)<sup>1</sup>

(Supreme Court of California. Oct. 11, 1898.)

NOMINATION FOR CONGRESS — CERTIFICATE — DETERMINATION OF REGULARITY.

In deciding on the regularity of certificates of nomination for congress offered to the secretary of state to be filed, the usage of a party in nominating its candidates, viz. by the formation of district conventions at a state convention by the delegates thereto, in accordance with the call of the state central committee, will be recognized as decisive in favor of a candidate thus nominated against one nominated by delegates in a district convention organized and conducted independent of the state convention.

In bank. Application for mandamus by T. C. Spelling against L. H. Brown, secretary of state. Writ denied.

The following is the report of the commissioner (Searls, C.):

"This is an original proceeding in mandamus to compel the respondent, L. H. Brown,

<sup>1</sup> Rehearing denied November 7, 1898.



as secretary of state in and for said state of California, to file a certificate of the nomination of T. C. Spelling, the petitioner, for the office of representative in congress of the Fourth congressional district in and for the state of California, etc.; also that he, the said secretary, strike from the files of his office an instrument purporting to be a certificate of nomination of James H. Barry for the office of representative in congress for said Fourth congressional district, etc. An alternative writ of mandamus issued upon the petition, whereupon L. H. Brown filed his answer thereto. The taking of testimony and finding the facts deducible therefrom having been referred to the undersigned, and, the parties having appeared, and introduced their evidence, and submitted the cause, the following facts are found, and herewith presented to the court for its action:

"Facts.

"(1) The Democratic party is the name of a regular political organization in the state of California, which has existed in the state since the year 1888, and for a period long anterior thereto, and which at the last general election, to wit, the general election of 1896, polled more than three per cent. of all the votes of the entire state.

"(2) The supreme control and authority of the Democratic party in the state of California is vested: First, In the state convention of said party when in state convention assembled. Second, When the state convention is not in session, in the state central committee by it selected, and in such executive committee or subcommittees as the Democratic state central committee may from time to time appoint, to act for it when not in session.

"(3) Since 1888, and for a long time prior thereto, it has been the invariable practice, usage, and custom of the Democratic state central committee, prior to each general election, to issue a call for a Democratic state convention; to designate the time and place of its meeting, the number of delegates to which each county is entitled, etc.; such convention, when assembled and organized, to select and nominate candidates for the Democratic party to be voted for at the next ensuing general election. Also to provide in said call that the delegates chosen as delegates to the Democratic state convention shall be delegates to the district conventions of their respective districts, for the purpose of nominating candidates for the offices of representatives in congress, railroad commissioners, and members of the state board of equalization, and to transact other business not necessary to be mentioned here.

"(4) During all the time mentioned in finding 3 it has been a like practice, usage, and custom of the members or committees of the Democratic party to select delegates pursuant to such calls of the state central committee; and they have, when thus selected, met in

state convention, organized, and nominated candidates to be voted for at the ensuing general election for state officers; and the delegates so selected as delegates to the Democratic state convention have acted as delegates to the district conventions by them represented,—that is to say, the delegates from each congressional district have met and organized separate congressional conventions, and nominated a candidate for congress, in their respective districts, to be voted for at the next ensuing general election.

"(5) It should be stated that the Democratic state central committee, during all the time aforesaid, has been appointed by the Democratic state conventions to serve until the next state convention of the party, and until its successor is appointed.

"(6) Some time prior to August, 1898, the state central committee of the Democratic party issued and published a call headed as follows: 'Call for Democratic State and District Conventions.' It then proceeded as follows: 'The Democratic state committee of the state of California, representing the Democratic party of said state, a political party which at the last general election held in the state of California polled more than three per cent. of the entire vote of the state, by virtue of the authority vested in said committee, hereby issues the following call for state and district conventions: First. A state convention of the Democratic party of the state of California is hereby called to meet at the city of Sacramento, county of Sacramento, state of California, on the 16th day of August, 1898, at two o'clock p. m. of that day, to nominate candidates for state offices, to be voted for at the general election to be held in the state of California on the 8th day of November, 1898; to select a new state committee; and to transact such other business as may be brought before said convention. Second. The appointment of delegates to said convention shall be one delegate at large for each county, and one delegate for each two hundred votes, or a majority fraction thereof, cast in each county for J. W. Martin, who, as the Democratic nominee for presidential elector, received the highest number of votes cast for any nominee of the Democratic party for presidential elector in the state of California in the election of 1896. Third. The delegates chosen as delegates to the state convention shall also be delegates to the district conventions of their respective districts for the purpose of nominating candidates for the offices of members of congress, railroad commissioners, and members of the state board of equalization. They shall also select congressional committees for each of the congressional districts of this state, and perform such other business as may properly come before said state and district conventions. The district conventions above referred to are hereby called to meet at the same time and place as the Democratic state convention. The representation to the state and district conven-

tions upon the basis herein set forth is hereby declared to be as follows.' Then follows a table showing, among other things, the number of delegates to which each county is entitled, etc., and then as follows: "The Democratic state committee directs that the delegates to said state and district conventions be selected in such a manner as the various county committees shall determine to be expedient, provided that the holding of primary elections for the election of said delegates is recommended wherever it may be practicable to hold said elections.'

"(7) Delegates to the convention were selected in the several counties of the state, and met in Democratic state convention, and organized pursuant to the call at Sacramento on the 16th day of August, 1898, at 2 o'clock p. m.

"(8) The delegates from the city and county of San Francisco were selected under the circumstances and in the manner following: The local democracy of said city and county was divided into two factions, each claiming the right to exercise local power. The state central committee appointed a local committee to investigate and report in the premises, which committee reported that neither of said factions was entitled to wield such power. Thereupon the state central committee appointed a committee of one hundred persons to act as a county committee of the Democratic party in and for the city and county of San Francisco. This committee of one hundred selected and appointed the number of delegates to which the city and county of San Francisco was entitled, viz. one hundred and fifty-four delegates, of which number eighty-nine delegates were from the Fourth congressional district. These delegates were selected as follows: Each member of the committee named one delegate, and the remaining fifty-four were selected by the committee at large. A set of rival delegates was elected in said city and county by a primary election, and when the state convention met and organized a hearing was had, and such action taken that the rival delegates were rejected, and the delegates selected by the committee of one hundred were seated as delegates from said city and county in said state convention. On the 18th day of August, 1898, the state convention, being still in session, and about to adjourn for a noon recess, the chairman announced that the congressional convention for the Fourth congressional district would assemble in the hall during the recess. Such congressional convention then assembled and organized by electing a chairman and secretary, there being present eighty-five of the eighty-nine delegates from said Fourth congressional district, who had been admitted to the state convention, twenty-five of whom were proxies, and such proceedings were then and there had that in the end James H. Barry was nominated by acclamation as the Democratic candidate for the office of representative in congress from said Fourth congressional-

al district. The usual certificate was prepared and verified as required by law, which, with the necessary accompanying proofs, was on the 10th day of September, 1898, duly presented to the respondent herein for filing, etc.

"(9) The facts regarding the candidacy of T. C. Spelling for the office of representative in congress for the Fourth congressional district are as follows: In 1896 a Democratic state convention had been called, and delegates from the city and county of San Francisco had been elected thereto. There were rival delegates elected. The delegates first mentioned not being certain of securing seats in the state convention, and being desirous of nominating James G. Maguire as the Democratic candidate for congress from the Fourth congressional district, the delegates from said Fourth congressional district met in San Francisco prior to the meeting of the state convention, organized as a Democratic congressional convention by selecting a chairman and secretary, and then and there such proceedings were had that said James G. Maguire was unanimously nominated as the Democratic candidate for the office of representative in congress from said Fourth congressional district. A congressional committee of seven persons was also appointed at the same time and place.

"(10) The delegates participating in such action were afterwards admitted as delegates to the state convention, and thereupon met as a congressional convention for said Fourth district, and then and there again nominated said James G. Maguire for the same office for the said district.

"(11) In 1898, and probably about August 11th, the 'congressional committee of the Democratic party of the Fourth district of the state of California,' being the committee appointed in 1896 as aforesaid, met in San Francisco, and reorganized by the appointment of a new committee, consisting in the main of the same members as the old, elected a chairman and secretary, and, among other things, adopted a resolution to call a nominating convention in and for the Fourth congressional district, to be held on the 13th day of August, 1898, at 8 o'clock p. m., at 121 Eddy street, to nominate a candidate for congress to represent said Fourth district. A list of say fifty delegates was by said resolution appointed, and the secretary was instructed to give notice to the delegates so appointed, which he afterwards did by postal cards directed to them severally. The committee was also increased to probably nine members or more by appointment. E. J. Reynolds, chairman of the committee, resigned, and J. M. Chase was appointed in his place.

"(12) The convention so called met at the time and place designated, duly organized by the appointment of a chairman and secretary, adopted an order of business, platform, etc., and, among other things, unanimously nominated the petitioner herein, T. C. Spelling, as the Democratic candidate for the office of



representative in congress from the Fourth congressional district. A committee of nine, as the successors of the committee of the Democratic party of the Fourth congressional district, was appointed; an auditing committee, etc. The usual certificate of nomination, as required by statute, was certified and verified in due form, and presented, with the necessary accompanying papers, to the respondent herein, L. H. Brown, as secretary of state, with a request that it be filed, etc. This was on September 11, 1898, at, say, 11:30 a. m., a couple of hours prior to the presentation of the certificate of James H. Barry. Each party protested against the filing of the certificate of the other; and, after a hearing, the respondent herein filed the certificate of nomination of James H. Barry, and refused to file the petition of petitioner, and returned to him his certificate on the 23d or 24th day of September, 1898, with the reasons for his refusal in writing.

"(13) There is no evidence that the Democratic state conventions, or the state committees appointed by them, have ever recognized or in any wise empowered the Democratic congressional committee of the Fourth district herein mentioned to nominate candidates, or to transact other business.

"(14) In using the word 'custom' herein, I have so used it as a fact nearly synonymous with practice, usage, etc., acquiesced in, and not as a conclusion of law.

"(15) The practices of the Democratic state central committees hereinbefore mentioned are not founded upon any written rules.

"(16) There are a few minor facts in relation to auditing committees and merely technical matters at which I have only glanced. If a more full statement on such questions is desired, the evidence will warrant findings thereon. Conscious of the necessity of an early determination of the matter, these findings have been hurriedly prepared, and are hereby respectfully submitted."

T. C. Spelling, in pro. per. E. S. Van Meter, for respondent.

BEATTY, C. J. Prior to the general election in 1896, the state central committee of the Democratic party called a state convention of the party, and provided, among other things, that the delegates to the state convention from the respective congressional districts should form district conventions for the purpose of nominating candidates for congress. In pursuance of this call the state convention met, and the several district conventions were also organized, and made nominations. In the Fourth congressional district the delegates elect to the state convention anticipated the meeting of that body by organizing a district convention, and nominating James G. Maguire as their candidate for congress. At the same time they appointed a campaign committee. In the month of August, 1898, the regular state central commit-

tee of the Democratic party called another state convention for the purpose of nominating candidates for state offices, and again provided that the delegates to the state convention from the respective congressional districts should meet in district conventions for the purpose of nominating candidates for congress. In pursuance of this call a state convention met and organized, and subsequently the delegates from the Fourth congressional district organized a district convention, by which James H. Barry was nominated as the Democratic candidate for congress in that district. In the meantime the campaign committee representing the district convention of 1896 had appointed delegates to a district convention, who met, and, claiming the right to represent the Democratic party in the district, nominated the petitioner as a candidate for congress. Regular certificates of nomination were presented to the respondent by the representatives of each convention. He filed the certificate of Barry, and refused to file the certificate of petitioner, who therefore asks a writ commanding him to reverse his action.

We think the respondent was clearly right in the course he took. It was his duty to decide which of the two certificates was issued by the regular convention. There was no law to guide him in determining which was regular, and necessarily he was compelled to resort to the test of party usage. Mr. Barry was nominated by a convention called in conformity with the established usage of the Democratic party, and recognized as regular by the state convention of the party. This, in our opinion, is decisive. Writ denied.

We concur: HARRISON, J.; TEMPLE, J.; VAN FLEET, J.; HENSHAW, J.

122 Cal. 387

VINCENT v. COLLINS et al. (Sac. 385.)

(Supreme Court of California. Nov. 21, 1898.)

#### APPEAL—NOTICE—PARTIES.

A mortgagor and his assignee in insolvency were made parties defendant in an action to foreclose. A decree was entered for the mortgagee, and the property sold for a sum in excess of the debt and expenses of foreclosure. The mortgagor, who was the only defendant to appear, moved to set aside the sale for irregularities. The motion was denied, and he appealed from the judgment and order. *Held*, that the assignee was an "adverse party," within Code Civ. Proc. § 940, i. e. one whose interest would be affected by a reversal, on whom notice of appeal should have been served.

Commissioners' decision. Department 1. Appeal from superior court, Nevada county.

Action by George Vincent against W. J. Collins and others. From a judgment for plaintiff and an order denying a motion to set aside a foreclosure sale, defendant H. J. Keymer appeals. On motion to dismiss the appeal. Granted.

C. W. Kitts, for appellant. Thos. S. Ford, for respondent.

BELCHER, C. This action was brought to foreclose a mortgage, executed by the defendant H. J. Keymer on lot 4, in block 12, of the city of Grass Valley, Nevada county. The mortgage was dated September 26, 1892, and the complaint was filed September 2, 1896, naming as defendants W. J. Collins, assignee of the estate of H. J. Keymer, an insolvent debtor, H. J. Keymer, Agnes Keymer, and W. D. Harris. Due service of process was made on all of the defendants, but only H. J. Keymer, the mortgagor, appeared and answered, the defaults of the others being regularly entered.

The complaint alleges that on December 22, 1893, defendant H. J. Keymer filed his petition in insolvency, and was adjudged to be an insolvent debtor, and that thereafter the defendant W. J. Collins was duly appointed assignee of said insolvent's estate and qualified as such, and that the clerk of the court duly conveyed and assigned to him all of the said estate. The answer does not deny any of the averments of the complaint, but alleges that on December 20, 1893, said H. J. Keymer filed a declaration of homestead on a portion of the said mortgaged lot, setting out therein the facts required in such case, and "that the remainder of the said lot, with the improvements thereon, after taking out said homestead, is amply sufficient to satisfy plaintiff's claim." The cause came on regularly for trial on November 7, 1896, and a decree of foreclosure was signed and filed on the 11th day of that month. It appears from the recitals in the decree that findings were waived by the parties, and that there was due and owing to the plaintiff upon the said promissory note and for money expended under the terms of the said mortgage, including interest, attorney's fees, and costs, the sum of \$1,517.03. It was adjudged that the whole of the mortgaged premises mentioned in the complaint be sold at public auction, in the manner prescribed by law, by L. A. Garthe, a commissioner appointed by the court for that purpose, and that the said commissioner, out of the proceeds of the sale, retain his fees, disbursements, and commissions, and pay to the plaintiff, or his attorney, the amount found due him, with interest thereon from the date of the decree, or so much thereof as the said proceeds will pay. It was further adjudged "that it is necessary to sell the whole of said land in one parcel to satisfy the mortgage, and the whole of said land in one parcel is hereby ordered sold"; that, "if more than the amount necessary to satisfy the mortgage and costs is realized, the commissioner is directed to pay the same to W. J. Collins, assignee of H. J. Keymer, insolvent"; and "that the defendants, and all persons claiming, or to claim, from or under them, \* \* \* be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part or parcel thereof, from and after the delivery of said commissioner's deed." In pursuance of the decree the commissioner,

against the objections of said Keymer, sold the whole property in one parcel, and from the proceeds of the sale, after paying all expenses thereof and the amount due the plaintiff, he had left in his hands the sum of \$447. Subsequently Keymer moved the court to set aside and declare void the said sale, upon the ground that the property sold consisted of two distinct parcels, and before the sale was well known by the plaintiff, defendants, and commissioner to so consist; that defendant Keymer, prior to the sale, demanded in writing of the commissioner that he sell the parcels separately, which he refused to do; and that said property being sold in one parcel prevented its bringing its full value. At the hearing of the motion there were used and referred to, on behalf of the defendant, the judgment roll, the notice of the motion, and the affidavit of H. J. Keymer; and on behalf of the plaintiff the counter affidavits of George Vincent, L. A. Garthe, and W. J. Collins. After considering the matter, the court denied the motion, and in due time thereafter defendant Keymer appealed from the judgment and the order denying his said motion. Respondent moves to dismiss the appeals upon the ground that notice thereof was not served on the defendant W. J. Collins, or the other defendants, and this court, therefore, never acquired jurisdiction to hear the cause.

It appears that notice of the appeals was served only on the attorney for the plaintiff, and the question is, was that service sufficient to give this court jurisdiction of the case? The Code (Code Civ. Proc. § 940) requires that notices of an appeal shall be served on the "adverse party," and it is settled law that every party to an action, who has an interest in the subject-matter of the litigation and whose rights would or might be affected by a reversal of the judgment or order appealed from, is an adverse party, on whom service of the notice must be made. In *Senter v. De Bernal*, 38 Cal. 640, it was said: "Every party whose interest in the subject-matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an 'adverse party,' within the meaning of these provisions of the Code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervener." In *Williams v. Association*, 66 Cal. 195, 5 Pac. 85, it is said: "This court has not jurisdiction to hear an appeal from a judgment, unless the appellant shall have served a notice of appeal on all the adverse parties; that is to say, upon all whose rights may be affected by a reversal of the judgment, or, when the appeal is from part of a judgment, by a reversal of the part appealed from. And, where the appeal is from the whole judgment, this court has no jurisdiction to modify the judgment in such a manner as shall affect the rights of the parties on whom notice of appeal has not been served, as such rights have been ascertained and fully deter-



mined by the judgment." And see *O'Kane v. Daly*, 63 Cal. 317; *Randall v. Hunter*, 69 Cal. 80, 10 Pac. 130; *Millikin v. Houghton*, 75 Cal. 530, 17 Pac. 641; *In re Castle Dome Mining & Smelting Co.*, 79 Cal. 246, 21 Pac. 746; *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103; *Lancaster v. Maxwell*, 103 Cal. 67, 36 Pac. 951; *Barnhart v. Edwards*, 111 Cal. 428, 44 Pac. 160.

In view of the law, as declared in the cases above cited, we think it must be held that defendant Collins was an "adverse party," and that notice of the appeals should have been served upon him. He was the assignee in insolvency of the appellant, and as such the title to all the estate, real and personal, of the insolvent debtor, not exempt from execution, was vested in him. Insolvent Act 1880, § 17; *Poehlmann v. Kennedy*, 48 Cal. 201. True, he held the property in trust for the benefit of the creditors of the insolvent, but it was his duty to care for and look after the property, and, if any was withheld from him, to sue in his own name and recover possession of the same.

In this case there were left in the hands of the commissioner, after paying the amount found due the plaintiff and all expenses incident to the foreclosure, the sum of \$447, which by the decree he was directed to pay to the said assignee. It is evident that if the judgment should be reversed or the sale set aside the rights of the assignee might be affected, as upon another sale there might be nothing left to be paid over to him for the benefit of creditors. Upon this motion we cannot consider the question as to whether or not the decree was valid and binding until reversed, in so far as it directed the balance, if any, to be paid over to Collins, assignee. As presented here, we think this court has no jurisdiction to consider and decide upon the merits of the case, and hence that the motion to dismiss the appeals should be granted.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the motion to dismiss the appeals is granted.

(122 Cal. 421)

PEOPLE ex rel. DEAN v. BOARD OF  
SUP'RS OF CONTRA COSTA  
COUNTY. (S. F. 713.)

(Supreme Court of California. Nov. 25, 1898.)  
WHARVES—FRANCHISES—COUNTIES—EXERCISE OF  
JUDICIAL FUNCTIONS—CERTIORARI.

1. Act March 23, 1893, § 1, providing that every franchise "to erect or lay telegraph or telephone wires, to construct or operate railroads along or upon any public street or highway, or to exercise any other privilege whatever" to be granted by a county or city, shall be granted only on conditions provided in such act, applies to a franchise granted by a county to construct and maintain a wharf.

2. The action of a board of county supervisors in granting a franchise for a wharf, under Act March 23, 1893, requiring a publication of

a notice describing the franchise to be granted, and the opening of bids and the awarding of the franchise to the highest bidder, does not call for the exercise of judicial functions, and therefore certiorari will not lie to review such action.

3. Nor is the action of a board under this act even quasi judicial, so as to allow such a writ.

In bank. Appeal from superior court, Contra Costa county.

Application for a writ of certiorari, on the relation of Roger G. Dean, against the board of supervisors of Contra Costa county. From judgment for defendant, plaintiff appeals. Proceeding dismissed.

Page, McCutchen & Eells, for petitioner. Garber & Garber, for respondent.

GAROUTTE, J. This is an application for a writ of certiorari to review the action of the board of supervisors of Contra Costa county in granting to one McNear a franchise to construct and maintain a wharf upon the southern shore of the straits of Carquinez. It is claimed by the petitioner that the action of the board in granting the franchise was wholly without the law. Section 1 of an act of the legislature approved March 23, 1893, declares: "Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate railroads along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by the board of supervisors, common council or other governing or legislative body of any county, city and county, city, town or district within this state, shall be granted upon the conditions in this act provided, and not otherwise." This language is broad in its terms. It is difficult to imagine language broader in significance and more explicit upon the subject with which the act is dealing. It includes franchises such as is here before us.

It is now claimed upon the part of McNear that the board of supervisors in no degree, and to no extent, followed the law laid down in this act, and required to be pursued by the board in the granting of this franchise; but it is insisted that the board made a grant of the franchise under certain provisions of the Political Code; and therefore it is claimed that the act of the legislature passed in 1893 cannot furnish the test upon which to base a decision as to an exercise or nonexercise of judicial functions upon the part of the board in granting the franchise. This position cannot be maintained. This franchise should have been granted by the board of supervisors under the provisions of the act of 1893. If the granting of a franchise under the act by the board demands the exercise of judicial functions, then the granting of this franchise in disregard of the provisions of the act is an act performed in excess of judicial power. If a franchise may be granted lawfully only by the exercise of judicial power, then any other mode or manner of granting it would be an act of trespass upon that power, and outside of and beyond it.

It is contended that the action of the board of supervisors in granting the franchise under the act of 1893 in no sense calls for the exercise of judicial functions, and therefore certiorari is not the proper remedy. Let us pause a moment to examine this act. It will be observed that it is an act simply providing the course to be followed by the board in granting the franchise, and but two things are required to be done by that board: First, a notice must be published describing the franchise to be granted, and asking for bids therefor; and, second, upon a date stated in the notice the bids are to be opened, and the franchise awarded to the highest bidder. As to the authority to reject all bids, we are not now concerned. There is nothing calling for the exercise of judicial functions in the publication of the notice required by the statute, and certainly nothing involving the exercise of judicial functions upon the part of the board in arriving at a determination as to who is the party making the highest bid, for such decision is based upon mathematical computation. Hence the single question remains, is the granting of the franchise a judicial or a legislative act? That such a grant is essentially and entirely legislative cannot be questioned; and for the judicial department of the government to interfere by certiorari with legislative action would constitute a usurpation of power. A franchise is a special right or privilege granted by the people to an individual, and, under the act of 1893, the grant is based upon valuable considerations. The legislative character of the grant is the same whether it passes to the individual from the people, via the state legislature, or by way of a municipal board of supervisors having the authority vested in it by the state legislature to make the grant. When legislative power is vested in a municipal board, acts done in the exercise of that power are acts of legislation, and should be recognized as such by the courts. It has been decided by this court that the granting of a franchise is a legislative act. This has been decided in a long, unbroken line of cases, beginning with *Chard v. Harrison*, 7 Cal. 113, and ending with *Quinchard v. Board*, 113 Cal. 664, 45 Pac. 856. If the granting of this franchise be a purely legislative act, then there was no exercise of judicial functions upon the part of the board in making the grant, and clearly no excess of jurisdiction. The *Quinchard* Case, supra, carefully treats of this question at great length, and the principles there declared are controlling here. Those principles all point to a denial of the relief here sought, for the reason that the writ of certiorari does not open a way by which to reach the wrongs sought to be righted in this proceeding. As an interesting case bearing directly upon the question before us, *People v. Oakland Board of Education*, 54 Cal. 375, is cited.

It may be said that the action of the board of supervisors in granting a franchise under this act of the legislature is, at least, quasi judicial, and for that reason courts will reach out

and take hold of the proceedings by this writ. Upon such theory, courts have sometimes accommodately reached out and annulled the proceedings of inferior boards and tribunals. This has even been done by the courts of this state in cases where franchises of various character have been granted; but there is no justification for it under the law, and remedies for such wrongs should be found by traveling other roads. Legislative action in no sense is the exercise of judicial functions. The mere fact that, in certain proceedings pending before boards of supervisors, notice must be given of a hearing, evidence of witnesses taken, and a decision made by the board involving a determination of facts based upon the exercise of judgment, does not constitute such proceeding even quasi judicial. These things constitute the mere form of judicial action. The essential elements of judicial action are lacking, namely, the ascertainment of existing rights. *Murray v. Board*, 23 Cal. 492, probably looks the other way from the views we entertain upon this question, and there may be other early cases in company with it, but the tendency of the later decisions of this court is all the other way. Certiorari is not the proper remedy. For the foregoing reasons, the proceeding is dismissed.

We concur: HARRISON, J.; HENSHAW, J.; TEMPLE, J.; McFARLAND, J.; VAN FLEET, J.

(122 Cal. 358)

#### LEWIS v. BURNS et al. (Sac. 421.)

(Supreme Court of California. Nov. 19, 1898.)

HUSBAND AND WIFE—DEED TO WIFE—COMMUNITY PROPERTY—PRESUMPTIONS—EVIDENCE—DEEDS.

1. The amendment of Civ. Code, § 164, which provided that a deed to a married woman would be presumed to have vested title in the marital community, and that this presumption could only be overcome by clear and satisfactory evidence, so as to provide that the presumption in such cases is that the title is thereby vested in the wife, as her separate property, does not apply to conveyances made before the amendment went into effect.

2. Plaintiff testified that a lot was purchased with the savings of himself and wife; that at the advice of their employer, who negotiated the sale, the deed was made to the wife; that a house was built thereon by the employer, and was paid for out of their wages (this latter fact also being testified to by other witnesses); that afterwards the purchase of a second lot was negotiated by their employer, and the deed taken in the same way; that it was paid for partly by rent saved from the first house, and a mortgage given for the balance; that the property was always considered community property. The rents were collected by the wife, but applied for family purposes. Shortly after the second purchase a mortgage was given on both lots for \$1,500, and, several years after, the second lot was mortgaged for \$500. Defendants, to whom the wife had conveyed the property, claimed that it had been given to her as her separate property by the husband and their employer, and that the latter had furnished part of the price, and that the remainder had been furnished by the wife from her savings before marriage. The deed to defendants described the property as being the



wife's "sole and separate property, acquired by her while living separate and apart from her husband." *Held*, that the property was community property.

3. Evidence of statements as to whether a deed to a wife was intended as her separate property, made out of the presence of the husband, is inadmissible against him.

4. A notary's record, showing the acknowledgment before him of a deed by a husband to his wife, is inadmissible to prove conveyance of title from the husband, in the absence of proof that the deed had been delivered.

5. It is inadmissible as secondary evidence without showing that the deed, if delivered, had been lost.

6. The fact that assessment lists against property standing in name of a wife, made out to the wife, are sworn to by the husband, does not constitute an admission that the property belongs to the separate estate of the wife.

7. A recital in a deed given by a wife that the property conveyed is the separate property of the wife is not evidence that such was the fact, as against the husband.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by S. T. Lewis against Thomas Burns and another. From a judgment for defendants, and from an order denying plaintiff's motion for a new trial, he appeals. Reversed.

James A. Louttit, for appellant. Baldwin & Thompson, Budd & Thompson, and Minor & Ashley, for respondents.

HAYNES, C. Action to quiet plaintiff's title to two certain lots in the city of Stockton. The complaint alleges that plaintiff and Bridget Burns intermarried in 1873; that Bridget died November 16, 1892; that while they were husband and wife they purchased with their own means, the result of their joint labors, the lots in question; that the conveyances were taken in the name of the wife for the community, and were so held until Bridget's death, and upon her death became the sole property of the plaintiff, as surviving husband. The answer denied that the purchases were made by the fruits or results of their joint labors, or that the lots were owned or possessed as community property, or that the conveyances thereof were taken in the name of the wife for the community, or that they were so held, and denied that their claim was without right. The answer also alleged that defendants are the owners in fee, "and that they derived title to the same from that certain deed of conveyance made, executed, and delivered to defendants by said Bridget Lewis, and dated the 16th day of October, 1890, a copy of which is hereto attached, and marked 'Exhibit A,' and made part hereof." In this deed the grantor is described as "Bridget Lewis, wife of Sylvester Lewis," and the clause describing the property is as follows: "Lot 15 in block 33, and lot 10 in block 24, both east of Center street; the said property being her sole and separate property, acquired by her while living separate and apart from her said husband, Sylvester Lewis, aforesaid."

The court found for the defendants, and plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

Appellant attacks the findings, and also specifies several errors of law occurring upon the trial.

The findings are to the effect that said lots were acquired by the wife, during marriage, by way of gift, from one De Blainville and the plaintiff, pursuant to an agreement between the three, by the terms of which the title was placed in Bridget (the wife) to be held, owned, occupied, and used by her as her separate property; "that it was not purchased or acquired as the fruits and results of the joint labor and efforts of plaintiff and said Bridget, and they were not, as husband and wife, the owners of the same in community," and were not at any time held as the property of the community; and that on the 16th of October, 1890, said Bridget conveyed said lots, by her grant, bargain, and sale deed, to the defendants. Appellant attacks these findings upon the ground that the evidence does not justify them. Plaintiff and Bridget Burns intermarried in 1873, and the marriage relation continued until the death of Bridget, on November 16, 1892; and the two lots in question were conveyed to her by grant, bargain, and sale deed, for a money consideration, after the marriage. The first of these lots (lot 15 in block 33, east of Center street) was purchased January 8, 1882, and the second (lot 10, block 24, east of Center street) was purchased April 14, 1885; the deeds respectively bearing those dates. Under section 164 of the Civil Code, as it stood prior to the amendment of 1889, and the subsequent amendments, a deed of bargain and sale to a married woman must be presumed to have been paid for from the community funds, and to have vested the title in the marital community; and this presumption could only be overcome by clear and satisfactory evidence. *Gwynn v. Diersen*, 101 Cal. 563, 36 Pac. 103; *Jordan v. Fay*, 98 Cal. 267, 33 Pac. 95; and *Tolman v. Smith*, 85 Cal. 280, 24 Pac. 743, and cases cited on page 284, 85 Cal., and page 744, 24 Pac. As these lots were purchased before said section was amended, the presumption arising from the mere fact of the conveyance by such deeds during the marriage relation is not affected by the amendment which has changed the presumption. In *Jordan v. Fay*, 98 Cal. 264, 267, 33 Pac. 95, in discussing the effect of the amendment of section 164, Civ. Code, by which it is declared that the presumption in such cases is that the title is thereby vested in the wife, as her separate property, it was said: "But the rule declared by the statute was more than a rule of evidence; it was a rule of property, as well; and we do not think the legislature intended or had the power to change it so that it would be retroactive in effect, and disturb titles already vested." And in *Gwynn v.*

Dierssen, 101 Cal. 565, 36 Pac. 103, it was said: "Section 164 of the Civil Code, as amended in 1889, is not retroactive in effect." That the marriage relation existed at the time these lots were severally conveyed to the wife, and her subsequent death, are admitted by the pleadings, by the failure of the defendants to deny those allegations in the complaint; and that they were acquired during coverture is also shown by the deed under which they claim title, and which they make part of their answer. The plaintiff put in evidence the deeds by which these lots were severally conveyed to the wife; each being a grant, bargain, and sale deed, the first dated January 8, 1882, for the consideration of \$250, and the second dated April 14, 1885, for the consideration of \$1,656.05. Under the pleadings this made a prima facie case for the plaintiff, and threw upon the defendants the burden of proving "by clear and convincing evidence" that the lots in question were not community property.

A careful examination of the record leads me to the conclusion that the findings hereinbefore stated are not justified by the evidence. Plaintiff and his wife moved to Stockton in 1877 or 1878. They then had eight horses and two or three wagons. In the latter part of 1881, or first of 1882, they moved into De Blainville's house, and lived with him; the wife keeping house, and the plaintiff assisting De Blainville in his store and bar, for which services they were to receive \$35 per month. The plaintiff testified that about this time De Blainville learned that said lot 15 was for sale, and advised plaintiff and his wife to buy it, and, they assenting, he negotiated the purchase, at the price of \$250; that the lot was paid for out of the money they had saved from their earnings; that De Blainville and the wife attended to closing up the purchase, he remaining in the store; that De Blainville advised that the deed be taken in the name of the wife, "as she would be better satisfied"; that he assented, saying he would as soon it would be in her name as his, and the deed was so made on January 8, 1882. After the purchase, De Blainville bought lumber, employed a carpenter, and built a house for them on said lot, and retained and applied their wages until from that source and the sale of a horse he was fully paid for the erection of the house. That the house was erected for the plaintiff and his wife, and that their wages were retained by De Blainville to pay therefor, is also shown by his statements to the man who built the house during his employment, as well as by other witnesses. In regard to the purchase of the second lot, the plaintiff testified: That De Blainville advised its purchase. That, to plaintiff's statement that they had but little money, De Blainville replied that it would do no harm to mortgage it; that the rents would pay for it. The house built on the first lot had been rented, and they had saved up something therefrom. As before, De Blainville

negotiated the purchase, and attended to closing it up, and again advised the plaintiff that the deed be made to the wife, and the plaintiff again assented. That what they had was paid on the purchase, and a mortgage executed for the remainder. The plaintiff testified, in substance, that these lots were always considered and treated as belonging to both himself and his wife; and there is nowhere in the record any evidence that, in the conversations between De Blainville and the plaintiff and his wife in reference to these purchases or the deeds of conveyance, any reference was made to a gift or to separate property, or to any agreement between the three that these purchases were or should be regarded as a gift from the plaintiff and De Blainville to Mrs. Lewis, who was present on both occasions when the question was considered as to which should be named as grantee. It is claimed, however, as evidence tending to show that these lots were the separate property of the wife, that she collected the rents. The plaintiff testified that she did, but the money was used and applied for family purposes, just as she used and applied his earnings, which he handed over to her. The money used to purchase the first lot was accumulated from their mutual earnings, and it also was in possession of the wife, but that did not make it her separate property. She was merely the custodian for the marital community.

Judge Smith was called by defendants, and testified that he had a conversation with Mrs. Lewis and De Blainville in relation to the purchase of the second lot, and that plaintiff was not present. He was then asked to state what occurred at that time. Counsel for plaintiff objected that it was hearsay, irrelevant, and incompetent. The objection was overruled, and an exception taken. The witness then testified: That De Blainville told him how he wanted the deed made; that he was buying it for, and giving it to, Mrs. Lewis. That she was present, and they were talking about the property, and he gave directions to the clerk how to draw the deed. That they afterwards came to the office, and De Blainville complained that a mistake had been made in drawing the deed in the name of Mrs. Lewis, it being for a valuable consideration; that some one told him it was community property, and might be taken for the debts of the husband. That he replied that there was no mistake. That they simply asked that the property be deeded to Bridget Lewis. That plaintiff was not present at this conversation. That they requested him to see Mr. Lewis. And that he could only recollect that it related to another deed. All this testimony was given subject to the objection above stated. Whether what was said at the time the deed was prepared was inadmissible, we do not stop now to inquire. What was said afterwards, plaintiff not being present, was clearly inadmissible. Upon cross-examination the witness testified that he knew



nothing about where the money came from to buy the property; that nothing was said about it. His statement that he was buying the property for, and directing the deed to be made to, Bridget Lewis, was entirely consistent with a purchase by him, acting on behalf of plaintiff and his wife, in which he had no personal interest; and the direction as to the deed was in accordance with the understanding had with plaintiff and his wife, and therefore does not raise a conflict with the testimony of the plaintiff that it was bought with community funds and was regarded as community property. And, as additional evidence that De Blainville did not put any money into this purchase, the record shows that, a few days after the purchase, plaintiff and his wife joined in a mortgage on both lots to F. F. Seiden for \$1,500, payable April 22, 1886, and on the same date in 1891 mortgaged the lot last purchased for \$500, and on October 28, 1892, about two weeks before the death of the wife, again mortgaged lot 10 for \$200. The date and amount of the first mortgage would indicate, even in the absence of the testimony of the plaintiff, that the money was applied to the purchase of the lot. If it had been applied to any different purpose, we may reasonably suppose that the defendants, who were the brother and sister of Mrs. Lewis, would have known it, and disclosed it upon the trial.

Mr. Haas, who sold the first lot as attorney in fact for the owners (called by defendants), testified that De Blainville stated to him that he wanted to buy the lot for Bridget Lewis; that De Blainville paid the money for it, but he did not know whose money it was. Our comments upon De Blainville's statements to Judge Smith apply here, and need not be repeated.

A. C. McDonnell, called for defendants, testified that he was a notary public in 1885, and produced his notarial record, and was asked: "Now read the entry or state to the court whether you took the acknowledgment of S. T. Lewis of a deed from S. T. Lewis, as grantor, to Bridget Lewis." Plaintiff objected—First, that the deed must be produced; second, if lost, its loss must be shown before secondary evidence is admissible, and that defendants have not proved, or tried to prove, its existence or its delivery or its loss. Defendants then stated, as a further ground for its admission, that it tended to contradict the testimony of plaintiff that he did not acknowledge such a deed. To this, plaintiff objected that said testimony was given upon the cross-examination of the plaintiff, over the objection of the plaintiff that it was not cross-examination and was immaterial, and that they could not now contradict him. The court ruled that he would allow the question as to a certain act being done by Lewis in reference to this property,—whether he made an acknowledgment. The witness answered that he took the acknowledgment of S. T. Lewis of a deed to Bridget Lewis of said

lot 10 on April 20, 1885. The witness was then asked, "What was the character of the deed?" Plaintiff's objection, based upon proper grounds, was overruled, and the witness answered that it was a quitclaim deed. Plaintiff, at the close of his case, on rebuttal, moved the court to strike out said testimony upon the ground that no evidence had been introduced tending to show its delivery or loss, and this motion was overruled. In each of these rulings the court erred. If the deed was never delivered, its acknowledgment was wholly immaterial; and, if it had been delivered, it was the best evidence of all the facts appearing thereon, and, before secondary evidence could be given, its loss must be shown.

The assessment lists of the lot first purchased were sworn to by plaintiff. They were made out by the assessor, and were properly assessed to Bridget Lewis. It was not an admission that they were her separate property. The circumstances did not require any explanation from the husband as to his interest in the property.

The defendants offered in evidence the deed from Bridget Lewis, under which alone they claim, and a copy of which is set out in their answer. Plaintiff objected upon the usual grounds, and also that there was no evidence of delivery; that it was not recorded until in December, which was after the grantor's death. The presumption is that a deed duly executed was delivered at its date. Civ. Code, § 1055. There was therefore sufficient evidence of its delivery to justify its admission. Whether the fact that Bridget Lewis twice mortgaged one of these lots after the date of the deed,—the last time within three weeks before her death,—and that it was not recorded until about a month after her death, coupled with the fact that in his petition for the probate of her will the defendant Thomas Burns, shortly after her death, and before the deed was recorded, included these lots as a part of her estate, would overcome the presumption declared by the statute, and put the defendants on proof of its actual delivery, in the view we take of the case, need not now be decided. The presumption is perhaps sufficient, as against these circumstances, to preclude us from saying that the finding that it was delivered is not justified by the evidence, nor is it necessary to a reversal of the judgment that we should so conclude. The recital in the deed that the property conveyed was her sole and separate property, acquired by her while living separate and apart from her husband, is not, however, evidence, as against the plaintiff, that such was the fact. Plaintiff, in rebuttal, however, showed by several witnesses that the recital was not true, and defendants made no effort to sustain it. Whether the defendants are estopped by this particular recital made in the deed which they plead as their only source of title (and which, if it had been omitted, would, on its

face, show that it was community property) from showing that it was a gift from de Blainville or her husband, we do not now inquire. The question was not made in the court below, nor argued here. The recital, however, is evidence that it was not acquired in the way declared in the findings.

We find no evidence that there was any agreement between plaintiff and his wife and De Blainville that these lots should be a gift to the wife, or that the matter of separate property was ever mentioned between them, or that it was ever regarded or treated between the plaintiff and his wife as her separate property; nor do we find evidence which would justify a finding that De Blainville ever gave or paid any of his own money upon either of these purchases. In conclusion, we find no evidence inconsistent or in conflict with the presumption of law that the lots in controversy were community property; and upon that ground, as well as because of errors of law hereinbefore pointed out, we advise that the judgment and order appealed from should be reversed.

We concur: CHIPMAN, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

122 Cal. 379

In re KELLEY'S ESTATE. (L. A. 518.)  
(Supreme Court of California. Nov. 19, 1898.)

NONRESIDENT EXECUTORS — REVOCATION OF LETTERS — STATUTES — JURISDICTIONAL POWER — PROCEDURE — INTEREST IN PETITIONER.

1. Under Code Civ. Proc. §§ 1436, 1437, providing that an executor, who has permanently removed from the state, may be suspended, and that the judge shall then cite the executor to appear, and, if the court is satisfied that cause exists, such executor's letters must be revoked, the court has power to revoke letters testamentary to a nonresident, who, after qualifying and filing an inventory, permanently departs from the state.

2. Where a nonresident executrix, immediately after qualifying and filing her inventory, returned again to her home outside the state, and there remained permanently, and did not come into the state nor submit herself to the jurisdiction of the court, nor personally conduct the affairs of the estate, and, when cited to show cause why she should not be removed, demurred, and filed her first account, but did not answer personally or otherwise, it is ground for revoking her appointment, under Code Civ. Proc. § 1437, providing that if an executor, cited to show cause why his letters should not be revoked, fails to appear, or, having appeared, the court is satisfied that cause exists for his removal, his letters shall be revoked.

3. Under Code Civ. Proc. §§ 1436, 1437, providing that an executor who has permanently removed from the state may be suspended, and then cited to appear and show cause why his letters should not be revoked, he may be cited for that purpose without being first suspended.

4. Under Code Civ. Proc. § 1436, providing that an executor may be suspended "whenever, \* \* \* from his own knowledge or from credible information," the judge of the superior

court learns that there is cause for such action, it is immaterial that the person petitioning therefor has no interest in the estate.

Commissioners' decision. Department 2. Appeal from superior court, Riverside county.

In the matter of the estate of Morgan C. Kelley, Luther C. Russell, public administrator, petitioned for a revocation of the letters of Frances A. Van Voorhis, as executrix, and for letters of administration c. t. a. to the petitioner. From an order granting the petition, the executrix appeals. Affirmed.

Eugene Van Voorhis and Curtis & Curtis, for appellant. L. Gill, for respondent.

CHIPMAN, C. Petition of Luther C. Russell, public administrator of Riverside county, praying that letters testamentary issued to Frances A. Van Voorhis be revoked, and that letters of administration with the will annexed be issued to him. The court gave judgment removing the executrix and appointing petitioner as prayed for, from which the executrix appeals on the judgment roll alone.

The court found that deceased died testate January 7, 1895, naming appellant executrix. On January 28th she filed her petition for probate of the will and for letters testamentary, which duly issued February 11th, and she thereupon duly qualified as executrix. February 21st she filed her inventory and appraisal, and took possession of the property of the estate. At that time she was a resident of the city of Rochester, Monroe county, state of New York. Immediately after issuance of letters she returned to her home in Rochester, and has continuously resided and now resides there. She has not come into this state nor submitted herself to the jurisdiction of the court since her appointment, nor has she personally conducted the affairs of the estate. She has never filed any account of her administration except an account filed November 16, 1897, and after application for her removal had been made by the public administrator. "As a conclusion of law from the foregoing facts, the court finds that the said Frances A. Van Voorhis \* \* \* has forfeited her right to further act as such executrix, and she is therefore removed as such executrix, \* \* \* and that Luther C. Russell, public administrator, \* \* \* is entitled to letters," etc.

The question presented is: Should the letters of a nonresident executor be revoked who, upon receiving his appointment and filing his inventory, permanently removes from the state, and does not at any time return to personally conduct the business of the estate, or place himself within the jurisdiction of the court? The executrix in this proceeding was appointed February 11, 1895, and filed her inventory February 21st. She then returned to her home in Rochester, N. Y., where she ever since has remained. The court found that she had not come into this state, nor submitted herself to the jurisdiction of the court, since her appointment, nor personally con-



ducted the affairs of the estate. She was cited to appear and show cause why her letters should not be revoked. She appeared by attorneys, who filed a demurrer to the petition and also filed her first account. She did not appear personally, nor did she make any answer to the citation. We think the trial court had the power to revoke the letters, and that the findings justify its exercise.

The statute forbids the appointment of a nonresident as administrator. Code Civ. Proc. § 1369. Nonresidence, however, is not made a disqualification to the appointment of an executor. Id. § 1350. It was held in *Brown's Estate*, 80 Cal. 384, 22 Pac. 233, that a nonresident named as executor in a will might apply for letters through an attorney, and would be held to be constructively present for that purpose; but it was added: "Of course, the appointee must come here within a reasonable time, and personally submit himself to the jurisdiction of the court, and personally conduct the settlement of the estate." The provisions for the "removals and suspensions in certain cases" of executors and administrators are found in sections 1436 to 1440, inclusive. The judge may suspend the powers of an executor for various causes, among them: "Whenever \* \* \* any executor \* \* \* has permanently removed from the state" (section 1436); and it then becomes the duty of the judge to cite the executor "to appear and show cause why his letters should not be revoked." If he appear, and "the court is satisfied that there exists cause for his removal, his letters must be revoked," etc. Section 1437. The sections following relate to the procedure upon the hearing. We do not think that the court must first suspend the executor before citing him to appear and show cause why his letters should not be revoked. The suspension looks to the removal of the executor, and is a step towards it, but not a necessary one. Usually the grounds of suspension would justify removal, but the former takes place without a hearing, while the latter cannot. But, as it becomes the duty of the court to issue the citation after the suspension, we see no reason why it may not reach the ultimate object (removal) by a direct proceeding, as was done in this case. Section 1354, Code Civ. Proc., provides, in the case of a person absent from the state who is named as an executor, when there is another who qualifies, the absentee may be admitted as joint executor upon his return. The phrase, "has permanently removed from the state," in section 1436, may more properly refer to a resident executor who has permanently removed from the state; but the reason for revoking the letters in such case applies equally to a nonresident executor who comes here to receive his appointment, and then permanently withdraws from the state and remains away. It is his permanent absence from the place where the business is to be transacted, beyond the process of the court, and where the creditors of the estate and others having

business with it cannot reach him, that creates the disqualification; and this is equally true of both resident and nonresident executors. Our laws are made to promote the interests and convenience of our own citizens, and should be construed, if possible within the rules of construction, to promote their welfare. We do not wish to be understood as destroying, by construction, the right of the testator to name a nonresident as his executor; but we do say that the statute should be so construed as to give ground of removal of a nonresident executor when he fails to come to this state and personally conduct the business of the estate, at such times and as frequently as the interests of the estate and of those concerned in its settlement may require. And the court, exercising a sound discretion, must be the judge as to what will constitute the permanent absence from the state.

If it be said that the public administrator is a volunteer, without any interest in the estate, and ought not to be heard by this petition, the answer is that it is immaterial how the judge obtains the information on which he acts. He may proceed "whenever, \* \* \* from his own knowledge, or from credible information," the facts may appear. Section 1436. The judgment and order should be affirmed.

We concur: SEARIS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(122 Cal. 377)

#### PEOPLE v. ROBERTS et al. (Cr. 464.)

(Supreme Court of California. Nov. 19, 1898.)

CRIMINAL LAW—ALIBI—DEGREE OF PROOF—IMPEACHING WITNESSES—MODE OF EXAMINATION.

1. An instruction that if defendants were not present at the time it "was alleged or proven that the crime was committed, \* \* \* and did not aid or abet in its commission," they should be found not guilty, is erroneous, as assuming a crime proven.

2. An alibi need be proven only so as to raise a reasonable doubt whether defendant was present when the crime was committed.

3. Informal or inartificial questioning of impeaching witnesses is not reversible error, unless it has resulted in injustice to accused.

Department 1. Appeal from superior court, Lassen county.

Frank Roberts and another were convicted of grand larceny, and they appeal. Reversed.

Goodwin & Goodwin and W. M. Boardman, for appellants. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. Defendants have been convicted of the crime of grand larceny, and appeal from the judgment and order denying their motion for a new trial. They introduced evidence tending to establish an alibi, and, as bearing upon this branch of the case, the court gave the jury the following instruction: "You

are instructed that if the defendant, or the defendants, was at some other place at the time it is alleged or proven that the crime was committed, it is what, in law, is called an 'alibi.' When satisfactorily proven, it is a good defense in law. Whether or not an alibi was proven and established to your satisfaction in this case is a fact for you to decide from all the evidence introduced before you; and if you believe that the defendants, or either of them, was not present at the time it was alleged or proven that the crime was committed, and therefore could not have committed the crime charged in the information, and did not aid or abet in its commission, then you should find him or them not guilty." The foregoing instruction is attacked by defendants. It is first claimed that the instruction is erroneous in assuming as a fact that the larceny was proven. Under the constitution of the state, a judge may state to the jury what the evidence introduced at the trial is, but the power there granted gives him no right to declare, as a matter of law, that certain facts are established by the evidence. It follows that the contention of defendants in this regard is well founded. But the most serious objection to the instruction is presented in the fact that it assumes throughout that an alibi is a matter of defense, and the jury are told that it must be established to their satisfaction. When a jury is told that any particular fact must be established to their satisfaction, such statement can only mean that such fact must be established at least by a preponderance of evidence; yet there is no such burden cast upon a defendant charged with a crime, except in certain particular instances, which are in no sense presented here. It is for the people to make a case against the defendant beyond a reasonable doubt, and the element of alibi is included in the case which the law demands the people to make out, equally with all other parts of it. If the evidence offered by defendants tended to establish an alibi to the extent that it was sufficient to raise a reasonable doubt in the minds of the jurors as to defendants' guilt, then those defendants should have been acquitted. It is thus apparent that the alibi, to be efficacious to a defendant, need not be "satisfactorily proven," and need not be established to the satisfaction of the jury.

It is next insisted that error was committed in allowing certain questions to be asked of witnesses who were called for impeachment purposes. The evidence of these witnesses bore upon the general reputation for truth, honesty, and integrity of certain witnesses produced by the defendants. The objections here insisted upon go more to form than to substance. There is no rigid, inflexible rule to be followed by counsel in the form of the questions to be addressed to witnesses when testifying to general reputation as bearing upon the question of veracity. And any deviation from the general course to be followed, as marked out by the decisions of this court, will not be held reversible error unless those deviations

have resulted in some injustice to the defendant. In this case we find nothing of the kind. For the foregoing reasons the judgment and order are reversed, and a new trial ordered.

We concur: HARRISON, J.; VAN FLEET, J.

122 Cal. 367

CARTER v. MEULL. (Sac. 417.)

(Supreme Court of California. Nov. 19, 1898.)

HIGHWAYS—TOLL ROADS—FRANCHISES — ASSIGNMENTS.

1. Where a public highway is vacated by the board of supervisors, they may grant a franchise to construct and maintain a toll road over the highway vacated, since it is then not a grant of a public highway to a private individual.

2. The requirement and acceptance by the board of supervisors of a bond from the assignee of a franchise, as owner of such franchise, which had been granted by the board, is a sufficient approval of the assignment.

Department 2. Appeal from superior court, Tuolumne county.

Action by Mrs. J. B. Carter against George Meull. From a judgment for plaintiff, defendant appeals. Affirmed.

J. F. Rooney, for appellant. F. W. Street, for respondent.

TEMPLE, J. This action was brought to recover the sum of five dollars, the season's tolls, alleged to be due from the defendant for traveling over the Sonora and Mono toll road. In 1860 a toll road was constructed from Sonora, in Tuolumne county, to Bridgeport, in Mono county, under franchises granted by the counties of Tuolumne, San Joaquin, and Stanislaus. Prior to May, 1883, the franchises had expired, and the road, under the law, became a public highway. The portion in question here is 58 miles in length, and extends over a rough, mountainous country. On the 7th day of May, 1883, the board of supervisors, "upon proper petition filed," vacated and discontinued the road as a public highway, and on the same day granted to J. B. Carter, "his associates and assigns," a franchise to construct and maintain a toll road for a period of 15 years "over that portion of the Sonora and Mono wagon road hereinafter described." Carter took possession of the road, and collected the tolls according to rates fixed by the board until January, 1893, when by deed he conveyed the franchise and road to plaintiff, soon after which he died. Since that time, plaintiff has been in possession, and has collected tolls. In August, 1896, the board of supervisors required her, as owner of the franchise, to give the bond provided for in the original grant of a franchise to J. B. Carter. In compliance with such order, plaintiff gave the bond, which was approved and filed.

1. It is contended that the grant of franchise to J. B. Carter is void because it was a grant of a public highway to a private in-



dividual. In *Blood v. Woods*, 95 Cal. 86, 30 Pac. 129, it was held that the board could not authorize an individual to collect tolls on a public highway. It is argued that the mode pursued here was a mere evasion. But by vacating the public highway the board destroyed the road as a public highway. If it passed over private land, the rights of way were lost, and the roadbed, the bridges, and other structures, if any, became the property of the landowners. The right to these did not pass to J. B. Carter by the grant of the franchise. Carter was authorized to construct and maintain a toll road. Since he was for years in possession, collecting tolls according to established rates, we must presume he did so. If he did not, a forfeiture could not be declared in this suit.

2. It is contended that the franchise could not be assigned without the consent of the granting power, as it is a personal trust. *Wood v. Turnpike Co.*, 24 Cal. 474; *People v. Duncan*, 41 Cal. 511; *Electric Light Co. v. Sims*, 104 Cal. 328, 37 Pac. 1042. We find, however, that after the assignment the board of supervisors recognized the assignment, and required Mrs. Carter to give a bond as owner of the franchise. The board also approved and filed the bond. This was a satisfaction and approval of the transfer. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

(122 Cal. 400)

FRASSI v. McDONALD. (S. F. 851.)<sup>1</sup>

(Supreme Court of California. Nov. 22, 1898.)

BILL OF EXCEPTIONS — SERVICE — EXTENSION OF TIME — BUILDING CONTRACTS — INDEPENDENT CONTRACTORS — NEGLIGENCE — SIDEWALKS.

1. Under the statute authorizing an extension of 30 days for serving a bill of exceptions, the court may make three extensions of 10 days each, though the third is made on the eleventh day after the making of the second, where the tenth day was Sunday; Code Civ. Proc. § 12, authorizing the exclusion of the last day in which an act is to be done, if it is a holiday.

2. One contracting to erect a building under an architect's direction, the owner reserving a right to make any deviations from the contract, is an independent contractor, for whose negligence the owner is not responsible.

3. An owner of a building in process of erection, knowing that an independent contractor must take up boards of a sidewalk over an excavation to examine certain work, is not liable for injuries to a pedestrian falling into the excavation through its being negligently left open by such contractor without the owner's knowledge.

4. After a lot owner had caused an excavation to be made under an adequate sidewalk without consent of the city, an independent contractor made an opening in the sidewalk, through which plaintiff fell, to his injury. *Held*, that the owner was not liable, as the excavation was not the direct cause of the injury.

5. A lot owner is not responsible for injuries occasioned by an opening over an excavation under a sidewalk in front of his premises, where the opening was made without his knowledge by persons not in his employ, and only a few minutes before the accident.

Department 1. Appeal from superior court, San Francisco county.

Action by A. Frassi against Thomas McDonald. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Reddy, Campbell & Metson, for appellant.  
E. M. Adams, for respondent.

GAROUTTE, J. This is an action for personal injuries sustained by the plaintiff by reason of his falling through a sidewalk in front of a certain lot in the city of San Francisco, belonging to defendant, which sidewalk is alleged to have been in a dangerous condition by reason of defendant's negligence. The sidewalk was a temporary affair in use during the progress of the erection of a building for defendant upon the lot of land fronting thereon. At the time of the accident the building was in process of erection by three contractors,—one contractor for the plumbing; one for the excavating, brick, concrete, and iron work; and the third for the carpenter work, plastering, etc. There appears to be no material difference in the testimony of the various witnesses as to the occasion of the defect in the sidewalk. It was caused in the following manner: The excavating contractor had built a temporary sidewalk in front of the building, and made excavations thereunder. This sidewalk was securely fastened and properly constructed in all ways. Subsequently the plumbing contractor, at the request of the plumbing inspector of the city, and for the purpose of examining the fitness of the work under the sidewalk, took up two boards thereof. Within 15 or 20 minutes thereafter, this plaintiff, while passing by, fell through the opening thus made, and received serious injury.

Plaintiff first insists that the bill of exceptions found in the record was not served in time. The time to serve this bill expired upon June 7th, unless an order made by the judge upon June 8th extended it an additional 10 days; that is, the time expired upon June 7th, unless the fact that the 7th being Sunday gave appellant an additional day upon which to serve the bill. And that the law did give the appellant an additional day upon which to serve the bill there can be no question. If a bill served upon the 8th had been in time,—and that must be conceded (section 12, Code Civ. Proc.), then the court had the power upon that day to extend the time. The court had previously made two orders, of 10 days each, extending the time to serve the bill. Under the statute, it had power to extend the time 30 days in all. June 8th was within the life of the second order, and necessarily the court had the power to make a third order extending the time 10 days. Whatever time the law gave by reason of the fact that one of these orders expired upon a Sunday does not pro tanto exhaust the power of the court. If the 30-days time had been given in one order, and had expired upon a Sunday, the appellant would

<sup>1</sup> For modification of opinion, see 55 Pac. 772.

have had an additional day, by favor of the statute. The fact that the time fixed by an intermediate order fell upon a Sunday does not alter the case. The court made three orders, of 10 days each, extending the time. By any process of mathematical calculation this can only be reckoned as an extension of 30 days' time in all. The proposition here discussed has been directly passed upon in *Muir v. Gallo-way*, 61 Cal. 498; and we are satisfied with the construction of the statute as there declared, notwithstanding some doubt has been cast upon this decision in the later case of *Reay v. Butler*, 99 Cal. 477, 33 Pac. 1134. Even if the soundness of this construction of the statute be doubtful, it would not be advisable to change the rule at this late day. There certainly are no pressing reasons which demand it.

It is insisted by respondent that these contractors were servants of the owner, and not independent contractors, and therefore their negligence was his negligence, and consequently rendered him liable for the injuries received. This contention presents an important question in the case; for, if these contractors were independent contractors, they were not the servants of the owner, and he could not be held liable for their negligence. The contracts entered into by the owner with these men provided that the work should be done "under the direction and to the entire satisfaction of the architect"; that the owner should have the right at any time during the progress of said building "to make any alterations, deviations, additions, or omissions from the said contract," and the cost of the same should be added to or deducted from the amount of said contract price, as the case may be, by a fair valuation by the architect. Upon these provisions respondent rests his contention that the parties erecting this building were not independent contractors, but servants of the owner. The provisions found in this contract are the ordinary and usual provisions placed in building contracts, and, if the men doing this work were not independent contractors, it is difficult to find such. Many cases from foreign jurisdictions are cited by respondent to support his contention upon this branch of the case. *Donovan v. Transit Co.*, 102 Cal. 245, 36 Pac. 516, is also relied upon, but that case is not in point. It was there said, "Since the negligence which caused the injury was that of failing to guard the hole after it was finished by the contractors, it must be imputed to the defendant;" and the conclusion deduced in that case rested upon that proposition. We will not review the cases cited from other states; for in this state the question has been carefully considered in the recent case of *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017, and a conclusion arrived at by this court contrary to the position taken by respondent. The case even was broader in its facts than this case, and it was held that the relation of master and

servant did not exist. We are entirely satisfied with the conclusion there declared.

It is next contended that the opening in the sidewalk was a nuisance per se, and defendant, having caused it, was liable for the injury resulting. A sufficient answer to this contention is found in the fact that defendant did not cause or create the opening, but, upon the contrary, it was made by the independent contractor. There is nothing in the record to indicate that the opening in the sidewalk was made with the consent of the owner, or even with his knowledge. Even if it be conceded that the architect, as the agent of the defendant, must have known that the plumber, in order to do his work beneath the sidewalk, would be compelled to make an opening therein for the purpose of egress and ingress, still these facts do not bring the case within the principles of law laid down in *Colgrove v. Smin*, 102 Cal. 220, 36 Pac. 411. The law as there declared is not applicable, for here the making of the opening in the sidewalk was purely collateral to the subject-matter of the contract. This case would be no different in principle if this opening had been a trapdoor in the sidewalk, and had been negligently left open by the plumber in going to or from his work.

Some point is made by respondent that the excavation under the sidewalk made by the excavating contractor was a nuisance, inasmuch as no consent from the city to do the work had been previously obtained. Whatever may be the facts in this regard, we hardly see their materiality. The excavation was in fact made, and thereafter covered by a sidewalk entirely adequate for all practical purposes. The injury of which complaint is here made was the direct result of the opening in the sidewalk, and not the direct result of the excavation underneath. If a permanent sidewalk of concrete had been finally laid over the excavation, and some plumber had thereafter made an opening therein for purposes similar to those here disclosed, it could hardly be urged successfully that, the original excavation being made without a permit from the city, for such reason a party injured by falling through the opening could recover damages from the owner.

The trial court refused to give the jury the following instruction: "While it is the duty of the defendant to keep the sidewalk in front of his premises in a safe condition for pedestrians to travel upon, if such sidewalk is rendered unsafe by the negligent acts of a third person not in his employ, the defendant is not responsible therefor, unless he had knowledge of such unsafe and insecure condition of said sidewalk, or said unsafe and insecure condition had existed for a sufficient length of time for the defendant to have obtained knowledge thereof by the exercise of due care." It is suggested that this instruction was refused upon the authority of *Spence v. Schultz*, 103 Cal. 208, 37 Pac. 220;



but that case does not justify its refusal. The facts differ widely from the facts of this case. If there had been no sidewalk in this case, and plaintiff had fallen into the excavation made by the excavating contractor, then the two cases would probably have stood upon common ground. But here, as already suggested, the excavation was not the direct and proximate cause of the injury. The owner of property fronting on the street is not an absolute guarantor that no opening may be found in his sidewalk. The law does not demand that he shall guard his sidewalk at night, lest some evil doer shall make an opening therein to the great danger of the belated traveler. Before liability attaches to the owner in such a case, he must have known of its defective condition, or, as a careful, prudent man, should have known it. In the present case the defendant did not know of the opening in the sidewalk. The evidence also discloses that it had been made but 10 or 20 minutes when the accident occurred. In this state of the evidence, such instruction was entirely proper to be given to the jury.

The trial court instructed the jury as follows: "If the plaintiff has substantially shown you, so that your minds and consciences are clear on that point, that there was no contributory negligence on his part, then Mr. Frassi should recover damages in this case, because, as I shall presently instruct you, it is the law in this state and in this city, both by ordinance and by decision, that a man who owns property is responsible for a dangerous condition of the sidewalk, — a temporary sidewalk, at least, as was the fact in this case." In view of what has already been said, it is apparent that this instruction should not have been given. In conclusion, we would say that the court very properly submitted the question of contributory negligence to the jury. For the foregoing reasons the judgment and order are reversed, and the cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.

(122 Cal. 357)

PEOPLE v. KNOWLTON. (Cr. 472.)

(Supreme Court of California. Nov. 19, 1898.)

INDICTMENT AND INFORMATION—CRIMINAL LAW—DECLARATIONS—DURESS.

1. An information which follows the language of the statute is sufficient.

2. Declarations of accused which are not confessions of guilt cannot be objected to as obtained under duress.

Department 1. Appeal from superior court, Siskiyou county.

H. W. Knowlton was convicted of a felony, and appeals. Affirmed.

James F. Lodge, for appellant. W. F. Fitzgerald, Atty. Gen., W. H. Anderson, Asst. Atty. Gen., and C. N. Post, Dep. Atty. Gen., for the People.

GAROUTTE, J. Defendant has been convicted of a felony, and now appeals. He was prosecuted under section 332 of the Penal Code, upon an information. The information is in the general form held sufficient in *People v. Frigerio*, 107 Cal. 152, 40 Pac. 107, and is clearly sufficient. The evidence also is ample to support the verdict. It is insisted that error was committed by the court in admitting certain declarations of the defendant before the jury, which were claimed to have been made under menace and undue influence. It is sufficient to say that the declarations made in no sense amounted to a confession of guilt, and therefore any question of menace and undue influence does not arise. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

(122 Cal. 353)

PYLE v. PIERCY. (S. F. 860.)

(Supreme Court of California. Nov. 21, 1898.)

MARRIAGE PROMISE—CONSIDERATION—DISMISSAL—BAR—ABATEMENT—EVIDENCE—CROSS-EXAMINATION—IMPEACHMENT.

1. Under Code Civ. Proc. § 581, providing for dismissal or judgment of nonsuit where plaintiff fails to appear at the trial, and section 582, providing that in every other case judgment must be rendered on the merits, a judgment based on dismissal for want of prosecution is not a bar to another action, since there was no adjudication on the merits.

2. A judgment of dismissal, not being available as a plea in bar, cannot be pleaded in abatement.

3. A marriage promise is not without consideration because of a breach of a previous promise.

4. Admission of evidence that a person (not a witness) employed by defendant in a marriage-promise suit to shadow plaintiff was committed to the reform school was prejudicial error.

5. Witness for defendant in a marriage-promise suit was forced to admit on cross-examination that she had lived with her husband before marriage. Held not to be proper cross-examination.

6. Error in compelling a witness to admit that she lived with her husband before marriage is prejudicial, since she cannot be impeached in this way, and it tended to discredit her.

Department 1. Appeal from superior court, Santa Clara county.

Action by Jessie Pyle against Edward M. Piercy. There was a judgment for plaintiff, and from the judgment, and an order denying a new trial, defendant appeals. Reversed.

Thos. V. Cator and E. E. Cothran, for appellant. Wm. P. Veuve and R. R. Syer, for respondent.

GAROUTTE, J. Defendant appeals from the judgment and an order denying his motion for a new trial. The action is one for damages, based upon a breach of a promise of marriage.

Defendant pleaded a judgment in bar, based upon the following facts: Plaintiff filed her complaint, and defendant answered. The time

arrived for trial, and the plaintiff's attorney failed to appear. Thereupon defendant answered "Ready," and made a motion that the action be dismissed by reason of nonappearance of plaintiff. At this stage of the proceeding, plaintiff's attorney appeared, and declined to further prosecute the action. The court thereupon ordered the action dismissed for want of prosecution, and gave judgment in favor of defendant for his costs. Thereafter a new complaint was filed upon the same cause of action, and defendant, by his answer, pleaded this aforesaid judgment in bar to the prosecution of the present action. Section 581 of the Code of Civil Procedure declares that an action may be dismissed or a judgment of nonsuit entered in the following cases: "(3) By the court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal." The succeeding section declares: "In every case other than those mentioned in the last section judgment must be rendered on the merits." In this case it may be fairly said that the plaintiff failed to appear at the time the case was called for trial, and under the authority of this section the court was justified in dismissing the action. We are not inclined to extend the doctrine of retraxit as recognized in the case of *Merritt v. Campbell*, 47 Cal. 543, and that case is essentially different in its facts from the case at bar. When there has been no adjudication of the cause upon its merits, it will only be in exceptional cases that this court will hold that a judgment of dismissal is the equivalent of a judgment of *res adjudicata* upon the facts. Upon reason, there is nothing to justify such a rule. Nothing has been litigated, and no principle of estoppel can be invoked. If plaintiff had proceeded with the trial until nonsuited upon the weakness of her evidence, such judgment of nonsuit would not have been a bar to the commencement of the present action. How much less reason to declare a bar under existing circumstances! We find no direct authorities in this state upon the question, but in the case of *Laird v. Morris* (Nev.) 42 Pac. 11, the matter is directly presented under a similar statute, and after careful consideration it was held that such a judgment was not a bar.

It is also insisted that if this judgment of dismissal may not be pleaded in bar, because not a final judgment, in the sense that the time for appeal therefrom had not expired, then it may be pleaded in abatement, and consequently the present action should have been abated. Having already held that the judgment of dismissal was not a judgment of the character that could be pleaded in bar, it necessarily follows that such a judgment cannot be pleaded in abatement and avoidance. In other words, if the judgment of dismissal be a final judgment, and still cannot be pleaded in bar, then, if it is not a final judgment, it cannot be pleaded for the purpose of abating the action. A judgment which has not the elements to constitute a bar has not the elements to support a plea in abatement.

It is contended that the action is barred by the statute of limitations. The action was begun in the month of August, 1895. The promise of marriage is alleged to have been made in September, 1893. The evidence disclosed that defendant had made promises of marriage to plaintiff as early as 1891; but the fact of a promise having been made in 1891 is no reason why a new and independent promise could not have been made in 1893. There would be the same character of consideration to support the last promise as the first, and the fact that a previous promise had been made by defendant, and a breach thereof taken place, was in no sense a bar to the introduction of evidence before the jury that a new and subsequent promise had been made in 1893, which defendant refused to carry out.

Upon cross-examination, defendant was asked, "Have you had detectives employed to shadow her [plaintiff]?" He replied that he had one, and, in answer to another question, stated that her name was Miss Katie Lewis. He was then asked, "Don't you know that this detective—this little girl—was committed by Judge Lorigan, a month or six weeks ago, to the reform school at Whittier?" Notwithstanding objection upon the part of his attorney, the witness was required to answer the question, and replied in the affirmative. The trial court appears to have admitted the evidence for the purpose of showing the character of the person employed by defendant as a detective. The admission of this evidence was clearly erroneous. Its single purpose was to create a prejudice against the defendant, and it was likely to serve that purpose well. The girl was not a witness in the case; hence, if for no other reason, the evidence was entirely incompetent as bearing in any way upon her credibility. It was an indirect attack upon the honesty and integrity of the defendant and his case, and wholly unauthorized by any principle of law. This evidence necessarily weighed against him with the jury.

Mrs. Tomlinson was an important witness for the defendant. Upon cross-examination, under objection, she was forced to say that she had been living with her husband, Tomlinson, prior to their marriage. This evidence was not cross-examination, and, in addition thereto, a witness cannot be impeached in this way. Such evidence tended strongly to discredit the witness, and the error committed in its admission was clearly prejudicial.

Numberless other objections are made to the rulings of the trial court in the admission and rejection of evidence. The court has examined them patiently and carefully, and nothing appears therein demanding a retrial of the case. Indeed, we find there nothing demanding extended consideration. Some objection is made to an instruction of the court, wherein the jury are told that, in the assessment of damages, defendant's financial ability is an element to be taken into consideration. In view of the fact that there was no evidence given at the trial as to the financial ability of the de-



fendant, this instruction would seem to be without the facts. Upon an examination of the other instructions given and refused, we find no objection of merit. For the foregoing reasons the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

122 Cal. 426

SMITH v. MASON. (Sac. 402.)

(Supreme Court of California. Nov. 26, 1898.)

STATUTE OF FRAUDS—TRUSTS—PAROL EVIDENCE.

1. Under Civ. Code, § 852, forbidding an express trust in lands to be created or declared otherwise than by a written instrument, declarations of a grantor showing that a deed absolute on its face was intended as a trust is inadmissible.

2. The fact that a deed was made by a father to a daughter without consideration does not of itself raise a presumption of fraud.

3. Nor is it sufficient to create a resulting trust in favor of the grantor's other children.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by Maud Smith against Hannah Mason to set aside a deed. Judgment for defendant, and plaintiff appeals. Affirmed.

W. C. Greene and Gibson & Ramage, for appellant. Nicol & Orr, for respondent.

BRITT, C. Plaintiff and defendant are members of a family of five children who survive their father, one Daniel Hoover, deceased. Said Hoover died November 30, 1891. About seven months previously he made to his eldest daughter, Hannah, the defendant here, a deed in form an absolute conveyance of a parcel of land, on which he then resided with his said family. In plaintiff's complaint it is substantially alleged that at the date of such deed said Daniel was sick, and expected early dissolution; that he reposed great confidence in said Hannah Mason (then Hannah Hoover), and because thereof, and in order to save expenses of administration, he signed and acknowledged said deed to her, with directions that she should hold the land described therein in trust for the benefit of herself and his other children, and convey to them their respective interests, etc.; that the deed was without consideration; that it was never delivered by the grantor, but that defendant obtained possession of the same after his death, and claims title thereunder in herself, and repudiates the trust. It is prayed that the deed be adjudged void, or that defendant be declared a trustee for plaintiff, etc. The complaint was not demurred to for uncertainty. The answer of defendant put in issue its more material allegations. We do not find it necessary to consider the point made by respondent, that the averment in the complaint of nondelivery of said instrument precludes the assertion of a trust which must rest on it as a

deed delivered. There was evidence at the trial that it was delivered by Daniel Hoover to the defendant on the day of its date, and the court so found.

Plaintiff offered evidence of declarations of Daniel Hoover, uttered orally, regarding his purpose in executing said deed, and of oral admissions of defendant relative to her title in the land. Such evidence was rightly rejected by the court. Our statute of frauds forbids an express trust in lands to be created or declared otherwise than by a written instrument. Civ. Code, § 852; Code Civ. Proc. § 1971; *Hasshagen v. Hasshagen*, 80 Cal. 514, 22 Pac. 294; *Doran v. Doran*, 99 Cal. 311, 33 Pac. 929; *Moore v. Hamerstag*, 109 Cal. 122, 41 Pac. 805.

It seems to be contended that the court erred in refusing to admit proof of a constructive trust, or to find such a trust from the evidence which was admitted. Allowing that any evidence offered or received had a tendency to establish a trust of that nature (which is by no means clear), it was yet irrelevant to the case before the court; for, leaving out of view the question of delivery of the deed, found in defendant's favor, the complaint contains no showing of other circumstances from which a trust arises by construction of law, as distinguished from one express. It is not alleged that Daniel Hoover was in any respect incompetent to execute the deed to defendant, nor that he at all mistook its contents, nor that defendant procured it by means of undue influence or fraudulent promises, or, indeed, that she made any effort whatever to obtain it. The fact that the instrument was made from father to daughter, and the alleged fact that it was without consideration, do not in themselves raise a presumption of fraud, nor suffice to raise a resulting trust in favor of other children of the grantor. *Tillaux v. Tillaux*, 115 Cal. 663, 47 Pac. 691; *Emmons v. Barton*, 109 Cal. 671, 42 Pac. 303; *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910; *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Perry, Trusts*, § 201; Civ. Code, § 1040. The judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

122 Cal. 473

RUSSELL v. FINDLEY et al. (Sac. 431.)

(Supreme Court of California. Nov. 29, 1898.)

MORTGAGES—COSTS—COUNSEL FEES—LIEN.

A mortgage provided that the mortgagee, on foreclosure, should recover costs and counsel fees, but nowhere stated that they should be secured by the mortgage, nor provided for their payment out of the proceeds of a sale under it. *Held*, in foreclosure, that such costs and fees were not a lien on the mortgaged property.

Commissioners' decision. Department 2. Appeal from superior court, Calaveras county.

Suit by R. W. Russell against J. E. Findley and others. There was a judgment for plaintiff, and defendants appeal. Modified.

A. H. Carpenter, for appellants. F. J. Solinsky and A. L. Rhodes, for respondent.

CHIPMAN, C. Foreclosure of mortgage on real estate. The mortgage contained the following provision: "In any action which may be brought to foreclose this mortgage, the said party of the second part shall recover in said gold coin not only all moneys which may be due on said note, but also any and all sums paid for taxes and assessments or incumbrances or insurance, with interest thereon as aforesaid, and also counsel fees, at the rate of ten per cent. upon the amount due, and all costs and charges attending the foreclosure, including such sums as may have been paid for searching the title of said premises since the date of the record of this mortgage, and that said counsel fees shall be paid whether judgment be entered in said action or not." The court found that there is owing as counsel fees the sum of \$100, \$2.50 paid out for search of title since the mortgage was recorded, and also the sum of \$13 costs of suit; making the aggregate sum, with the principal and interest of the note, of \$4,986.37, "\* \* \* which is a lien upon and against said premises." Directions to docket any deficiency there might be after sale was given. Defendants appeal from the judgment on the judgment roll alone.

Appellants' contention is that the items of counsel fees, costs of search, and costs of suit were not secured to be paid by the mortgage, and it was error to declare them to be a lien on the mortgaged premises; citing Civ. Code, § 2920; 15 Am. & Eng. Enc. Law, p. 756; Clemens v. Luce, 101 Cal. 432, 35 Pac. 1032; Mason v. Luce, 116 Cal. 233, 48 Pac. 72. Respondent claims that the court was authorized by the terms of the mortgage to include these items as secured; citing O'Neal v. Hart, 116 Cal. 69, 47 Pac. 926. The mortgage reads: "That for the purpose of securing the payment of a promissory note, a copy whereof is as follows [copy of note], the said parties of the first part hereby grant and mortgage," etc. First parties agree to pay all taxes and assessments, etc., "which appear to be liens upon the property," etc., keep the building insured, and the mortgage gives second party the right to pay these amounts, if first parties fail to do so, "and all sums so paid shall be secured hereby." Then follows the clause first above quoted. The only other clause bearing upon the question is a provision that, if the mortgage be foreclosed, "such judgment and decree of foreclosure and order of sale shall provide for the sale of the mortgaged premises en masse, and in one lot only," but makes no provision as to the application of the proceeds of sale. The mort-

gage specifically declares that certain sums shall be secured by it, but it does not purport to secure the liabilities in question, although it makes them the liabilities of the mortgagor. Clemens v. Luce, supra, held "that, where the mortgage does not provide that counsel fees shall be a lien, no such lien exists. O'Neal v. Hart, supra, presented a different case from the one here, as there the mortgage provided that on foreclosure a decree might be entered to sell the premises, and out of the proceeds of sale counsel fees might be paid. This express provision was held to create an obligation which was of the same nature as the obligation to discharge the other costs of foreclosure. No such obligation was entered into by the mortgagor in the present case. He agreed to pay the charges mentioned, but he did not agree that the land should stand security for payment. See, also, Irvine v. Perry, 119 Cal. 352, 51 Pac. 544, 949, citing Lee v. McCarthy (Cal.) 35 Pac. 1034. The decree should be so modified as that the items of charge above mentioned (\$115.50 in all) shall not be secured by a lien on the premises, and in all other respects it should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the decree is so modified as that the items of charge above mentioned (\$115.50 in all) are not secured by a lien on the premises, and in all other respects it is affirmed.

122 Cal. 483

In re GREGORY'S ESTATE. (Sac. 506.)  
(Supreme Court of California. Nov. 29, 1898.)

#### APPEALABLE ORDER—REVIEW.

1. An order overruling a motion to vacate, for averred error therein, a dismissal of a petition to vacate a decree of distribution, is not appealable.

2. A refusal to make findings cannot be reviewed on appeal from an order overruling a motion to set aside a judgment in which the alleged error was committed.

Commissioners' decision. Department 2. Appeal from superior court, Placer county.

In the matter of the estate of James Gregory. The petition of Mary A. Brind, administratrix c. t. a., to vacate a decree of distribution, was dismissed, and from an order overruling her motion to set aside the order of dismissal she appealed. Dismissed.

James Gartlan, for appellant. F. P. Tuttle, for respondents.

BELCHER, C. James Gregory died testate in the county of Placer on January 24, 1877; being at the time a resident of said county, and leaving an estate therein, consisting of real and personal property. The will of said deceased was duly admitted to probate, and letters testamentary were issued to Mary Gregory, named in the will as sole executrix thereof; and such letters re-



mained in full force and effect until December 1, 1880, when she died. On January 8, 1881, a decree of distribution was made and entered in the matter of the estate, whereby the whole of the estate was distributed to John H. Gregory and John S. Gregory. On February 18, 1895, an order of court was made and entered appointing Mary Ann Brind administratrix with the will annexed of the said estate, and on the same day letters of administration were issued to her. On May 3, 1895, the said administratrix, Mary A. Brind, filed a petition, and on October 31, 1895, an amended petition, setting forth, among other things, that between the times of the death of Mary Gregory, executrix, and the appointment of the petitioner as administratrix, there was a vacancy in the administration of the said estate; that the decree of distribution of January 8, 1881, was made without any petition therefor, or notice thereof, and is void on its face, and not conformable to law or justice; that the petitioner and three other persons named were pretermitted children of said James Gregory, and were entitled to his estate, or a portion thereof; and that the said decree of January 8, 1881, was beyond the jurisdiction of the court, and in contravention of the constitution of the United States and of this state, in that it deprived the said pretermitted children of their property without due process of law. Wherefore the petitioner prayed that the said decree of January 8th be vacated and set aside. J. H. Gregory, J. S. Gregory, and five other parties interested answered the petition; denying that the said decree of distribution was made without any petition therefor or notice thereof, or is void on its face, or not conformable to law or justice; and averring that no appeal was ever taken from the said decree, and that the same is conclusive as to the rights of the petitioner, and the cause of action set forth in the petition is barred by the provisions of sections 1666 and 1908 of the Code of Civil Procedure. The matter came on regularly to be heard before the court upon the issues presented by the petition and answer; and, after hearing the evidence and the arguments of counsel, it was on June 17, 1896, "ordered, adjudged, and decreed that the prayer of said petition be, and the same is hereby, denied, and the said petition dismissed." On June 16, 1897, counsel for petitioner served notice on respondents that on the 28th day of that month he "would move the court for an order setting aside and vacating the judgment marked as made and entered herein on the 17th day of June, 1896, on the grounds that there are no findings or decision to support said judgment, and that the same is therefore void and of no effect." This motion was made and submitted on the papers and record in the case, and on an affidavit made by petitioner's attorney, in which it was stated that the issues of fact raised by the answer to the petition to vacate and set

55 P.—10

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aside the decree of distribution "were tried by the court, sitting without a jury, on the 17th day of June, 1896; that the testimony having been introduced, and the arguments of counsel heard, the cause was submitted for decision, and thereupon the court announced that he would give judgment in favor of respondents; that, immediately on such announcement being made, this affiant, in behalf of his client, the said petitioner, and in open court, demanded findings, and requested that a copy of such findings as counsel for respondents prepared be furnished him, with the intent that he have opportunity to prepare amendments thereto; that subsequently, and without any findings ever having been made or filed or waived, a judgment was made and entered in favor of respondents and against petitioner." This motion was heard and denied on October 26, 1897, and from this last order the present appeal is prosecuted by the petitioner.

The only ground urged for a reversal is that the court erred in failing to find the facts when it made and filed its judgment or order denying the prayer of the said petition, and dismissing the same. The order appealed from is not, in our opinion, an appealable order. If appellant desired to have the alleged error complained of reviewed in this court, she should have appealed from the judgment of dismissal, in rendering which the error occurred. That judgment was not void because of the alleged error, and it could not be set aside in the manner sought to be availed of here. The appeal should be dismissed.

We concur: CHIPMAN, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal is dismissed.

122 Cal. 413

SOUTHERN PAC. CO. v. PROSSER. (Sac. 284.)

(Supreme Court of California. Nov. 25, 1898.)

LIMITATIONS—NEW PROMISE—LIENS—FORECLOSURE.

1. A letter written by a debtor to his creditor, referring to property bought of the creditor, and requesting employment of the creditor in order that he might pay for it in work, amounts to an unqualified admission of an existing debt which the debtor desires to pay (Code Civ. Proc. § 360), and is sufficient to interrupt the running of limitations; and the suggestion of a new mode of payment, not being made as a condition of the acknowledgment, did not impair the effect of the admission, the bar of the statute then being two years remote.

2. An action on a debt barred by limitations, except for an acknowledgment of the debt before the statute had run, is based on the original debt, and not on the new promise; and hence an action to foreclose a mortgage, brought after the original period of limitation, is not barred, where the debt has been acknowledged before the running of limitations, since Civ. Code, § 2911, provides that a lien is not extinguished by lapse of time short of that within

which an action may be brought on the "principal obligation."

Temple, J., dissenting.

In bank. For opinion in department, see 52 Pac. 836.

**BEATTY, C. J.** This is an action to foreclose a chattel mortgage given to secure the promissory note of the defendant. The complaint was filed more than four years after the maturity of the note, and the superior court held, on demurrer, that the action was barred by the statute of limitations. The judgment of the superior court was reversed in department on the ground that the note was taken out of the operation of the statute by a new promise or acknowledgment in writing (Code Civ. Proc. § 360), but at the same time it was held that the right to foreclose the mortgage was barred. As to this latter point only a rehearing was granted on petition of the appellant. Upon the first point we adopt the department opinion, as follows: "Plaintiff sued to foreclose a chattel mortgage made by defendant to secure payment of his promissory note. Such note fell due October 10, 1890. The property mortgaged was a certain traction engine at Auburn, Placer county. The action was brought more than four years after maturity of the note, and, in order to avoid the limitation of that period prescribed for actions on such instruments (Code Civ. Proc. § 337), the plaintiff set out in its complaint the following paper writing alleged to have been signed by defendant and delivered by him on October 8, 1892, to plaintiff's treasurer, who had authority to receive the same on its behalf: 'Dear Sir: Referring to that traction engine at Auburn, owned by me, and mortgaged to S. P. Co., I have not been able to sell it. \* \* \* Now, sir, can't you give me a chance to pay you in work? The Co. employs many men, and, if you choose, you can procure some employment for me. I have a sick family, and am hard up personally, and need work, and want to pay you, besides. \* \* \* W. S. Prosser.' Defendant demurred to the complaint on the ground that the statute bars the action. The demurrer was sustained, and judgment passed in defendant's favor. The distinct and unqualified admission of an existing debt contained in a writing signed by the party to be charged, and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same. From such an acknowledgment the law implies a promise to pay. Code Civ. Proc. § 360; McCormick v. Brown, 36 Cal. 180, 184, 185; Biddel v. Brizzolara, 56 Cal. 374; Tugle v. Minor, 76 Cal. 96, 18 Pac. 131; Wood, Lim. §§ 68, 85. The defendant contends that his said letter was nothing but an inquiry whether plaintiff would accept payment in work. We think it was more significant than this. As we read the document, it was an unqualified admission of an existing debt which

defendant desired to pay, and also a request for leave to pay in a manner more convenient to the writer than that provided in the original contract. The suggestion of a peculiar mode of payment, not being proposed as a condition of the acknowledgment, did not impair the effect of the admission. *Evans v. Simon*, 9 Exch. 282. This view of the import of defendant's letter is strengthened—'strongly fortified,' said the supreme court of New Hampshire—by the fact that the bar of the statute was then some two years remote, and defendant was in no position to impose terms of payment. *Butterfield v. Jacobs*, 15 N. H. 140, 142; *Wood, Lim. § 78*, and cases cited. To the extent of the value of the security, at least, payment was then enforceable in money. 'There is a great difference between the construction to be put on a letter written a short time after the debt has been contracted, and one written after the debt is already barred. *Pollock, C. B., in Cornforth v. Smithard*, 5 Hurl. & N. 14. We have no doubt that the latter interrupted the running of the statute as to the debt sued on. See, further, *Farrell v. Palmer*, 36 Cal. 187; *Curtiss v. Insurance Co.*, 90 Cal. 245, 249, 255, 27 Pac. 211.'

As to the second point, it was assumed in the department opinion that the life of the original mortgage ended four years after the maturity of the note, and that the written acknowledgment of the debt, though sufficient to prevent the bar of the statute as to the personal obligation, was not such an instrument as is essential to create, renew, or extend a mortgage. The contention of the appellant is that this view ignores the effect of section 2911 of the Civil Code, which reads as follows: "A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." The Code prescribes the manner of creating liens, and enumerates the various means by which they are extinguished. Civ. Code, §§ 2909-2913. This enumeration is no doubt intended to be exclusive, and the only provision applicable to this case is section 2911, above quoted. The question whether the lien of this mortgage was extinguished therefore resolves itself into the question whether an action such as this is based upon the principal obligation,—i. e. the note which the mortgage was given to secure,—or upon the new promise implied from the written acknowledgment of the debt. A wide diversity of opinion upon this point may be discovered in the reported decisions of this court, but it is to be observed that these expressions of opinion were generally unnecessary, and have generally ignored the distinction between a new promise made before, and one made after, the statute has run. This distinction is very clearly stated in section 81, *Wood, Lim.*, as follows: "The distinction between the acknowledgment of a debt before, and one after, the statute has run, consists merely in its effect upon the debt



and the remedy. An acknowledgment or promise made before the statute has run vitalizes the old debt for another statutory period, dating from the time of the acknowledgment or promise, while an acknowledgment made after the statute has run gives a new cause of action, for which the old debt is a consideration." This distinction seems to be recognized in the phrase "new or continuing contract," in section 360, Code Civ. Proc., and is clearly stated by Mr. Justice Rhodes in his opinion in *McCormick v. Brown*, 36 Cal. 184, as follows: "There are two ultimate facts that may be proved in the mode prescribed,—a continuing contract, and a new contract. The acknowledgment or promise made while the contract is a subsisting liability establishes a continuing contract, and, when made after the bar of the statute, a new contract is created." In *Smith v. Richmond*, 19 Cal. 477, it was held that the new promise is not the cause of action, but is only evidence that the original cause of action is not barred. In *Chabot v. Tucker*, 39 Cal. 438, Mr. Justice Temple says in his opinion that *Smith v. Richmond* was overruled in *McCormick v. Brown* as to this point. I think it is too strong an expression to say that the earlier decision was overruled by the latter, for it was not mentioned or referred to, and the two cases were not alike. In the former the new promise was made before the bar of the statute had attached to the original obligation, while in *McCormick v. Brown* the statute had run before the date of the new promise; and it seems clear from the language of Justice Rhodes, above quoted, that the express intention was to distinguish the two classes of cases, and the doctrine applicable to them, respectively. On principle, this distinction must exist. When a debtor makes a new promise before an action is barred upon the original contract, he does not make himself liable a second time for the same debt, and the old promise is not merged in the new. He merely continues his original liability for a longer term. In other words, he merely waives so much of the period of limitations as has run in his favor. But when his legal obligation is at an end, by reason of the lapse of the full period of limitation, or of a discharge in bankruptcy, a new promise creates a new obligation, and is itself the basis of the action. A clear recognition of this distinction reconciles all seeming conflict in the decisions of this court, and demonstrates the essential difference between this case and the case of *Wells v. Harter*, 56 Cal. 342, in which it appears that the action on the principal obligation had been barred before the new promise was made. In that case, of course, the lien of the mortgage was extinguished by the express terms of section 2911 of the Civil Code, and could only be renewed by compliance with the requirements of section 2922 of the Civil Code. But here the right of action never was barred. There never was a

time when it could not be maintained on the principal obligation, and there was no occasion to renew the lien. If it should be claimed that the lien was "extended," the answer is that the extension of a lien is not the prolongation of its life, but is making it security for an additional obligation. *Bank v. Bandmann*, 120 Cal. 220, 52 Pac. 583.

Our conclusion is that, as between the parties, the lien of this mortgage was never extinguished. Judgment reversed, and cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.; GAROUTTE, J.

TEMPLE, J. I adhere to the judgment and the opinion rendered in department.

122 Cal. 451

COWARD v. CLANTON. (Sac. 399.)

(Supreme Court of California. Nov. 26, 1898.)

PARTNERSHIP—AGREEMENT TO SHARE PROFITS—  
ACCOUNTING—PLEADING—BROKERS—  
PERFORMANCE OF AGREEMENT.

1. In an action on a contract for the sharing of profits in a transaction, plaintiff may recover on facts showing that he is entitled to relief, although he wrongly alleged that the contract, which he correctly set out, was one of partnership.

2. To entitle one to an accounting under an agreement to share the profits of a transaction, he need not establish a partnership relation.

3. An agreement between plaintiff and defendant that the latter should buy land with his own funds, and have control thereof, and that the former should negotiate the sale thereof under defendant's direction, and that the proceeds, above the cost price and expenses of selling, be divided between them, is not a partnership.

4. The Code, defining "partnership" as the association of two or more persons to carry on business together and share the profits, does not make profit sharing the test of partnership.

5. Under an agreement between a landowner and a broker, whereby the latter was to sell the land for a share of the proceeds above the cost price and selling expenses after all the land was sold, the procuring of a purchaser for all the tract, who was accepted by the owner and with whom an executory contract was made, is a sufficient performance of the agreement to entitle the broker to his share of the profits.

Department 2. Appeal from superior court, Yolo county.

Action by W. M. Coward against D. R. Clanton. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Hurst & Hurst and C. W. Thomas, for appellant. N. A. Hawkins, R. C. Clark, and E. R. Bush, for respondent.

TEMPLE, J. This is an action for an accounting. It is averred in the complaint that plaintiff and defendant, in 1882, formed a partnership for the purchase and sale of real estate. Clanton was to furnish all the funds and moneys for investment, and to purchase real estate for plaintiff to sell. Plaintiff was

to furnish the skill and perform the labor of selling all or as much of said real estate as could be sold. From the proceeds, if any, there should be paid: (1) The cost of the land, with interest; (2) the expense of selling; and (3) the residue, if any, was to be divided equally. The plaintiff was to furnish office and the necessary clerks.

It is averred that in December, 1882, defendant purchased with his own funds a tract of land called the "Harlan Tract," containing the 160 acres which the parties subsequently caused to be divided into 5-acre tracts, and all of which plaintiff has negotiated and sold at a profit of \$4,156.50. It is charged that defendant has received to his own use all of the proceeds of the sale, including the purchase price and interest stipulated, the costs and expense of sale, and \$2,312.51 profits in excess of his share, and that plaintiff has paid certain sums as expenses, and the exact amount due plaintiff cannot be ascertained without an accounting. The defendant denies all the allegations of the complaint, but admits and avers that he employed plaintiff as a real-estate broker to sell the Harlan tract, and agreed that when all the land was sold at prices to be fixed and agreed to by the defendant, and the cost of the land, with 8 per cent. per annum interest, was paid from such proceeds, and the expenses incurred in subdividing and selling were paid, plaintiff was to have one-half of the remainder, if any there was, for his services, but that plaintiff has not sold all the land, but abandoned his contract, and refused to perform the same. The findings are for the plaintiff, and against the contention of the defendant, except that it is found that the sales resulted in an advance of \$4,155 over the purchase price; that the current rate of interest was 8 per cent.; and, after deducting interest and expenses, there remained in the hands of Clanton \$3,457.23 profits, to be divided between plaintiff and defendant, one-half of which belonged to plaintiff. Plaintiff, therefore, recovered judgment for \$1,723.61, with interest and costs.

The chief contention between the parties in this court has reference to the character of the contract. Most of the averments in regard to it contained in the complaint are admitted, but the defendant contends that the contract did not create the relation of partners. But, since the statute of frauds is not relied upon, I cannot see how it was material for plaintiff to show that the contract created a partnership, if, as the court found, the entire Harlan tract was sold. The complaint shows a contract to sell the land for defendant for one-half of the profits, ascertained in a specified way. The contract admitted by the defendant is to the same effect, except that defendant contends that the contract was to sell the entire tract of land, and that plaintiff is not entitled to compensation unless the entire service contracted for has been rendered. The fact that the relation is

wrongly averred to be that of partners is not material. If a case is stated which entitles the plaintiff to relief, it matters not that the contract which is correctly set out is wrongly called a contract of partnership. I do not understand the suggestion that the court has no jurisdiction to compel an accounting unless a partnership was created. If plaintiff has a cause of action of which the court has jurisdiction, and it is necessary to have an accounting to determine his rights, it will be done. *Lumber Co. v. Reynolds* (Cal.) 53 Pac. 410. Whether the facts would have given jurisdiction to a court of equity is of no consequence. We have no such courts, but our courts afford the remedies to which the facts may show the parties are entitled, whether legal or equitable.

I think the testimony of Coward did not establish a partnership, although he did testify to the facts stated in the complaint as constituting a partnership. It was not such, not only because Coward owned no interest in any partnership property or business, and had no control of any business, but throughout was to act under the direction and control of Clanton, and was simply, at the end, to be only a creditor of Clanton for the value of his services. He really was not to share in the "profits," as the term is understood among merchants or in the decisions concerning partnerships. The profits were not, according to his testimony, real profits. They were conventional profits only. If two persons agree to sell goods on a credit, one to take the accounts at their face, and the profits made on that basis to be divided equally, it is obvious that the division would not be of the profits of the business, if there were any bad debts. This is precisely the character of the business testified to by Coward. He was only a real-estate agent. As he testifies, he was in no way concerned in regard to the moneys actually realized from the sales, but only in the amount of sales, whether by executory contract or otherwise, which he could induce Clanton to accept. This is not a carrying on of business by partners.

Nor is it true that our Code makes profit sharing a test of partnership. It would not lack much of a good definition of a "partnership" if the clause in regard to a division of profits were omitted. It would read: "Partnership is the association of two or more persons for the purpose of carrying on business together." This is now said to be the distinguishing feature of a partnership as established in *Cox v. Hickman*, 8 H. L. Cas. 268. See full discussion and citation of authorities in *Eastman v. Clark*, 53 N. H. 276.

But in litigation between partners, or those who may be so considered, it is not often necessary to determine whether that relation exists or not. A partnership is not like a corporation, from which certain consequences necessarily follow. As to the parties to it the contract of partnership is like any oth-



er, and the powers conferred, duties enjoined, and liabilities imposed are to be deduced from its terms. This idea was expressed by Mr. Justice Lindley in *Walker v. Hirsch*, 27 Ch. Div. 260. He said: "Persons who share profits and losses are, in my opinion, properly called partners; but that is a mere question of words. Their precise rights in any particular case must depend upon the real nature of the agreement into which they have entered."

In this case, if the tract had all been sold, there would be no difference in the outcome, whether the contract be regarded as creating a partnership or not. If the property had not all been sold, and there were a partnership, still, if the proceeds were sufficient in amount to repay the purchase price and expenses, the residue would be profits to be divided. If a contract for services, as the contract was entire, if the land were not all sold plaintiff has not performed his contract. Either conclusion would be reached only by construing the contract, and although under one construction the relation might be that of partners, and under the other of employer and employé, they are both within the scope of the complaint.

It seems to be conceded that if the tract was all sold, and the pleadings are not defective in the respects noted, plaintiff is entitled to recover. Whether all had been sold or not—aside from the question of partnership—is the main fact in controversy; and I think, if the relation had been that of partnership in the ordinary sense, if plaintiff was to have a share of the profits made in the transaction it would be necessary to hold that it was not sold. Then plaintiff would be required to share in the risk of loss from the fact that some purchaser on credit might fail to complete his purchase. But if plaintiff was, as appellant contends, acting merely as a real-estate agent, and as compensation was to receive, not a share in the profits proper, but a share in the increment after certain specified deductions, then I think the contract has been performed on the part of plaintiff; or, rather, there is evidence sufficient to sustain the finding to that effect. There is evidence tending to show that purchasers for the entire tract, who were acceptable to and who were accepted by defendant, and with whom satisfactory contracts were made, were found by plaintiff.

As to the Eaton tract, there is a sharp conflict in the evidence, but the testimony of Coward is positive that it was a sale of a portion of the Harlan tract, and was accepted by Clanton as such. A similar remark may be made as to the other tracts. Only executory contracts were entered into, but there was evidence that Clanton accepted them as sales within the terms of their contract; and, if the relation was that of vendor and broker, he could not have done otherwise. I do not understand upon what ground interest was allowed, but no point is made

as to that, and perhaps reason could have been shown for such action. The order and judgment are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.

122 Cal. 391

ALFERITZ v. PERKINS. (Sac. 388.)

(Supreme Court of California. Nov. 21, 1898.)

CHattel Mortgages—Confusion of Goods.

A chattel mortgage covered 2,000 sheep and the increase thereof. Five hundred wethers, part of the flock, were, with the mortgagee's consent, exchanged for 500 ewes, which were commingled with the remaining 1,500, and could not thereafter be distinguished therefrom. *Held*, that mortgagee's right to the 500 ewes was merely an equitable one, which could not affect the rights of creditors of the mortgagor to attach them before the mortgagee had taken possession.

Commissioners' decision. Department 1. Appeal from superior court, Madera county.

Action by Peter Alferitz against S. J. Perkins to recover the value of certain lambs sold by defendant as a constable under a writ of attachment. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

R. E. Rhodes and L. I. Mowry, for appellant. R. L. Hargrove, for respondent.

HAYNES, C. This appeal is from the judgment upon the judgment roll. The findings show the following facts: On December 7, 1893, one Miguel Lujea executed his promissory note to the plaintiff for the sum of \$3,600, payable six months after date, and on the same day executed to the plaintiff, as security therefor, a chattel mortgage upon 2,000 head of sheep then owned by him and in his possession in the county of Fresno, and in which the mortgaged property was described as follows: "Two thousand sheep and the increase thereof, two mules and two horses, now in the county of Fresno, state of California." This mortgage was in all respects duly executed, and was recorded in Fresno county, and afterwards in the counties of Mariposa, Stanislaus, and Madera, and was made in good faith to secure said note and certain advances therein provided for. That in 1894 the mortgagor, being then in the county of Mono with said sheep, with the consent of the plaintiff, exchanged 500 wethers, part of said 2,000 sheep, to another party, for 500 ewes, which were mingled with the remaining 1,500 so mortgaged, and thereafter could not be distinguished from them. That in January, 1895, there were born to the ewes of said band of 2,000 sheep 1,000 lambs. That in May, 1894, Rosenthal and Kutner brought suit in justice's court in the county of Madera against said Lujea, the mortgagor, and procured a writ of attachment to be issued, under which the defendant in this action, a constable, attached 320 of said lambs, and afterwards sold the same for the

sum of \$288; and this action is prosecuted to recover from the defendant (said constable) the value of said 320 lambs so attached and sold, and damages; and, on the facts so found, the court gave judgment for the defendant.

Several grounds are urged by respondent in support of the judgment, and each ground is combatted and elaborately argued on behalf of appellant. These grounds, as stated by respondent, are as follows: (1) "The description 'two thousand sheep and the increase thereof' is insufficient and void as against respondent." (2) "The mortgage did not cover the offspring of the ewes." (3) "That the alleged mortgaged property was so confused and mingled with the unmortgaged property as to render it impossible to identify and segregate the same." (4) That an action for the conversion of the property will not lie. Our conclusion is that the judgment should be affirmed upon the third ground above stated, and therefore a decision of the other questions presented and discussed is unnecessary; since, if they were each resolved in favor of appellant, the result would be in no wise affected.

The findings that 500 wethers, part of the 2,000 sheep mortgaged, were exchanged with a third party for 500 ewes, which were comingled with the remaining 1,500, and could not thereafter be distinguished therefrom, and that said exchange was made with the consent of the plaintiff, and that 1,000 lambs were borne by the ewes of said band of sheep, are clear and unequivocal. In *Jones, Chat. Mortg.* § 483, it is said: "If the mortgagee, by his fault or neglect, permit the mortgaged goods to be intermingled by the mortgagor, so that an officer having a writ of execution against the latter is unable, after making reasonable inquiry and effort, to distinguish them, and the mortgagee does not himself identify and point them out, the officer is justified in taking and selling the whole as the property of the debtor. \* \* \* The mortgage being ineffectual at law to convey the subsequently acquired goods, these are subject to seizure upon execution by a judgment creditor of the mortgagor; and, the confusion of goods having taken place by the permissive act of the mortgagee, he is not allowed to defeat the rights of the judgment creditor by claiming the goods under his mortgage." See, also, *Cobbey, Chat. Mortg.* § 765, and numerous cases cited by both authors; and the doctrine of these cases is based upon the familiar rule in relation to the confusion of goods. Upon this point, appellant cites three cases, namely, *Abbott v. Goodwin*, 20 Me. 411; *Allen v. Goodnow*, 71 Me. 420; and *Davis v. Marx*, 55 Miss. 376. It is not necessary to review these cases, in all of which there was given to the mortgagor the power of sale and the substitution of other goods. But, conceding that they support appellant's contention, the great weight of authority and

of reason supports the doctrine above quoted from *Jones on Chattel Mortgages*.

We do not doubt that, as between the mortgagor and mortgagee, the 500 ewes acquired by the exchange, and mingled with the remaining 1,500, could have been taken by the plaintiff under the mortgage; and, if possession had been taken by the plaintiff before the attachment was levied, his right to the whole band would have been undoubted. But, until possession taken, his right to the 500 ewes so brought into the band was merely an equitable right, which could not affect the right of another creditor to attach, there being nothing to distinguish them from those originally mortgaged; and it is equally true that no one could select from the 1,000 lambs those that sprang from the ewes not mortgaged. Hence it is immaterial, so far as this case is concerned, whether the mortgage was originally valid or not, or whether the increase born in 1895 were covered by it, or whether the 320 lambs seized and sold under the attachment were the offspring of the 500 ewes for which the wethers were exchanged. We therefore advise that the judgment be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

6 Cal. Unrep. 176

CLINE v. ROBBINS. (Sac. 349.)

(Supreme Court of California. Nov. 21, 1898.)

APPEAL—MANDATE—JUDGMENTS—CONSTRUCTION—  
COSTS—MORTGAGES—FORECLOSURE—  
FRAUDULENT CONVEYANCES.

1. A judgment declared an instrument in form a deed absolute to be a mortgage, and provided that it should be foreclosed, and that each party should pay his own costs and one-half of the jury fee. The jury fee had been paid by plaintiff, the mortgagor. The mortgagee appealed, whereupon the decree was modified by denying a foreclosure because not prayed for, and by directing that the decree fix a reasonable time within which the mortgagor should pay the balance due, and that, in default of such payment, the action should be dismissed. An "amended" judgment was then entered in the lower court, in accordance with the mandate, but it made no reference to costs or jury fees. *Held*, that the original judgment, in so far as it referred to the costs or jury fees, was not affected.

2. A judgment declaring a deed to be a mortgage, and ordering a foreclosure of it, found the amount due the mortgagee, and directed that "the commissioner \* \* \* pay to plaintiff [the mortgagor] or his attorney, out of said proceeds [of the foreclosure sale], the sum of thirty-six dollars, jury fees, costs of this suit." *Held*, that the cost should be deducted from the amount due the mortgagee, and not from the proceeds of the sale.

3. A judgment declared a deed a mortgage, and ordered defendant, the grantee, to reconvey on payment of a certain sum, and directed that, unless the payment was made within a certain time, the action should be dismissed. *Held*, that it was no ground for dismissing the action that prior to a tender the grantor conveyed the property in fraud of creditors.



Commissioners' decision. Department 1. Appeal from superior court, Nevada county.

Action by J. T. Cline against H. A. Robbins. From an order made after final judgment denying defendant's motion to dismiss the action, defendant appeals. Affirmed.

Thos. S. Ford, for appellant. J. M. Walling, for respondent.

HAYNES, C. This appeal is from an order made after final judgment denying appellant's motion to dismiss the action. Cline brought an action to have it adjudged that a certain instrument, in form a deed absolute, was in fact a mortgage, and for an accounting between himself and defendant Robbins, who was in possession of the property, and receiving its rents and profits, and offering to pay any balance that might be found due from him to the defendant. The defendant denied that said instrument was a mortgage, and alleged that it was a deed absolute. Upon the hearing, the court found that said instrument was a mortgage, and that there was due to the defendant \$583; and, as conclusions of law, that the mortgage should be foreclosed, that each party pay his own costs, and that each party pay one-half of the jury fee. That fee amounted to \$72, and had been paid by the plaintiff. Judgment was thereupon entered foreclosing said mortgage, and ordering a sale of the mortgaged premises. From this judgment, defendant Robbins appealed, making the points that the finding that said instrument was a mortgage was not justified by the evidence, and that the judgment foreclosing the mortgage was erroneous. This court sustained the finding that the instrument was a mortgage, but held that the action was to redeem from the mortgage, that a foreclosure was not sought by either party, and directing that the decree should fix a reasonable time within which the plaintiff must pay the balance found due, and that, in default of such payment within the time limited, the action should be dismissed, and ordering that the decree be modified accordingly. *Cline v. Robbins*, 112 Cal. 581, 586, 44 Pac. 1023. Upon the going down of the remittitur, what is styled an "amended judgment" was entered, in which it was recited that a former judgment had been entered foreclosing the mortgage, the appeal therefrom, and the judgment that the decree be modified, and then proceeded to decree "that the judgment heretofore entered be modified by striking out all that part thereof which forecloses the mortgage, and the same is hereby stricken out, and it is further adjudged and decreed that the plaintiff pay to the defendant the sum of five hundred and eighty-three dollars, together with interest at seven per cent. per annum from June 12, 1895, within forty days after the entry of this amended judgment; that, upon the payment of such sum, within said time, the said mortgage be decreed to be satisfied by this court; and, upon payment thereof, the defendant is ordered to duly make,

execute, and deliver to the plaintiff a deed of conveyance of the said mortgaged premises; and, if within the said forty days the whole of said money and interest shall not have been paid, then, upon motion of the defendant, this action shall be dismissed." Within the time above limited, plaintiff's attorney tendered to defendant's attorney \$590.60 in full payment of the amount due, and this tender was refused, upon the ground that it was \$38.65 (the amount of half the jury fee, with interest) less than the amount of said judgment and interest. Plaintiff thereupon deposited the sum tendered with the clerk of the court for the defendant in satisfaction of the judgment; and the defendant thereupon moved the court to dismiss plaintiff's action, upon the ground that he had failed to comply with said amended judgment. This motion was denied, and from the order refusing to dismiss the action this appeal is taken.

It is contended by appellant that the amended judgment makes no reference to costs or jury fees, but requires that the full sum of \$583, with interest, be paid. The former judgment, however, was only affected by the order of this court in the particulars specified. It was not reversed, and a new judgment ordered, but was modified in certain specified particulars, none of which referred to the costs of the action in the court below. It is further said by appellant that the original judgment as entered provided for the payment of said half of the jury fee out of the proceeds of the sale of the premises under the mortgage, and not out of the \$583 found due to the defendant; in other words, that defendant was to "receive his five hundred and eighty-three dollars, and interest over and above the thirty-six dollars jury fee due to plaintiff." The decree in that respect was awkwardly drawn, but the intention of the court is apparent from the expression as to "one-half the jury fee, now due plaintiff," and the further direction "that out of the proceeds of said sale the commissioner retain his fees, disbursements, and commissions on said sale, and pay to the plaintiff or his attorney out of said proceeds the sum of thirty-six dollars, jury fees, costs of this suit." If it had been the intention of the court that plaintiff should not be repaid by defendant one-half of the jury fee of \$72, paid by plaintiff, there was neither necessity nor propriety in saying anything about it in the decree, while the conclusions of law expressly directed that "each party pay one-half of the jury fee." The whole proceeding was an equitable one, and as the question of costs in the court below was not raised upon the former appeal, and as no order was made by this court upon that question, the court below properly found that this disbursement made by the plaintiff in the course of the action should be deducted from the amount found due the defendant, and that plaintiff's property should not be forfeited because of his refusal to pay to defendant money to which he was not equitably entitled.

It is further urged as "a more potent reason why this action should be dismissed," viz. that prior to the tender the plaintiff conveyed the property in question to his son, and, on the same day upon which the conveyance was made, he was adjudged an insolvent debtor upon his own petition. These facts were brought to the attention of the court by affidavit upon the hearing of the motion to dismiss the action. They were entirely immaterial. If the plaintiff was entitled to redeem, and by his tender effected a redemption, the defendant had no interest in the property to be affected by the conveyance; and, if no redemption was effected, the conveyance could not deprive him of the property; or if, as contended, the conveyance was a fraud upon creditors, it could only be so if redemption was in fact made, so that it became plaintiff's property; and in that case the creditors' remedy is not debarred, but is promoted, by the refusal of the court to dismiss the action. My conclusion is that the order appealed from should be affirmed.

We concur: CHIPMAN, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

122 Cal. 395

BENTON v. BENTON. (Sac. 434.)

(Supreme Court of California. Nov. 21, 1898.)

HUSBAND AND WIFE—ACTION FOR SUPPORT—DESERTION—PLEADING—ALLOWANCE—JUDGMENT—FINDINGS—APPEAL.

1. A complaint by a wife, for support, which did not allege that the husband had willfully deserted her, but charged acts of cruelty which compelled her to leave the family dwelling, was sufficient, under Civ. Code, § 98, providing that the departure of one party from the family dwelling, caused by the cruelty of the other, is a desertion by the latter.

2. Under Civ. Code, § 137, providing that, if the husband willfully desert the wife, she may sue for support, without application for divorce, the wife may maintain such action where the husband, by cruelty, compels her to depart from the family dwelling, though she is entitled to a divorce, since Civ. Code, § 98, makes such conduct a desertion by the husband.

3. In an action by a wife for support, the amount to be allowed is an issuable fact, and hence it is erroneous for the court to allow more than is asked in the complaint.

4. Where an appeal is from the judgment, it will be sustained on the presumption that findings were filed or waived; hence an objection that the judgment was not based on the findings filed is unavailable.

5. The findings and decree speak from the date of the filing, and, where both are filed on the same day, it is presumed that the findings were first filed.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by Elizabeth Benton against T. N. Benton. From a judgment for plaintiff, defendant appeals. Modified.

J. G. Swinnerton, for appellant. Nicol & Orr, for respondent.

CHIPMAN, C. Action to recover permanent support, without divorce. The court awarded plaintiff \$150 per month, \$100 for attorney's fees, and \$50 for costs of action. Defendant appeals on the judgment roll alone.

The court found that plaintiff and defendant intermarried August 11, 1874, and are now husband and wife. Plaintiff has at all times since the marriage "been to defendant a good and dutiful wife, and has ever been regardful of her marital obligations, and has never at any time given defendant any cause or provocation to treat her in any manner other than in kindness." Plaintiff is "without means; is aged, and in delicate health. Defendant is possessed of property of the value of fifty thousand dollars and upwards," and is well able to supply and provide plaintiff with support and maintenance. The court further finds that, for more than a year last past, defendant has treated plaintiff in a cruel and inhuman manner (setting forth the acts of cruelty), and finds "that defendant's course of treatment during said time has been such as was calculated to and did inflict upon her great mental pain, suffering, and anguish, and she became seriously sick, \* \* \* and is now unable, unassisted, to attend to herself or her common wants." Defendant's "course of treatment was such as made it impossible for her to continue to live in the family dwelling house, and she was compelled to and did on or about October 7, 1896, depart from said family dwelling house, and since said time she has lived away from said dwelling house and said defendant." Defendant has during said separation "refused to supply plaintiff with means for her support and maintenance," and she "is aged and infirm, and unable to longer endure the treatment of said defendant," and has not condoned defendant's offenses. The complaint is verified, and was filed October 29, 1896. As conclusions of law, the court found that defendant has been guilty of extreme cruelty towards plaintiff, by which she was compelled to depart from the family dwelling house as above stated; "that defendant deserted plaintiff on or about the 7th day of October, 1896, and ever since has lived separate and apart from plaintiff"; and that plaintiff is entitled to a decree awarding her permanent support. Judgment was accordingly entered.

1. It is contended that the complaint does not state facts sufficient to warrant the decree, because there is no allegation "that defendant willfully deserted the plaintiff. The words 'willful desertion,' 'abandon,' or 'desert,' or equivalent words, do not occur in plaintiff's averments, from first to last. It is not a complaint for willful desertion." A demurrer alleged insufficiency of facts. The complaint sets forth an action upon the ground of extreme cruelty, and avers that "by reason of the said acts of defendant towards her, and by reason of his cruelty towards her, this plaintiff was compelled to depart from the said family dwelling place"; and again, "Defendant's treatment of her has been such as to render it im-



possible for plaintiff to continue living with defendant." Section 98, Civ. Code, provides as follows: "Departure or absence of one party from the family dwelling place, caused by cruelty or threats of bodily harm, from which danger would reasonably be apprehended from the other, is not desertion by the absent party, but it is desertion by the other party." The complaint stated facts which constituted desertion, under this section. Having done this, it was not necessary, in such an action as this, to give those acts the statutory designation of "willful desertion." The desertion, as a legal conclusion, flowed from the facts constituting desertion.

2. It is claimed that extreme cruelty is not a cause for maintenance without application for divorce. Section 137, Civ. Code, provides, among other things, as follows: "\* \* \* When the husband willfully deserts the wife, she may, without applying for a divorce, maintain in the superior court an action against him for permanent support and maintenance of herself, or of herself and children." The contention is that the section was not intended to give the wife a choice of remedies, but only to give the support while the statutory time is running, entitling the wife to a divorce for desertion; citing *Peyre v. Peyre*, 79 Cal. 336, 21 Pac. 838; *Hardy v. Hardy*, 97 Cal. 125, 31 Pac. 906. Defendant's contention finds no support in these cases. In *Hardy v. Hardy* the facts necessary to the action are thus stated: "If at the time she institutes the action she is living separate and apart from him, it is essential for her to show that it is by reason of his desertion, or that by reason of his cruelty or threats of bodily harm she was forced to leave the family dwelling place." Defendant's construction would require us to ignore the very terms of the statute which gives the action "without applying for a divorce." It would force the wife to ask for a judicial separation, whereas the law encourages reconciliation, and the husband and wife should be allowed to indulge the hope of its realization. Plaintiff is not seeking support on the ground of defendant's cruelty, but because through his cruelty she has been compelled to dwell apart from him. The statute gives the relief for desertion unaccompanied by cruelty, and it also gives the relief where the wife is compelled to depart from the dwelling place, caused by the cruelty of the husband, because the statute makes such conduct on his part desertion. Civ. Code, § 98.

3. It is claimed that the findings do not support the judgment, because plaintiff asked for only \$100 per month, and the court gave her \$150 per month. Defendant claims that his denial, being literal (the pleadings were verified), was in effect, an admission of the averment, and there was therefore no issue upon the fact, and no finding was necessary, and, as the finding was against the admission, it was erroneous; citing Code Civ.

Proc. § 580. It was held in *Burnett v. Stearns*, 33 Cal. 468, that, where there is no issue tendered as to a fact, any finding, whether it agrees or disagrees with the fact alleged, is nugatory, and that no presumption will be indulged that evidence was introduced to contradict the admission. See, also, *Gregory v. Nelson*, 41 Cal. 278; *Silvey v. Neary*, 59 Cal. 97. The general rule is that the plaintiff is not entitled to recover more than his complaint demands, and we do not perceive that this case is exempt from its application. Respondent claims that the amount to be allowed was not an issuable fact, but rested in the discretion of the court. We think it was an important issuable fact, and was tendered as an issue by the complaint. In an action for divorce, where the complaint alleged that a certain sum was a reasonable amount to be allowed as counsel fees for the prosecution of the suit, it was held that the value of these services was no part of the plaintiff's cause of action, and need not have been named in her complaint; her estimate was only the opinion held by her when the action was commenced, which was subject to be changed by the development of subsequent circumstances. *Rose v. Rose*, 109 Cal. 544, 42 Pac. 452; citing *Insurance Co. v. Fisher*, 106 Cal. 234, 39 Pac. 758, where in an action to foreclose a lien, the court gave an amount as attorney's fees larger than was asked for in the complaint. It was held not to be an essential averment, and therefore not conclusive, and that the court was authorized to exercise its discretion. In actions for divorce, with application for alimony or allowance for support pendente lite, the cause of action is divorce, and the support of the wife pending suit is an incident. And so, in the case of foreclosing a lien, the attorney's fees to be allowed are no necessary part of the cause of action. Where, however, the action is for support, without divorce, it seems to us that, although a matter largely within the discretion of the court, over which he retains subsequent control, and may increase or diminish the allowance, still the amount to be allowed becomes an important, and, we think, an issuable fact. See *Kerry v. Supply Co.* (Cal.) 54 Pac. 262 (opinion Aug. 26, 1898).

4. It is claimed as error that the judgment was entered before the trial was concluded. The transcript shows that the findings were signed by the judge, and were marked: "Dated January 5, 1897. Filed January 6, 1897." The decree was signed by the judge, and was marked: "Dated January 5, 1897. Filed January 6, 1897." The decree begins with the usual statement, "The court having made and filed herein its written findings," etc., and is dated January 5th. The point made is that the judgment imports absolute verity, and that, as the findings shown in the transcript were not filed until January 6th, they cannot be the findings referred to in the judgment, and therefore the judgment

is without findings, and is destitute of vitality. The findings and judgment were signed of the same date, and were filed of the same date. There is nothing in this point. Where the appeal is from the judgment, it will be sustained, upon the presumption that findings had been filed or waived. *Van Court v. Winterson*, 61 Cal. 615. Furthermore, the findings and the decree speak from the date of the filing, and where they are filed on the same day it will be presumed that the findings were first filed. The judgment should be so modified as to make the amount of the allowance for support to be \$100 per month, and otherwise to stand affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is modified so as to make the allowance for support the sum of \$100 per month, and otherwise it is affirmed.

122 Cal. 410

PEOPLE v. KNOTT. (Cr. 393.)

(Supreme Court of California. Nov. 25, 1898.)

CRIMINAL LAW—INSANITY—SUBMISSION OF ISSUE—APPEAL—REVIEW—MURDER—EVIDENCE.

1. Where the only evidence of accused's insanity was an affidavit of his attorneys that, during two months last passed, they had frequently seen him, and that they were informed and believed he was insane, no question of his insanity having been raised during the trial, a refusal after conviction to submit a special issue of his insanity will not be disturbed, under Pen. Code, § 1201, providing for a trial of the issue of accused's insanity if, in the opinion of the court, there is a reasonable ground to believe him insane.

2. An instruction that, if the killing was with malice aforethought and by means of lying in wait, it was murder in the first degree, and that, irrespective of this, if the killing was unlawful and with malice aforethought, it would be murder in the first or second degree, according to the enormity of the act in view of the circumstances surrounding it, is not erroneous as assuming that there may be murder in the first degree, irrespective of that declared by statute.

3. On an issue whether the killing was by lying in wait, evidence that deceased was in the habit of going alone at night along the street on which he was killed is admissible, without showing that accused had knowledge thereof; its weight being for the jury.

In bank. Appeal from superior court, San Francisco county.

A. L. Knott was convicted of murder in the first degree, and from a judgment, and from an order denying a motion for a new trial, and from an order denying a motion for suspension of judgment pending an inquiry as to his insanity, he appeals. Affirmed.

Lewis Morris and Augustus Tilden, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The defendant was convicted of murder in the first degree, and judgment was rendered against him imposing the penalty of death. He appeals from the judg-

ment, from an order denying his motion for a new trial, and from an order denying his motion for suspension of judgment pending an inquiry as to his insanity.

1. It is not necessary to determine whether or not the ruling of the court upon the motion to suspend the judgment on account of insanity can be inquired into on this appeal; for, if that question could be reviewed here, there is no reason for disturbing the ruling of the court on that subject. It appears that during the trial of the cause no point was made as to the insanity of the appellant, and no evidence introduced upon that subject. But a few days afterwards, when the appellant appeared for judgment, a motion to suspend the judgment was made, which motion was based entirely upon a short affidavit of his two attorneys, in which affidavit it was stated that the affiants were "informed and believe, and upon such information and belief allege, that the said A. L. Knott was not of sound mind." And that "during two months last past" they had frequently seen and talked with the appellant, and from his conversations and actions "believe and allege that he is insane," and that judgment should be suspended upon an inquisition, etc. Section 1201 of the Penal Code, under which this motion was made, provides that, "if in the opinion of the court there is reasonable ground for believing him to be insane, the question of insanity must be tried," etc. In denying the motion, the court declared "that no doubt had arisen in the mind of the court as to the sanity of the defendant"; and, under the circumstances of the case, we do not think that the slight evidence offered would warrant us in disturbing the conclusion at which the learned judge of the court below arrived.

2. The appellant contends that the case should be reversed because the court gave the following instructions: "As I have stated to you already, if Knott unlawfully took the life of Knauer with malice aforethought, and by means of 'lying in wait,' he is guilty of murder in the first degree, for it is so declared by the statute. Irrespective of this, if he took the life of Joseph Knauer,—took it unlawfully and with malice aforethought,—Knott is guilty of murder of the first degree, or murder in the second degree, according to the enormity of the act, and in view of all the circumstances under which Knauer's life was taken. Such unlawful killing with malice aforethought is murder." Counsel for appellant contends that this instruction assumes that there may be murder of the first degree "irrespective" of murder declared by the statute. But that view of the instruction is clearly incorrect. The prosecution contended that appellant took the life of the deceased by means of "lying in wait"; and the instruction clearly means that, irrespective of the question of lying in wait, he would be guilty of murder in the first degree if certain other circumstances existed. The latter part of this instruction is, however, one not to be approved



as a proper addition to a correct statement of the distinction between murder in the first degree and murder in the second degree; but we do not see anything in it that could be understood in any sense prejudicial to the appellant. If the words "according to the enormity of the act" were not in the instruction, it would be colorless and of no importance at all; and we do not see how the words just quoted could possibly have injured the appellant. The instruction possibly might have had some little importance if it had stood alone; but, before it was given, the court had very fully and clearly and correctly defined murder in the first degree and murder in the second degree, and very explicitly stated the distinction between them. So that, while we cannot approve the instruction excepted to, we do not think it affords any ground for a reversal of the judgment. None of the cases cited by the appellant upon this question are in point.

3. The deceased was killed at night while going along a street called "Stevenson Street"; and it is contended that the court erred in allowing evidence to the point that deceased was in the habit of traveling that street alone at night after the close of his business, without showing that the defendant had knowledge of that habit. Evidence that the deceased was in the habit of traveling that street as aforesaid was proper evidence as tending to support the claim of the prosecution that he was killed by means of lying in wait; and, while that evidence would be weakened by the absence of proof that the appellant knew that fact, still it was not erroneous to admit proof of the fact, its weight and importance to be determined by the jury.

4. It is contended that the court erroneously allowed the introduction of the dying declaration of the deceased. We do not deem it necessary to state here the facts under which the declaration was made. It is sufficient to say here that, in our opinion, the admission of the declaration in evidence was clearly correct.

5. It is contended here that the evidence does not support the verdict. We think, however, that the evidence was legally sufficient to warrant the jury in finding the verdict which they rendered; and it would be a useless task to restate the evidence here. The judgment and orders appealed from are affirmed.

We concur: BEATTY, C. J.; TEMPLE, J.; HARRISON, J.; VAN FLEET, J.; GAROUTTE, J.

(122 Cal. 373)

HIGGINS v. CALIFORNIA PETROLEUM & ASPHALT CO. et al. (L. A. 431.)

(Supreme Court of California. Nov. 19, 1898.)

IDENTITY OF NEW AND OLD CORPORATIONS—  
FRAUD.

A corporation held a lease under which it mined asphalt on a royalty basis. One individual held substantially all of its stock. A

new corporation, with the same object, officers, and place of business, was organized, and substantially all its stock was issued to the principal stockholder of the old one, the sole consideration being a debt which the old corporation owed him. He afterwards sold some of his stock, but the old corporation received no part of the consideration. The old corporation transferred its lands and all of its business and assets, with the exception of the mining lease, to the new corporation, and practically went out of business. Held, that the new company was only the old one under another name, and hence was liable on the mining lease for royalties subsequently accruing; the transfer being fraudulent as to the lessor.

Department 1. Appeal from superior court, Santa Barbara county.

Action by P. C. Higgins against the California Petroleum & Asphalt Company and others. From a judgment in favor of plaintiff, certain defendants appeal. Affirmed.

Canfield & Starbuck, for appellants. W. S. Day, S. J. Parsons, and E. M. Selby, for respondent.

PER CURIAM. This is an action by one of the lessors in a lease of certain asphalt mines to recover royalties reserved in the lease. The facts as to the lease, and the conveyance by Mary A. Ashley, the other lessor, to the California Petroleum & Asphalt Company of a portion of the leased premises, are set out in the case of Higgins v. Asphalt Co., 109 Cal. 304, 41 Pac. 1087, and need not be here repeated. After the decision of that case, the defendant therein conveyed to the Alcatraz Asphalt Company, a corporation (also made a defendant in this case), the property so conveyed to it by Mary A. Ashley. Since that conveyance, the latter corporation has mined and taken from the premises so conveyed to it large quantities of bituminous rock, for which royalties are claimed by the plaintiff. Prior to that conveyance, the former company had also mined and taken from the same premises other bituminous rock, for which the plaintiff also claims royalties. The plaintiff had judgment against the former company for the royalties accruing prior to the transfer to the latter company, and against both companies for those accruing after that transfer. From the latter portion of the judgment, both companies have appealed, but no appeal has been taken from the former portion.

The appellants contend that the latter company, being the owner of the land, and not being an assignee of the lease, is not liable on the covenants of the lease, and that the former company had done no mining on the land after the transfer, and therefore cannot be held liable for any royalties subsequently accruing. The lease in question contains no covenants as between the lessors, and therefore either of them, or the grantee of either of them, might mine bituminous rock on his portion of the leased premises without incurring any liability to the other lessor. When Mary A. Ashley conveyed her land to the lessee, this right fell into conveyance, by

cause the lessee, as decided in the case referred to, was not by that conveyance absolved from its covenant to Higgins; but upon the conveyance by it to a third person, not an assignee of the lease, this right would revive in favor of its grantee; and such grantee would not be liable to Higgins for any mining it might do on that portion of the land. If this were the whole case, the judgment would therefore be erroneous.

But the court below found, in substance, that the California Petroleum & Asphalt Company and the Alcatraz Asphalt Company (its alleged grantee) are identical, and that the mining operations conducted by the latter company on this land were in reality conducted by the former company. On this ground the respondent contends that both companies are liable for the royalties in question. We think that there was evidence to sustain this finding. It shows that the new company was substantially a reorganization of the old one. In the old company there was only one real stockholder, and all of the stock issued by the new company was issued to him, the sole consideration being a debt which the old company owed him. It is true that shortly afterwards he transferred some of his stock to some Eastern capitalists, and had this in view when the new company was formed. But we cannot agree with appellants that this fact affects the case. The old company received no part of the consideration for that transfer. The objects of the two corporations were substantially the same. Each had the same officers and the same place of business, and the old corporation conveyed to the new one substantially all of its property, and practically went out of business upon making that transfer. The evidence, moreover, strongly suggests, if it does not establish, that the main and perhaps the sole purpose of this organization was to evade the obligations of this lease. While transferring to the new company its land and all of the business and assets, it retained the lease, which could be of no avail in its hands. It is a legitimate inference that this was done purposely, and, if so, the only possible object would be to prevent Higgins from collecting royalties. The old company was to continue to be the lessee, but was to do no mining; while it was to permit the new company, its alter ego, to mine without any responsibility therefor. We therefore think that the court below was justified in holding that the new company was only the old one under another name; and, that being so, it is plain that their responsibility to Higgins was not impaired by this merely nominal transfer. *Railroad Co. v. Bee*, 48 Cal. 398; *Blanc v. Mining Co.*, 95 Cal. 524, 30 Pac. 765. It is true that the court did not find that there was any actual fraud in the transaction; but we think that such a transfer, as against the holder of an existing obligation, is constructively fraudulent, as a matter of law. The parties may have supposed, and no doubt

did suppose, that the transaction was a legal and valid one; but, in so acting, they acted at their peril. The portion of the judgment appealed from is affirmed.

122 Cal. 442

RECLAMATION DIST. NO. 537, OF YOLO COUNTY v. BURGER et al. (Sac. 479.)

(Supreme Court of California. Nov. 26, 1898.)

RECLAMATION OF SWAMP LANDS—BOARD OF SUPERVISORS—JURISDICTION—FINDINGS—WITNESSES—OPINION EVIDENCE—ASSESSMENTS.

1. A petition to the board of supervisors for the organization of a district for the reclamation of lands must be signed by owners of one-half the acreage in the district, to give such board jurisdiction.

2. Proof of the existence of a reclamation district as a de facto corporation does not entitle it to proceed to assess an owner of land within such district without a hearing on notice of the petition to create the district.

3. The board of supervisors is authorized to determine whether a petition for the organization of a reclamation district is sufficiently signed, and their finding is conclusive.

4. On a proceeding to determine whether property in a reclamation district was properly assessed, it is incompetent to ask witnesses their opinion as to whether the assessments made were in proportion to the benefits.

5. Commissioners appointed to assess charges for the reclamation of lands in a district, in arriving at each owner's proportionate share, added the estimated value of an old levee bordering the district to the estimated cost of the new work, and, using the aggregate as a basis of calculation, ascertained what each owner should pay according to the number of acres he owned, crediting him with the estimated value of the portion of the levee on his land. *Held*, that the assessment was improper, as each owner's land should have been assessed in proportion to the benefits resulting from the work.

Department 2. Appeal from superior court, Yolo county.

Action by reclamation district No. 537, of Yolo county, a corporation, against A. H. Burger and others. From a judgment for plaintiff, and an order refusing a new trial, defendants appeal. Reversed.

F. E. Baker, for appellants. Hall & Dunn, for respondent.

TEMPLE, J. This suit is by a reclamation district to collect an assessment. The appeal is from the judgment and a refusal of a new trial. It is denied that the district was duly organized, and that the assessment was in proportion to benefits. The alleged defect in organization is that the petition was not signed by the owners of one-half of the acreage of the district. After the petition had been presented and had been published, the board organized the district excluding therefrom about 300 acres, which was included in the district as described in the petition. It is admitted that the petition does contain the signatures of the owners of one-half of the land in the district, as reformed. It is contended that the board of supervisors cannot thus give themselves jurisdiction by forming a new district in which a majority of acreage would be rep-



resented on the petition. This position is certainly sound. A petition with the requisite number of signatures must be presented before the board can act in the matter at all.

The proceeding results in putting a burden upon property against the will of the owners, and the requirements as to proceedings of that character cannot be evaded by calling the governmental agency through which the proceeding is conducted a "corporation." As remarked in *People v. Reclamation Dist. No. 551*, 117 Cal. 114, 48 Pac. 1016, the proceeding greatly resembles those in which property is assessed for local improvements in proportion to benefits; and I see no reason why the same rules as to essential requirements should not apply. The board of supervisors is required to inquire and determine whether the petition is sufficiently signed. So far as this depends upon a fact to be determined, their conclusion may be final as an adjudication, but the question is not whether the district has so acted as to constitute a corporation de facto. *Reclamation Dist. No. 531 v. Phillips*, 108 Cal. 306, 39 Pac. 630, and 41 Pac. 335. If, upon due notice and a petition sufficient in form, the parties have been afforded an opportunity to be heard before a competent tribunal, they have had due process, according to the law of the land, and are concluded. They cannot be deprived of their property without such hearing, or opportunity to be heard, by proof of the existence of a corporation de facto. There must have been, in fact, a substantial compliance with the law.

Plaintiff does not concede that the petition as presented was defective, or that it did not have the required number of signers. The number of acres represented by each signer is stated in the petition, and one of the petitioners signs as administratrix. Deducting the amount represented by this signer, there would not be enough land represented to give the board jurisdiction. It is conceded that an administrator would not be a competent petitioner under the law, but the petition does not show that the person so signing was administratrix of any estate. The petition only shows that the word was affixed to her signature. 'This is ambiguous, and no proof of the real fact was offered at the trial, and, if offered, would not have been competent. The question was, after all, one of fact, upon which the determination of the board has been held conclusive.

It was not competent to ask witnesses for their opinions upon the precise issue being tried before the court, as to whether the assessment, as made, constituted a charge upon each tract in proportion to benefits. But, if such questions were allowable, there can be no doubt as to the right of the opposing party, on cross-examination, to ask upon what the opinion was based. These rulings, though erroneous, are not of supreme importance.

The important question in the case has reference to the method adopted in making the assessment. It is contended that by it the district was assessed to pay for an old

levee which was used as a part of the plan of reclamation, and that, in the nature of things, it could not result in a charge upon each tract in proportion to benefits. The district fronts upon the Sacramento river, along which is an old levee, which is used as a county road. The district is about three-eighths of a mile wide, and slopes back from the river, so that the rear portion is some seven or eight feet lower than the front. Protected by the old levee, the higher land along the river can ordinarily be cultivated. Each tract fronts on the river, and most of them extend also to the rear boundary. The method pursued by the commissioners is set out in finding 3, which reads as follows: "That all the allegations of the third paragraph or subdivision of the complaint are true, but in relation to the allegation therein set forth 'that the commissioners assessed against each tract of land in said district a charge proportionate to the whole expense, and to the benefits which would result to each tract from the work of reclamation,' the court further finds that, at the time the engineer appointed by the board of trustees of said district planned, located, and reported the works necessary to effect a reclamation of the lands in said district, there was a levee along the river in front of the lands in said district. The commissioners, in making their view, considered the old levee in place as a part of the work necessary to reclaim all the lands in the district, and estimated its value at \$31,718.60, which, with the cost of the new work, estimated at \$55,000, aggregated the total sum of \$86,718.60, the cost of the work necessary for the reclamation of all the land in said district if there had been no front levee. To ascertain the charge which should be assessed against the land of each landowner, the whole number of acres within the line of the proposed levees within the district was divided into \$86,718.60, to find the rate per acre, by which rate the number of acres belonging to each landowner within the lines of the proposed levees was multiplied. And the result in each case was assumed by the commissioners as the amount he ought to pay if no front levees were in place, and if it was necessary to raise the entire sum of \$86,718.60. From the result so obtained, in each case, was deducted the value of the old levee in place in front of each owner's land; and the balance was assessed by said commissioners against his tract of land as the proper proportion which he should pay of \$55,000, cost of new work and incidental expenses; and the commissioners did not segregate the respective tracts of land into high land, middle class land, and low land, and assess different amounts upon each class, but assessed each tract described in the petition as a whole." Apparently by this method the district was assessed and was made to pay for the value of the old levee, and each landowner was credited with the estimated value of that

portion which was on his land. Of course, the result was that those who had the most levee received the greater credit, and those who had least had to pay most; that is, those who did not have an average share of the old levee were forced to pay that much more of the cost of reclamation, while those who had the levee paid just that much less towards the cost of reclamation.

A weak attempt is made to show that this was a proper method of determining the relative benefits which the different tracts would receive from the proposed reclamation. There is certainly no natural relation between the number of cubic yards of old levee found on a tract and the amount of benefit that land would receive from the reclamation. A break in the levee at any point would flood the whole district, and work on any part of the levee was of as much benefit to any other landowner as to him upon whose land the work was done. To levy and collect an assessment upon the district for the value of the old levee was to make the district pay for it. To credit the landowners with the value of the portion of the levee on their land at  $12\frac{1}{2}$  cents per cubic yard—as was done—was to pay such landowners for it.

But it is said that the result was to give each tract the precise advantage it would be entitled to, from the fact that the high lands along the river received less benefit from the reclamation than the back lands. The commissioners did not determine, nor did the engineer of the district, what were so-called "high lands" or "low lands." The phrase "high land" is applied to the narrow strip along the river which can sometimes be cultivated, and it is found that the amount on each tract is in proportion to its frontage. A glance at the map furnished, which accords with the calculations in the record, will show that this proposition will not hold as to any two tracts in the district. Tracts 6, 7, 8, and 9 run across the district from the river to the back lines, and are bounded by parallel and rectangular lines. Under the finding, they must contain precisely the same proportionate amount of high and low lands. No two are assessed alike, and between the contiguous tracts 7 and 8 there is a difference in the assessment of over \$8 per acre. The average was \$18.11. Tract 5, as compared with tract 11, has, at least, three times as much high land (under the finding), in proportion to its area, as tract 11 has. It is assessed at \$13.08, and tract 11 at \$8.52, per acre. This condition of things would be reversed if respondent's contention were good. Under the method pursued, tract 1 was entitled to an allowance; that is, its levee, which the district bought, more than paid for its share of the cost of reclamation. The commissioners thought they were not authorized to make an allowance, and must assess all the land. So, they charged tract 1 and tract 2 five cents per acre each. But all this, and as much more, would hardly make the

fact more obvious than it is from a mere reading of the finding.

Appellant's assessment is a specimen of all. Condensed it is as follows: Land benefited, 151.57 acres; total assessment which would have been necessary had there been no front levee, \$4,819.93; credit allowed for front levee at  $12\frac{1}{2}$  cents per cubic yard, \$1,147; net assessment, \$3,672.03. What a wonderful coincidence it would have been if there could have been found any relation between the value of the old levee, calculated at  $12\frac{1}{2}$  cents per cubic yard, and the relative amount of benefits received by that tract by the proposed reclamation! It may be that the owners of this old levee, if it was used in the reclamation, had some equity to be compensated for it. No such question is before us. If it was needed, and was a proper thing to be paid for, the trustees of the district could buy it, and its cost would constitute a portion of the expense of reclamation, and should have been included in the estimate of the cost of reclamation; but the commissioners have no concern with such a matter as that. Their function is simply and only, as assessors, to distribute the amount of the estimate for which the assessment was ordered upon the different tracts of land in proportion to the benefits which will result from the work. They are to take things as they are, and not as they were at some former period. When they assume to act as a legislature or a court of equity, they usurp functions which do not belong to them. The judgment is reversed, and a new trial ordered.

We concur: McFARLAND, J.; GAROUTTE, J.

122 Cal. 434

In re SLADE'S ESTATE. (Sac. 477.)

(Supreme Court of California. Nov. 26, 1898.)

EXEMPTIONS—FARMING UTENSILS—VALUE—ADMINISTRATION—SETTING APART EXEMPT PROPERTY—APPEAL—REVERSAL.

1. Code Civ. Proc. § 690, exempting farming utensils and implements of husbandry, is not confined to the tools used by the debtor in any one branch of farming, but exempts all the necessary tools used by a debtor engaged in diversified farming.

2. The power of the court, under Code Civ. Proc. § 1465, on return of the inventory, or at a subsequent time in the administration, to set apart exempt property for the use of the surviving spouse, on her petition therefor, is not affected by the fact that there is money of the estate that could be used, and that the executor is willing to pay the survivor for her support, under section 1466, providing that, if the amount set apart be insufficient for the support of the family, the court must make a reasonable allowance out of the estate to properly maintain them during the settlement of the estate.

3. Since the court has jurisdiction to set apart exempt property of an estate for the use of the surviving spouse, on her petition, under Code Civ. Proc. § 1465, it is immaterial whether the relief was granted under an erroneous sense of compulsion, or in the exercise of a sound discretion.

4. Where the transcript of the record shows



no limitation of the purpose for which a document was introduced in evidence, it is presumed that it was introduced for all legitimate purposes.

5. Where farm implements have been used, the cost of replacing them with new implements furnishes no measure of their value.

6. A finding that the farming utensils of a debtor are exempt is equivalent to a finding that their value is not in excess of the limit prescribed by St. 1897, p. 179, amending Code Civ. Proc. § 690.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county.

In the matter of the estate of V. Slade, deceased, a petition was filed by the widow to set apart personal property. From an order granting the relief prayed for, the executor appeals. Affirmed.

R. Clark and W. H. Grant, for appellant. Phil. Bouton and C. W. Thomas, for respondent.

CHIPMAN, C. Petition by the widow of deceased to set apart personal property. The executor named in the will of deceased, who was also his son, and one of the devisees of the will, opposed the petition. The court made the order prayed for, from which this appeal is prosecuted.

Deceased left an estate worth about \$30,000, consisting of 300 acres of land in one body. One hundred and fifty acres were devoted to growing orchard fruits and grapes, and about 10 acres to garden produce; the balance being used to grow hay. The farm was equipped with implements appropriate for, and which were used in, operating the entire farm. By his will, deceased devised to his wife about 90 acres, including the dwelling house of the family, and about 40 acres of the orchard and vineyard lands; and to his children and grandchildren he gave the residue of his property, without making any specific devise of the personal property. The estate was but little in debt, and there was money out of which an allowance could have been provided without disposing of the personal property. The court made its decree setting apart the property in question to the widow as property exempt from execution. Appellant, in his answer, claims that deceased carried on three distinct occupations, to wit, farming or agriculture, fruit growing or horticulture, and grape growing or viticulture, and that petitioner must elect to take under some one of these occupations, and no more; that this property is not necessary for her support, but that she is entitled to receive a full support from the estate, and appellant is willing to pay her therefrom (of which there is sufficient) for such support; that section 690, Code Civ. Proc., makes no provision for exempting the tools, implements, and machinery of a horticulturist or viticulturist, and none such are exempt; that only the household and kitchen furniture in use in the dwelling house is exempt, and this much appellant consents may be set apart to petitioner.

1. Section 690, Code Civ. Proc., is as follows: "The following property is exempt from execution, except as herein otherwise specially provided: \* \* \* (3) The farming utensils or implements of husbandry of the judgment debtor; also two oxen or two horses or two mules, and their harness, one cart or wagon;" and some other articles not here involved. We do not think that, where a person engages in diversified farming, the law exempts only such of his farming utensils or implements as he may use in some one of the separate branches of his farming operations. Webster defines a "farmer" to be "one who is devoted to the tillage of the soil; an agriculturist; a husbandman"; and "farming" he defines to mean "the business of cultivating land." He defines "husbandry" to mean "the business of a farmer, comprehending the various branches of agriculture." The followers of this ancient and honorable occupation may call themselves "horticulturists," or "viticulturists," or "gardeners," but they are farmers and their occupation is that of farming, as contemplated by the statute. The law does not deal with classes of husbandry, nor does it limit the exemptions to one particular class of husbandry out of many that may be followed by the debtor. Embraced in the list of articles are a great many whose use is peculiar to the particular branch of farming carried on by deceased. But we do not understand appellant to deny that they were all used, and were necessary for use, in the several branches of agriculture carried on by deceased; and, as appellant makes no point as to any one article, we shall not undertake to examine the list to ascertain whether any particular utensil or implement is not exempt.

2. Appellant contends that the court was not compelled to set apart this property; that the will devised it to other heirs at law; that there was no necessity for setting it apart to the widow, as there was money of the estate that could have been used, and the executor was willing to pay her for her support; that the trial judge regarded the provisions of section 1465, Code Civ. Proc., as mandatory, leaving him no discretion; and if he did not so regard the section, but exercised his discretion, then it was an abuse of discretion, and should be corrected. When a person dies, leaving a widow or minor children, section 1464, Id., gives them the right to remain in possession of certain property, and also a reasonable provision for their support, until letters are granted and the inventory is returned. "Upon the return of the inventory, or at any subsequent time during the administration, the court may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife \* \* \* all the property exempt from execution, including the homestead selected," etc. Id. § 1465. Section 1466, Id., provides: "If the amount set apart be insufficient for the support of

the widow and children, or either, the court or judge thereof must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate," etc. Whether, under these sections, it is the duty of the court to make provision for the support of the family in the order pointed out by these sections, or whether the court must, when petitioned to do so, set apart the exempt property, or whether such a petition may be refused, and provision be made under section 1466, are questions we do not think it necessary to decide. The court had the petition before it, and had jurisdiction to grant the prayer under section 1465, and it exercised that jurisdiction favorably to the petitioner. Whether it did so under a sense of compulsion, or in the exercise of a sound discretion, is immaterial, as it had jurisdiction over the subject-matter. The findings, we think, support the decree, and we are only to inquire whether the evidence justifies the findings. It is claimed that no necessity was shown for setting apart this personal property to the widow, and that the court erred in not finding upon contestant's answer, in which it is alleged that there are ample funds out of which the widow may be supported, and that the other devisees desired to retain these implements in kind. It appeared that the widow was to take by the will 46 acres of the orchard and vineyard land; and, although no direct evidence was offered that she needed this personal property, there was quite as much as there was to support the desire of the other devisees to retain it. The court had full power to grant the petition, and we find nothing in the record to warrant the claim that it abused its discretion. The dire consequences pointed out by counsel for appellant, should the decree stand, need not necessarily ensue, because, should the widow hereafter apply for an allowance under section 1466, the court, it must be presumed, will act with due regard to any previous order made for her support, and the subsequent condition of the estate.

3. It is further claimed that the court erred because the decree gave the widow property in value greater than \$1,000. Deceased died May 12, 1897. It does not appear when letters were issued, but an inventory was returned July 10, 1897, and immediately thereafter respondent petitioned for the property. The hearing was continued to September 13, 1897, to which date, but no longer, an allowance of \$40 per month was ordered. Section 690, Code Civ. Proc., was amended March 27, 1897, and the amendment took effect 60 days thereafter (St. 1897, p. 179), limiting the value of exempt implements of husbandry to \$1,000. It is claimed that the law in force when the petition was filed, and not the law when the deceased died, must control. The inventory was admitted without objection, and shows that the implements of

husbandry claimed were of less value than \$1,000, although there was other of the property in question, which, together with the implements, was of an aggregate value greater than \$1,000. Appellant claims that the inventory was offered for the limited purpose of showing what property belonged to the estate. But the transcript shows no such limitation, and we must presume that it was introduced for all legitimate purposes. A witness for contestant testified that "the property sought to be set aside could not be replaced for less than two thousand seven hundred or three thousand dollars." There was no other evidence as to values. We think the inventory values furnished some evidence, and that there was nothing in appellant's evidence necessarily disputing the correctness of the inventory values. To replace this personal property with new implements might cost \$3,000, but that furnishes no measure of value for implements which have been in use. There is evidence sufficient to support the decree. It was not prejudicial error to omit making a separate finding as to the value of the property. The court found that the property was exempt at the death of deceased, and is still exempt. If the court regarded the law in force as it stood at the death of deceased, the value of the property was immaterial. If the court held the amended statute to be in force, the finding that the property is still exempt, we think, is equivalent to a finding that the property did not exceed the statutory limit; and, as the evidence sustains such finding, the question as to which statute should be applied does not therefore necessarily arise, and is not decided. It was not error not to find as to appellant's answer that there were funds sufficient with which to support the widow. Conceding this to be true, the court had the power to exercise its discretion, and give the property asked for under section 1465. There was no petition for an allowance under section 1466, and the alternative of substituting money for the property was not presented. The failure to find as to the sufficiency of the funds could not show error as to an order which did not involve such funds. The order and decree should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and decree are affirmed.

(122 Cal. 405)

COMMERCIAL BANK OF MADERA v. REDFIELD et al. (Sac. 451.)<sup>1</sup>

(Supreme Court of California. Nov. 22, 1898.)

APPEAL AND ERROR — EXCEPTIONS — FINDINGS OF FACT.

1. A bill of exceptions to a decision, containing no specifications of the insufficiency of the evidence to sustain the decision, as required by Code Civ. Proc. § 648, cannot be considered.

<sup>1</sup> For modification of opinion, see 55 Pac. 772.



2. Where the ultimate facts are found by the court, though they are contradictory of probative facts, whether in the findings or in the bill of exceptions, they control.

3. Where it is competent for the parties to treat a question under their pleadings as an issue, and the court finds on such issue, it must be presumed that it was so treated at the trial, and that the evidence sustained the findings.

Commissioners' decision. Department 1. Appeal from superior court, Madera county.

Bill by the Commercial Bank of Madera against O. T. Redfield and others. From a decree for plaintiff as to some of the defendants, but against it as to others, it appeals. Affirmed.

R. L. Hargrove, for appellant. Bradley & Farnsworth and Evarts & Ewing, for respondents.

CHIPMAN, C. Foreclosure of mortgage on real property. It appears from the findings that the promissory note and mortgage, the subject of the action, were made by defendants O. T. and Phebe Redfield to defendant Roberts, and by Roberts was assigned to plaintiff before the maturity of the note, with written guaranty of payment at maturity indorsed thereon. Included in the mortgage, with other lots, was lot 14, block 60, town of Madera. November 11, 1893, the Redfields (mortgagors) sold this lot to defendant Lazar Popovich, who promised the Redfields that he would pay the note and mortgage. June 28, 1894, Lazar Popovich conveyed said lot (consideration love and affection) to his wife, defendant Viola Popovich; the deed reading, "Subject to the mortgages on the same to the amount of three thousand and eighty-six dollars, and interest on the same." The finding is that "she did not at that time or at any other time promise said plaintiff, Roberts, Lazar Popovich, or the Redfields that she would pay or discharge said note, or any part thereof." December 8, 1894, said Viola and Lazar Popovich conveyed a half interest in the lot to defendant Milan Vucovich, "subject to said mortgage." On or about May 24, 1895, said Milan "did verbally (and not otherwise) promise said plaintiff that he, said Milan Vucovich, would pay to plaintiff all sums due and to become due on said promissory note and mortgage; but said promise was without any consideration." On May 22, 1895, said Viola and Lazar conveyed to defendant Mitchell G. Vucovich the remaining half interest in said lot, subject to said mortgage, who entered into possession thereof. On May 24, 1895, Mitchell made a promise similar to that of said Milan Vucovich. Milan and Mitchell Vucovich composed the firm of Vucovich Bros., and the same persons and defendant Marco Vucovich composed the firm of Vucovich Bros. & Co.; and the finding is that neither the partnership of Vucovich Bros. & Co., nor any member thereof, promised to pay said note and mortgage. As conclusions of law, the court found that plaintiff was entitled to judgment for the amount due against

the Redfields and Lazar Popovich, and also judgment for any deficiency after sale of the premises; that said defendants Milan, Marco, and Mitchell Vucovich, Vucovich Bros., Vucovich Bros. & Co., and Viola Popovich are not, nor is either of them, indebted to plaintiff, nor is plaintiff entitled to deficiency judgment against them or either of them. Decree was accordingly entered, from which plaintiff appeals,—especially from that part carrying out the conclusion of law as to the defendants last above mentioned. The appeal is presented by bill of exceptions.

1. Respondents make the point that the bill of exceptions contains no specifications of the insufficiency of the evidence to sustain the decision, and cannot be considered, except as to two alleged errors of law occurring at the trial. The point is well taken, and is not controverted by appellant in its reply brief. Code Civ. Proc. § 648. We have examined the only two exceptions taken to rulings of the court upon the admissibility of evidence, and do not find it necessary to pass upon them; for it seems that the facts sought to be elicited by plaintiff were brought out later, and the court made a finding as to them. The plaintiff, as to these two errors, says in its brief, "The judge of the trial court examined the witness Cox, and showed the forbearance intended by the questions specified in the exceptions." The appeal therefore is here, in effect, on the judgment roll alone; and the only question we can consider is whether the judgment is supported by the findings.

2. It is difficult to follow the argument of counsel for plaintiff in his contention that the findings do not support the judgment, because he refers frequently to the evidence set forth in the bill of exceptions, which we are forbidden to consider. Still another embarrassment presents itself in the findings, as they contain some of the probative or evidentiary facts as well as the ultimate facts, and plaintiff refers to these probative facts. However much these probative facts might tend to establish plaintiff's contention, we cannot assume that they are the only facts upon the particular matter. For example, finding 8 contains certain letters addressed to plaintiff,—one, signed "Vucovich Bros., per M. G. V.," inclosing some interest money to plaintiff; another, signed in the same manner, stating that "they" (who are meant by "they" does not clearly appear from the letters) would endeavor to meet the interest as soon as possible. These letters are no more appropriate as findings of fact than would be the testimony and statements of a particular witness. Evidentiary facts belong in the statement or bill of exceptions, but have no place in the findings; and unless the findings themselves show these probative facts to be the only facts proven, from which alone the court finds the ultimate fact deducible from them, they must be disregarded, and cannot be looked to in this present case any more than evidentiary facts found in the bill

of exceptions. "The rule has been long settled that, when the ultimate fact is found, no finding of probative facts, which may tend to establish that the ultimate fact was found against the evidence, can overcome the finding of the ultimate fact." *Gill v. Driver*, 90 Cal. 72, 27 Pac. 64, citing *Smith v. Acker*, 52 Cal. 217; *Pico v. Cuyas*, 47 Cal. 174.

No question is raised as to the correctness of the findings and judgment as to the liability of defendants the Redfields and Lazar Popovich for any deficiency there may be after sale of the premises. The finding as to Viola Popovich and as to the co-partnership firms named as defendants is that neither of them ever promised to pay the note and mortgage, or any part thereof. Appellant does not seriously contend that Milan and Mitchell Vucovich, who now own the property charged with the mortgage lien, assumed the payment of the mortgage debt by the terms of their deeds; for they took the land, as the deeds declare, "subject to the mortgage," and this phrase carries with it no assumption of the debt. *Jones, Mortg.* § 748; *Pom. Eq. Jur.* § 1205. But the claim is that, by their words and their acts subsequent to their purchase, they promised plaintiff to pay the mortgage debt. The ultimate facts as found by the court as to both these defendants are in the same language, as follows: "That after the purchase of said property, to wit, on or about the 24th day of May, 1895, said \* \* \* did, at the town of Madera, \* \* \* verbally (and not otherwise) promise said plaintiff that he \* \* \* would pay to plaintiff all sums due and to become due on said promissory note and mortgage, but such promise was made without any consideration whatever." The court then finds that Mitchell V. Vucovich wrote the letters referred to above (one dated May 27, 1895, and the other August 13, 1895), and the finding concludes as follows: "That said plaintiff did forbear and delay foreclosure proceedings upon said note and mortgage from the 24th of May, 1895, up to the commencement of this action, December 12, 1896; but such forbearance was purely voluntary on the part of the plaintiff, and was without any agreement whatever between the parties, and wholly without consideration." There is no finding that the forbearance was based upon any promise to pay, verbal or otherwise, nor that it was in consideration of any promise contained in these letters. The verbal promise found by the court contains no condition looking to forbearance, but was made without any consideration, as the court finds. The court found that the forbearance was purely voluntary, and without any agreement between the parties, as well as wholly without consideration. We do not see how we can look beyond these ultimate facts found by the court. If they are contradictory of or inconsistent with the letters or other probative facts, whether set out in the findings or in the bill of exceptions, the ulti-

mate facts found must control for the reasons already stated.

Appellant claims that the finding that the promise was without consideration was outside any issue in the case, and was reversible error. As the case comes here, we cannot look into the bill of exceptions to discover under what circumstances the court permitted evidence to be offered to show want of consideration. It was competent for the parties at the trial to treat the question of consideration for the promise as an issue upon the pleadings; and, as the court found upon that issue, we must presume that it was so treated at the trial, and we must also presume that the evidence sustains the findings.

Appellant presents many interesting and important legal propositions for decision, but we are precluded from giving them consideration, inasmuch as they require us to examine the evidence, which, as we have seen, we cannot do. The judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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122 Cal. 507

**DANERI v. SOUTHERN CALIFORNIA RY. CO. (L. A. 444.)**

(Supreme Court of California. Nov. 30, 1898.)

**OVERFLOW OF LANDS—ACTIONS—LIMITATIONS.**

An action was begun in 1892 to recover damages resulting from an overflow of land in 1889, which plaintiff alleged was occasioned by the construction by defendant, in 1888, of a levee, which deflected the river from its course. The damages were occasioned by an unusual rise of the river, which broke the levee. *Held*, that the action was not one for trespass to realty, within the statute of limitations, but was an action on a liability not founded on an instrument in writing, and barred, under Code Civ. Proc. § 339, within two years.

Department 2. Appeal from superior court, Los Angeles county.

Action by Andres Daneri against the Southern California Railway Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

C. N. Sterry and Henry J. Stevens, for appellant. Works & Lee, for respondent.

**HENSHAW, J.** Appeals from the judgment and from the order denying defendant a new trial. The action was prosecuted to recover damages from defendant for injuries caused to plaintiff's land. For the facts and for the circumstances giving rise to the cause of action reference may be had to the case of *De Baker v. Railway Co.*, 106 Cal. 257, 39 Pac. 610. While the *De Baker* lands were riparian to the stream, the lands of this plaintiff were about six miles distant therefrom, but the new channel formed by the deflected river waters cut through the lands of plaintiff, to their great injury. In all other respects pertinent to this consideration the facts set forth in the *De Baker* Case are applicable to the case at bar.

The levee which deflected the water of the river was completed in March, 1888. In the latter part of the month of December, 1889, the river cut its new channel. The original complaint in this action was filed on April 1, 1892. Plaintiff was allowed to file an amended complaint, and to the amended complaint defendant, by demurrer, urged the bar of the statute of limitations. The trial court entertained the plea, but overruled the demurrer. If the injury was direct, and resulted immediately from the construction of the levee, the cause of action was clearly barred, since the original complaint was filed more than four years after the levee was completed. But if, however, the cause of action arose in December, 1889, when the new channel was cut through the lands of plaintiff, it is to be determined whether the action is an action for trespass upon real property, in which case, having been brought within three years, the statute did not bar a recovery (Code Civ. Proc. § 338, subd. 2), or whether it was an action upon a liability under *Id.* § 339, subd. 1; in which latter case, having been brought more than two years after the cause of ac-

tion arose, it is barred. At common law such an action would not have been trespass, but an action on the case. While the forms of actions have been abolished in this state, yet, when our statute of limitations speaks of an action for trespass upon real property, for the meaning of the word "trespass," as thus used, we must go to the common law, and nowhere else. In *Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189, the question was elaborately considered, and many of the authorities reviewed. That case is not dissimilar to the one at bar. The conclusion expressed is in accordance with the great weight of authority, that the action there was not trespass, but on the case. *Hicks v. Drew* correctly states the law, and we regard it as decisive of the proposition. But in the case of *De Baker v. Railway Co.*, *supra*, which, as has been said, was in its facts well-nigh identical with the present action, and where the nature of the injury and the cause giving rise to it were in fact identical, it is said: "There was no taking of plaintiff's property in this case, either according to the facts alleged or facts found, even if tested by the doctrine of *Pumpelly v. Green Bay Co.*, 13 Wall. 166, which has been held to be an extreme case. Neither was the damage to it the natural, certain, and immediate consequence of the facts alleged." Unless the damage was the natural, certain, and immediate consequence of the wrong complained of, then unquestionably the action of trespass did not lie.

This conclusion renders unnecessary a consideration of the other points ably presented by counsel upon either side. The judgment and order are reversed, and the cause remanded, with instructions to the trial court to sustain defendant's demurrer upon the ground that the cause of action pleaded is barred by subdivision 1 of section 339 of the Code of Civil Procedure.

We concur: **McFARLAND, J.; TEMPLE J.**

122 Cal. 477

**COLUSA COUNTY v. WELCH, Treasurer**  
(Sac. 350.)

(Supreme Court of California. Nov. 26, 1898.)

**COUNTIES—CLAIMS—POWERS—CONTRACTS—LOBBY SERVICES—PUBLIC POLICY.**

1. A claim against a county for a specific sum due on a contract cannot be repudiated because not itemized as required by County Government Act, § 41 (St. 1891, p. 311), where no notice to itemize it was given to claimant pursuant to said section, and the supervisors allowed it.

2. The invalidity of a contract as against public policy was shown by a complaint by a county to restrain payment of a warrant drawn in pursuance of the contract, where it was alleged that the contract was for the employment of an attorney "to secure, by means of personal solicitation, and by means of private interview with members of the legislature, \* \* \* and by means of lobbying, the defeat of" a certain bill.

3. Under County Government Act, § 25, subd. 17 (St. 1891, p. 304), authorizing the supervisors "to direct and control the prosecution and defense of all suits to which the county is a party, and to employ counsel to assist the district attorney in conducting the same," the supervisors have no power to employ an attorney to defeat, by means of lobbying, a bill pending in the legislature, by the passage of which the county in question would be compelled to pay a large sum of money to another county.

Commissioners' decision. Department 1. Appeal from superior court, Colusa county.

Action by Colusa county against R. F. Welch, treasurer of said county, to restrain him from paying a certain warrant. From a judgment in favor of defendant on demurrer, plaintiff appeals. Reversed.

W. F. Fitzgerald, W. G. Dyas, and Ernest Wyand, for appellant. E. T. Crane, for respondent.

SEARLS, C. This is an action brought by the county of Colusa, through its district attorney, to restrain the defendant, as treasurer of said county, from paying to one F. S. Sprague the sum of \$1,000 upon a warrant issued by the auditor of said county on said treasurer, and payable to said Sprague. A demurrer was sustained by the court to the second amended complaint of plaintiff, and a judgment entered in favor of defendant dissolving a restraining order theretofore issued therein, and for costs. Plaintiff appeals.

The action is brought under section 8 of the act of March 31, 1891, entitled "An act to establish a uniform system of county and township governments" (St. 1891, p. 295). The latter clause of that section makes it the duty of the district attorney to institute a suit to restrain the payment upon warrants or orders issued without authority of law. The amended complaint to which the demurrer was sustained, in addition to the merely formal parts thereof, alleged, in substance, that on the 1st day of April, 1893, one F. S. Sprague filed his claim, duly verified, against the county of Colusa for "services as special counsel in matters pending before the last session of the legislature of California, as per contract with J. O. Zumwalt, C. C. Felts, and D. H. Arnold, committee of the board of supervisors of Colusa county, one thousand dollars." The board of supervisors passed upon and allowed the claim for the amount thereof, and ordered the auditor to issue his warrant therefor on the treasurer, payable out of the "common fund." On the 12th day of April, 1893, the auditor drew his warrant accordingly. It is then averred that the county of Colusa never agreed to pay Sprague \$1,000, nor any sum, for services before the legislature of 1893, and was not indebted to him in any sum for services rendered as in the claim alleged or otherwise. It is then averred that on March 11, 1891, the county of Glenn was, by act of

the legislature, created and established from the territory of Colusa county. St. 1891, p. 98. It then shows that at the session of the legislature of 1893 a bill was introduced in the legislature entitled "An act to provide for the adjustment of the indebtedness and assets between any county that has been created, or may hereafter be created, and the county or counties from the territory of which such new county may be created"; that by said bill the county of Colusa would have been compelled to pay to the county of Glenn a large sum of money, and that it was to the interest of the county of Colusa to defeat the said bill, and that the sum of \$1,000, if agreed to be paid to Sprague, was agreed to be so paid "to secure, by means of personal solicitation, and by means of private interview with members of the legislature of California, and by means of lobbying, the defeat of the bill"; that the contract was illegal and void, and the board of supervisors was without authority of law to make such contract, or to pass upon or order the claim paid. The complaint also avers that the treasurer will pay the warrant unless restrained. The demurrer stated two grounds: (1) That the second amended complaint does not state facts sufficient to constitute a cause of action; (2) uncertainty. The grounds upon which the allegations of uncertainty are based may be epitomized thus: (1) That it does not certainly appear in the complaint with whom or with what body the alleged contract with plaintiff was made. (2) That it is not alleged of what the lobbying therein mentioned consisted, or whether the legislature or its members were to be influenced by dishonest means, or what members were to be influenced, or by what means, or that any members were in fact sought to be influenced under said agreement.

The first point made by appellant is that the claim is unlawful, because not properly itemized, as provided by section 41 of the county government act (St. 1891, p. 311). There seems to have been but one item in the claim. It is based upon a contract for the payment of a specific sum of money, and was properly set forth. If the board of supervisors was not satisfied with the claim as presented, it was its duty, under section 41, to give notice thereof to the claimant, that he might itemize and verify it. Not having done so, and having treated it as sufficient, and allowed it, the county is not now in a position to repudiate it for that cause. Are the facts pleaded sufficient to constitute a cause of action? Services rendered by an attorney at law in endeavoring to persuade members of the legislature to vote or to act favorably or unfavorably upon a bill introduced in the interest of a client, when no secret, unfair, or dishonest means are employed, is not lobbying in the sense prohibited by the constitution. *Foltz v. Cogswell*, 86 Cal. 542, 25 Pac. 60; *Miles v. Thorne*, 38 Cal. 335. The statute making cer-



tain lobby practices criminal does not, by implication, legalize others not within the purview of the criminal law, which are void as against public policy. *Sweeney v. McLeod*, 15 Or. 330, 15 Pac. 275. The general rule is thus stated by Judge Cooley: "The law also seeks to cast its protection around legislative sessions, and to shield them against corrupt and improper influences, by making void all contracts which have for their object to influence legislation in any other manner than by such open and public presentation of facts, arguments, and appeals to reason as are recognized as proper and legitimate with all public bodies. While counsel may be properly employed to present the reasons in favor of any public measure to the body authorized to pass upon it, or to any of its committees empowered to collect facts and hear arguments, and parties interested may lawfully contract to pay for this service, yet to secretly approach the members of such a body with a view to influence their action at a time and in a manner that do not allow the presentation of opposite views is improper and unfair to the opposing interest; and a contract to pay for this irregular and improper service would not be enforced by the law." Cooley, *Const. Lim.* (6th Ed.) p. 163. See, also, note, and cases cited. Does the complaint sufficiently show a violation of this cardinal doctrine? The language of the complaint is, as before stated, as follows: That, if the sum of \$1,000 "was agreed to be paid to said Sprague, it was to secure by means of personal solicitation, and by means of private interview with members of the legislature of California, and by means of lobbying, the defeat of said senate bill." These allegations bring the case within the rule enunciated by Cooley as being void. The term "lobbying" has a well-defined meaning in this country, and signifies to address or solicit members of a legislative body in the lobby or elsewhere with the purpose of influencing their votes. *Webst. Dict.*; *Black, Law Dict.* We think the allegations show that the alleged contract was void as against public policy. Waiving this, however, and we think that the contract alleged in the complaint was in excess of any powers conferred upon the board of supervisors, and hence void. Subdivision 17 of section 25 of the county government act (St. 1891, p. 304) defines, in part, the powers and duties of boards of supervisors, and the seventeenth subdivision is as follows: "To direct and control the prosecution and defense of all suits to which the county is a party, and to employ counsel to assist the district attorney in conducting the same." A county has power, among other things, to purchase and hold land within its limits; to make such contracts, and purchase and hold such personal property, as may be necessary to the exercise of its powers; and "to manage and dispose of its property as the interests of its inhabitants may require." St. 1891, p. 295. "Its powers can only be exercised by the board of supervisors, or by agents and officers acting under their authority

or authority of law." *Id.* It has been said that boards of supervisors are the guardians of the property interests of their several counties; that they occupy a position of trust, and are bound to the same measure of good faith required of ordinary trustees and agents. "Legal assistance stands as a means for the protection of property, in relation to the general power to hold, acquire, preserve, and protect it. There is no difference in this respect between one sort of protection and another, between the charge of the lawyer and the charge of the clerk, between laying out money to buy a safe to keep the money in and laying out money to employ a lawyer to recover the money improperly withheld." *Smith v. Mayor, etc.*, 13 Cal. 531. See, also, *Hornblower v. Duden*, 35 Cal. 670, and *Ellis v. Washoe Co.*, 7 Nev. 293. In the very nature of things, the authority to manage and dispose of the property and assets of the county which are given to the supervisors carries with it the right to take such action as may, in their judgment, be necessary to their conservation. They are authorized by subdivision 35 of section 25 of the county government act (St. 1891, p. 307), "to do and perform all other acts and things required by law and not in this act enumerated," etc. In *Lassen Co. v. Shinn*, 88 Cal. 512, 26 Pac. 366, it was said: "It is settled law that, where a county has legal business to be transacted, its board of supervisors may employ counsel, other than the district attorney, to transact the business, if, in the judgment of the board, the public interest will thereby be subserved." A like doctrine was enunciated in *Kelley v. Sersanous* (decided Oct. 6, 1896), not reported in the California Reports, but found in 46 Pac. 299. In *Merriam v. Barnum*, 116 Cal. 619, 48 Pac. 727, it was held that the board of supervisors had no authority to charge the county with liability for special counsel for mere legal advice on matters pertaining to the reconstruction of a court house, or upon other matters, without contemplation of any suit. The court in that case reviews the cases of *Lassen Co. v. Shinn*, 88 Cal. 510, 26 Pac. 365, and *Kelley v. Sersanous*, 46 Pac. 299, and holds that the language used in the former case is broader than the authorities cited will justify, and in the latter case it was said, in substance, that, as the plaintiff was employed to collect money for the county by "action at law or otherwise, it came within the spirit, if not the precise letter, of the authority of the supervisors." These were both cases in which counsel were employed for the collection of money due, or supposed to be due, to the county; matters in which, as the custodians of the property and assets of the county, it was the duty of the supervisors to take action. See, also, *Merced Co. v. Cook*, 120 Cal. 275, 52 Pac. 721. In the case at bar the supervisors had no duty in the premises to perform. They had no authority to influence, or to employ others to influence, the legislature in the action which, in its wisdom, it

should see fit to take. If the board could do so in the present case, then, by parity of reasoning, it could do so in all matters of revenue, and in all cases which might indirectly affect the interests of the county. If the board of a given county may exercise such authority, then like boards of all other counties may exercise like authority in like cases, and there is a possibility of a corps of attorneys being always in attendance upon sessions of the legislature to influence the action of members in matters confided to the judgment of the latter. There is no such authority given, either directly or by implication, to boards of supervisors, and the attempt to exercise it by the board in the case at bar was null and void. We recommend that the judgment be reversed, and the court below directed to overrule the demurrer to plaintiff's second amended complaint.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to overrule the demurrer to plaintiff's second amended complaint.

122 Cal. 456

RICHARDS v. FRASER et al. (Sac. 442.)  
(Supreme Court of California. Nov. 28, 1898.)  
PARTNERSHIP—ACCOUNTING—FRAUD—OBLIGATIONS  
OF PARTNERS INTER SESE.

1. On an issue as to whether plaintiff and defendants were co-partners, and whether the latter had obtained from the former a release from liability to account to him, by false representations as to the condition of the business, plaintiff was entitled to prove, under the allegations of a partnership, in an action for an accounting, the representations made by defendants, and the actual facts, as every partner is required by statute (Civ. Code, § 2411) "to act in the highest good faith with his co-partners," and "he may not obtain any advantage over them, in the partnership affairs, by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind."

2. In an action for an accounting between alleged co-partners, it was unnecessary for plaintiff to offer to place defendants in statu quo respecting certain securities which they had discharged, where such securities were alleged to have been obtained from him by them through certain frauds practiced on him by them.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by L. A. Richards against P. B. Fraser and another, for an accounting and other relief. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Van R. Paterson and J. A. Louttit, for appellant. Nicol & Orr and Budd & Thompson, for respondents.

BRITT, C. Among other allegations of the complaint here, plaintiff charges, in substance: That in December, 1891, himself and the defendants, Fraser, Rosenbaum, and

Guernsey, formed a co-partnership, for the purpose of buying and farming a tract of 3,000 acres of land, called the "Sargent Tract," the parties to share equally in profits and losses. That, by a conspiracy between defendants and the seller, the real purchase price of the land—\$40 an acre—was concealed from plaintiff, and he was fraudulently induced to contribute, and did contribute, to the purchase of the same at the rate of above \$75 an acre. That defendants and the said seller of the property shared among themselves the excess thus obtained from plaintiff by fraud. That plaintiff paid his share of the fraudulent price in the manner following: The sum of \$6,250 at the time of the formation of the partnership, and the balance, of \$56,000, by his note made to defendant Rosenbaum in August, 1893, secured by mortgage on various lands of plaintiff, including 750 acres of the said Sargent tract, which had been previously set over to him in severalty upon a division of the tract among the alleged partners. That subsequently plaintiff satisfied said note and mortgage by the conveyance to Rosenbaum of property which the latter accepted in payment thereof. That defendants knowingly kept false accounts of the business of said partnership. That they omitted therefrom certain considerable credits to which plaintiff was entitled, and rendered to him false statements of said accounts, and fraudulently misrepresented to him the amounts received and expended in the partnership business. That the concern is largely indebted to plaintiff. And that no complete accounting of its business has ever been had. It is further alleged that on September 11, 1894, at the request of defendants, plaintiff executed to them an instrument of writing, in form a release of all demands "upon or by reason of any matter, cause, or thing, from the beginning of the world" to the date last mentioned; that defendants "then and there" falsely, and for the purpose of inducing plaintiff to sign said instrument, and of defrauding him, represented that nothing was owing to him from them or from said co-partnership; that Rosenbaum threatened to foreclose the mortgage by which said note for \$56,000, then past due, was secured, unless plaintiff signed said release; that plaintiff was then ignorant of the aforesaid frauds perpetrated by defendants; that, under the circumstances thus alleged, he signed said release; and that, subsequently to the execution thereof, he discovered the frauds charged. The prayer of the complaint is for an accounting, etc. The action was begun August 1, 1896. In their answer, defendants denied any partnership with plaintiff, and denied all the allegations of fraud. They pleaded affirmatively that on said September 11, 1894, they had a full and fair settlement of all previous business transactions with plaintiff, and that thereupon he executed to them the release mentioned in the complaint, and that the same remains in force; and they de-



nied that Rosenbaum threatened any foreclosure proceedings against plaintiff, or that the latter signed said release in fear of foreclosure. At the trial, the court ruled that the issues concerning the execution of the release of September 11, 1894, should be first tried, plaintiff making no objection to the order of trial so adopted. Thereupon the plaintiff produced evidence tending to show that his said note for \$56,000 and interest became due about four weeks before said September 11th; that Rosenbaum said he must have the interest due, or he would foreclose the mortgage; that plaintiff afterwards made an arrangement with Rosenbaum by which the latter agreed to accept, in satisfaction of the debt, a conveyance of plaintiff's 750 acres in the Sargent tract, together with a quantity of personal property valued at about \$12,000; that, at this stage of the negotiation, defendant Guernsey presented to him the said written release, saying, "It don't amount to anything, but we would like to have you sign it," and plaintiff executed the same accordingly; whereupon the said arrangement with Rosenbaum was consummated. Plaintiff testified that the inducement moving him to execute the release was to prevent foreclosure of the mortgage to Rosenbaum, and also that, if he had then had the information he afterwards obtained concerning the accounts of the partnership, he would not have signed it. Plaintiff further offered evidence under the allegations of his complaint concerning the formation of a partnership with defendants, and, generally, what representations were made to him by defendants regarding the purchase of said Sargent tract, and also the price in fact paid for the same. Defendants objected on the ground that the release in writing executed by plaintiff estops any inquiry into previous transactions, unless it was fraudulently obtained, and that the evidence offered has no bearing on the execution of that paper, which objections the court sustained. The court also struck out the testimony of plaintiff concerning his receipt of a statement of firm accounts rendered by defendant Guernsey in the early part of the year 1894, and which, plaintiff testified, he discovered to be false after he had executed said release of September 11th. The court also rejected evidence of declarations regarding such statement made to plaintiff by Guernsey in May, 1894. The ground of these rulings seem to have been that the evidence was too remote in point of time from the release. Other rulings of similar general character, excluding evidence for plaintiff, appear in the record. The court held that, for the purpose of proving representations by defendants,—meaning, apparently, representations directed immediately to obtaining the said release,—plaintiff's counsel might interrogate the witnesses upon the assumption that a partnership existed between the parties; but it refused to try the question whether there was in fact a partnership until the presumptive effect of the release should be overcome by

other evidence. Judgment was rendered in favor of defendants at the close of the evidence for plaintiff.

It has seemed proper to set out thus fully the condition of the case at the trial in order that the nature and scope of the action and the consequent bearing of the rulings of the court on the admission of evidence may be made clear. Our conclusions thereon may be stated more briefly. It is plain that the court circumscribed too narrowly the field of investigation. If the parties were partners, then in the matter of the acquittance of September 11, 1894, defendants were not dealing with plaintiff as with a stranger. They were trustees for him. It is statutory law with us that "in all proceedings connected with the formation, conduct, dissolution and liquidation of a partnership every partner is bound to act in the highest good faith with his co-partners. He may not obtain any advantage over them in the partnership affairs by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." Civ. Code, § 2411. Now, if the other allegations of the complaint, upon which the evidence rejected seems to have been relevant, are true, then, when plaintiff gave defendants the said acquittance, they obtained a very decided advantage over him, by concealing information of their actions which, as his partners and as trustees for him, they ought to have divulged, withholding such information was equivalent to false representation operative at the time of the release, and the evidence offered was strictly pertinent to the issue made whether the release was fraudulently procured. *Belden v. Henriques*, 8 Cal. 87; *Pomeroy v. Benton*, 57 Mo. 548; *Lindl. Partn. marg.* pp. 486, 516; *Caldwell v. Davis*, 10 Colo. 490, 15 Pac. 696.

Defendants urge that plaintiff's action must fail in any event, for the reason that he has not offered to restore to them, or any of them, the advantages he gained by the discharge of his note for \$56,000 and the mortgage on his property by which the note was secured. But, if the averments of the complaint are true, the note and mortgage to Rosenbaum were fruits of the alleged frauds practiced on plaintiff, and for that reason they ought not to be enforced. The parties should account together as if said note and mortgage had not been executed. And, if plaintiff fails to prove his charges of fraud, the said note and mortgage remain as they are,—discharged by the effect of the transactions of September 11, 1894. It was therefore unnecessary to offer to place defendants in statu quo as regards those securities. *Mining Co. v. Gilson*, 47 Cal. 597; *Millard v. Farley*, 15 La. Ann. 518. "One who attempts to rescind a transaction on the ground of fraud is not required to restore that which, in any event, he would be entitled to retain." *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593.

It is also argued that plaintiff is barred by

his own negligence and delay. However this may be, the fact does not affirmatively appear on the face of the evidence rejected by the court. Plaintiff was entitled to have the same considered on that as well as other questions which it tended to illustrate. See *Zebbley v. Trust Co.*, 139 N. Y. 461, 34 N. E. 1067. The judgment and order denying a new trial should be reversed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

122 Cal. 501

PEOPLE v. LYNCH et al. (Cr. 429.)

(Supreme Court of California. Nov. 30, 1898.)

ROBBERY—TESTIMONY OF ACCOMPLICE—EVIDENCE OF COLLATERAL FACTS—INSTRUCTIONS.

1. One could not maintain that he was convicted on the uncorroborated testimony of an accomplice where, though the only direct evidence of his connection with the crime charged was such testimony, there was other evidence which, without the aid of such testimony, tended to connect him with the commission of such offense.

2. On trial for robbery, testimony as to a certain conversation between defendant and his accomplices, on the night before such robbery, was erroneously admitted, where such conversation related to collateral transactions, which were incapable of affording any reasonable inference as to the matter in issue.

3. Where a witness for defendant, who was on trial for robbery, had testified that defendant had in his possession certain money, on the day before such robbery, it was error to show by him, on cross-examination, that he and defendant had been in jail together.

4. An instruction, in a trial for robbery, that if the jury believe, beyond a reasonable doubt, from the testimony of an accomplice who testified for the people, that defendant is guilty of the offense charged, and if they believe from the evidence, "outside of that which tends to connect the defendant with the commission of the offense, other than shown in the commission of the offense itself and the circumstances thereof," they should find defendant guilty, failed to state with sufficient clearness the rule that testimony of an accomplice is insufficient of itself to justify conviction, and the degree of proof sufficient to corroborate such testimony.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county.

Harry Lynch, who was accused of the crime of robbery, jointly with two others, was convicted; and from the judgment, and from an order denying a new trial, he appeals. Reversed.

J. O. Prewett and W. Renfro, for appellant. Atty. Gen. Fitzgerald, for the People.

CHIPMAN, C. Defendant Lynch was, jointly with Frank Davis and Fred Howard, informed against for the crime of robbery. This appeal is from a judgment of conviction against Lynch, and from an order denying his motion for a new trial.

1. Defendant contends that he was convicted upon the uncorroborated testimony of an accomplice, and that therefore, under section 1111, Pen. Code, the judgment cannot stand. The only direct evidence of defendant's connection with the crime was given by his co-defendant Davis. As we think the judgment and order must be reversed upon other grounds, it is sufficient to say upon the point just stated that we are unable to agree with defendant. It appears to us that there is evidence in addition to that of the accomplice which, without its aid, tends to connect the defendant with the commission of the offense charged.

2. On redirect examination of Davis by the district attorney, he asked the witness to state "the conversation that occurred on Saturday night [the night before the robbery] when Lynch, Howard, and yourself were present; anything that was said between Howard and Lynch, or anything that was said between yourself and Lynch." Defendant objected as irrelevant, immaterial, and incompetent, and was overruled, and an exception was reserved. The witness answered: "Lynch started to tell us about a fellow named the Rambler. He told us that the Rambler and him were going down to hold up the station at Davisville; also the big hotel across the railroad. He only had one gun." Defendant's counsel moved to strike out this answer as irrelevant, incompetent, and immaterial. The motion was denied. We think this ruling was prejudicial error. Testimony must be confined to the issues. Evidence of collateral facts are excluded under the rule, as being incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. 1 Greenl. Ev. §§ 51, 52. It is under this rule that it is held to be incompetent for the prosecution to give evidence of facts tending to prove another distinct offense for the purpose of raising an inference that the person had committed the offense in question. So, also, it is incompetent to give evidence of the prisoner's tendency to commit the offense with which he is charged. *Rose. Cr. Ev. \*81*; *People v. Tyler*, 36 Cal. 522; *People v. Vidal* (Cal.) 53 Pac. 558.

3. The witness Smith was called for defendant, and testified that he knew defendant, and that defendant had five or six dollars on Saturday, October 3d, the day before the robbery. On cross-examination the district attorney asked the witness if he and defendant were not together in Stockton, to which witness replied that they were once. The witness was then asked: "Weren't you there with him in the county jail?" The question was objected to as irrelevant and incompetent. Objection was overruled, and the witness answered, "Yes." The district attorney claimed that the evidence was admissible for the purpose of showing the relations of the witness and prisoner. If this fact had come out as part of a narrative in



which the witness was endeavoring to explain their relations, it might be that, under the rule as laid down in *People v. Ward*, 105 Cal. 335, 38 Pac. 945, and *People v. Kuches*, 120 Cal. 566, 52 Pac. 1002, it should be allowed to stand; but the bare fact that the two were together in a jail at Stockton, or elsewhere, would not be sufficient to justify the inference of bias on the part of the witness. And in its effect upon defendant, as furnishing an inference pointing to the probability of his being guilty of the offense charged, it was inadmissible, for the reasons heretofore stated. *People v. Vidal*, supra.

The court gave the following instruction for the people: "If you believe that an accomplice has testified in this case, and you believe, beyond a reasonable doubt, from his testimony, that the defendant Lynch is guilty of the alleged offense in the information charged, and then, in connection therewith, you believe from the evidence, outside of that which tends to connect the defendant with the commission of the offense, other than shown in the commission of the offense itself and the circumstances thereof, then it will be your bounden duty to find the defendant guilty." The conviction of Lynch largely rested upon the evidence of his accomplice, Davis. I do not think this instruction clearly points out the rule that the evidence of the accomplice is insufficient in itself to justify conviction; nor does it clearly point out what degree of proof is sufficient as corroborative of that of the accomplice. The judgment and order should be reversed, and the cause remanded.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded.

122 Cal. 462

In re SMITH'S ESTATE. (S. F. 1405.)

(Supreme Court of California. Nov. 29, 1898.)

ALIMONY PENDENTE LITE—FINAL JUDGMENTS—  
PROBATE—PREFERRED CLAIMS—ORDERS  
—NOTICE—RES JUDICATA.

1. A decree awarding a wife alimony pendente lite is a final judgment against the husband, so as to be a preferred claim against his estate, under Code Civ. Proc. § 1643, to the extent of the amount due thereunder on his death.

2. An order of the probate court deciding the respective status of two claims alleged to be preferred claims against an estate is without authority and void, even as to the contesting parties, where based on a hearing had without notice to the other creditors, heirs, and legatees.

3. Adjudications on the question of preferred claims of an estate should be litigated at the same time, and under the same notice, that is required on the settlement of accounts.

4. A creditor of an estate is not estopped from asserting his claim as a preferred claim, by reason of an order of the probate court made on the application of such creditor and another, deciding that the claim was not pre-

ferred, where the order was void for failure to give notice of the hearing to others interested.

Department 1. Appeal from superior court, city and county of San Francisco.

In the matter of the estate of William F. Smith, deceased. From an order settling the final account and ordering a distribution, one Lynch appeals. Reversed.

Lloyd & Wood, for appellant. Andrew Thorne, for respondent.

GAROUTTE, J. This appeal is prosecuted from an order of the court settling the final account and ordering distribution of the estate of William F. Smith, deceased. The estate was insolvent. The claim of Andrew Thorne being a preferred claim, upon the settlement of the account it was ordered that the money of the estate be applied to its payment. Lynch, administrator of the estate of Eudora V. Smith, claiming that her estate also held a preferred claim against the estate of William F. Smith, appeals from the order made by the trial court. The only question presented by this appeal arises upon the contention of the administrator of her estate that the claim of that estate is also a preferred claim.

Is the claim presented by this administrator a preferred claim? Section 1643 of the Code of Civil Procedure provides: "The debts of the estate subject to the provisions of section 1205 must be paid in the following order: \* \* \* (4) Judgments rendered against the decedent in his lifetime, and mortgages in the order of their date." Was this claim based upon a judgment rendered against the deceased, William F. Smith, during his lifetime? The facts are these: Eudora V. Smith, his wife, brought suit against him for permanent support, alleging desertion. An order was made, pendente lite, allowing her alimony to the amount of \$100 per month. At the time Smith died the action had not been tried upon its merits, but alimony had accumulated under this pendente lite order to the amount of about \$10,000. Thereafter Eudora V. Smith died, and a claim against his estate to that amount is based upon these facts. This claim is a preferred claim, under section 1643, supra, if this allowance of alimony pendente lite constitutes a judgment rendered against Smith. In *Sharon v. Sharon*, 67 Cal. 196, 7 Pac. 462, 635, and 8 Pac. 709, the identical question here presented was carefully considered. And in speaking as to a decree awarding alimony pendente lite the court said: "It certainly possesses all the elements of a final judgment. Nothing remained to be done except to enforce it, and for that purpose an execution might issue and be proceeded on, as if the judgment had been rendered in an ordinary action for the recovery of a specific sum of money." A "judgment" is defined by the Code as a final determination of the rights of the parties in an action or proceeding. The decree in this case is, to all legal

intents and purposes, a judgment, and not only a judgment, but, as to all matters upon which it takes effect, a final judgment. For as to those matters the litigation, as far as the trial court is concerned, has fully and completely ended. If the decree to pay alimony is a final judgment,—so final as that an appeal to this court may be taken from the decree,—and such is the law declared in *Sharon v. Sharon*, then the order in this case decreeing the payment of alimony is a final determination of the rights of the parties as to the matters with which it deals. It follows that the alimony accrued under the order of the court is a judgment rendered against the decedent, Smith, during his lifetime, and consequently a preferred claim against his estate.

It is next insisted that the question as to the dignity of the claim presented by the administrator of the estate of Eudora V. Smith, deceased, as to its being a preferred claim, is *res adjudicata* against her estate. This contention is rested upon the following state of facts: In the year 1895, and during the administration of the estate of William F. Smith, deceased, upon a citation issued to the administrator of his estate at the instance of Walter Thorne, who held a preferred claim against the estate, and upon consent of Thorne and said Lynch, as administrator of both estates, the question was litigated before the court, sitting in probate, as to the respective status of Thorne's claim and this claim, and the court upon such hearing adjudged and decreed that the Thorne claim was a preferred claim, and the alimony claim was not a preferred claim. That adjudication has never been questioned in any way, and is a perpetual bar to appellant's prosecution of this proceeding and this appeal, if the court had authority under the law to litigate the matter at that time. This order of the court was based upon a hearing had without notice. Devisees, heirs, and legatees were directly interested in the matter under consideration. Other creditors were likewise interested, and neither creditors, heirs, devisees, nor legatees had any notice whatever of the hearing and determination establishing the respective priority of these two claims. If a decree rendered under such circumstances is binding upon the world, then a decree settling the final account of an administrator, made without notice, would be binding. Two interested parties by stipulation attempt to give the court jurisdiction to hear and determine a matter in which many other parties are equally interested. This cannot be done. A hearing of the question here involved contemplates notice to the world. It is a proceeding in rem, and without notice to all the world the court has no jurisdiction to act. In such a proceeding it cannot be said that the court had jurisdiction over some of the parties, and that as to those the judgment is final and conclusive. The court only has jurisdiction over the subject-matter when the

whole world is served with statutory notice. This question was incidentally touched upon when this case was heard upon a former appeal (In re Smith's Estate, 117 Cal. 508, 49 Pac. 456), where it was held that the claim of Thorne could not be paid under the order of the court made without the statutory notice required to be given upon the settlement of the administrator's accounts. If an order to pay the claim must fall because made without statutory notice, then an order adjudging a claim a preferred claim must likewise fall. In re Spanier's Estate, 120 Cal. 698, 53 Pac. 357, is directly in line with the last case cited. There is no specific provision found in the Code providing the procedure to be followed in adjudicating upon claims alleged to be preferred, but it is clearly apparent, from the various provisions of the Code, that such matters should be litigated at the same time and under the same notice that is required upon the settlement of accounts. At that time the assets are marshaled, and orders may then be made for the payment of the various debts, and these orders of payment necessarily include a determination as to what claims are preferred. It follows that the order here claimed as constituting matter *res adjudicata* is void by reason of lack of power in the court to make it. Neither do we see any principle of estoppel involved in the proceeding which might be successfully urged against the administrator of Mrs. Smith's estate.

There is no merit in the remaining positions taken by respondent in his brief, and for the foregoing reasons the order is reversed.

We concur: HARRISON, J.; VAN FLEET, J.

122 Cal. 480

BRIND v. GREGORY et al. (Sac. 500.)

(Supreme Court of California. Nov. 29, 1898.)

JUDGMENT ON THE PLEADINGS—ADVERSE POSSESSION—COLOR OF TITLE—EVIDENCE—APPEAL—PRESUMPTIONS.

1. A plaintiff suing for possession of land is not entitled to a judgment on the pleadings where defendant pleads *res judicata*.

2. A decree distributing certain land to certain persons is admissible to show color of title in support of their claim to the land by adverse possession, though there were such irregularities in the making and entering of the decree as would make it inadmissible as evidence of title.

3. Evidence in support of an issue which a party had a right to prove will be presumed to be relevant and material, if it is not set out in the transcript.

4. Findings will be presumed to be supported by sufficient evidence where it is not given in the transcript.

Commissioners' decision. Department 2. Appeal from superior court, Placer county.

Action by Mary A. Brind, administratrix with the will annexed of the estate of James Gregory, deceased, against John H. Gregory, guardian of the person and estate of John Shattuck Gregory, a minor, and others. From



an order denying a motion for a new trial, plaintiff appeals. Affirmed.

James Gartlan, for appellant. F. P. Tuttle, for respondents.

CHIPMAN, C. Action by plaintiff, as administratrix with the will annexed, to recover possession of certain lands as property belonging to the testate's estate. Defendants had judgment, from which an appeal was taken. Sac. No. 418. Judgment was affirmed. Opinion filed April 28, 1898, 53 Pac. 25. This present appeal is from the order denying plaintiff's motion for a new trial. The facts in the case, and a general statement of the pleadings and findings, are given in the opinion filed in the appeal from the judgment, already referred to. As matter of law the lower court found plaintiff's cause of action barred by the statute of limitations, and that plaintiff is estopped from maintaining the action.

Plaintiff was not entitled to judgment on the pleadings. The answer pleaded the statute of limitations and an estoppel by reason of the former decision of this court between the same parties. Even if the statute of limitations was not a good plea (which we think it was), defendants were entitled to be heard on the plea of estoppel by the judgment in *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364. In Sac. No. 418 it did not appear that any motion for a new trial was ever made or passed upon, and the statement was held not to come within section 950, Code Civ. Proc., and could not be considered. By a bill of exceptions in this transcript it appears that, owing to the disqualification of the resident trial judge, some delay occurred in having the motion for a new trial passed upon, but it was finally heard and denied, and the appeal from the order was taken in time. Except as to these facts, the two transcripts are the same. It was held in Sac. No. 418 that there was nothing in that record which shows the finding as to adverse possession to be erroneous. Nor is there in this record.

The certificate of the judge to what is called an "engrossed statement on motion for a new trial," states that it is "but a skeleton, and does not contain all the evidence offered at the trial tending to prove the allegations of the answer of the defendants. I believe it correctly states the exception taken to certain documentary evidence, but for some reason unknown to me the attorneys have failed to make a full and complete statement containing all of the evidence. \* \* \* Hence, with these limitations, I settle the statement as presented." We think the statement might well be entirely disregarded because of its utter failure to adequately present the evidence of which errors are claimed. Even the documentary evidence above referred to by the judge is not sufficiently given or identified to admit of intelligent review. However, so far as we can do so, the alleged errors will be noticed.

Exception 2 relates to the admissibility of a decree of distribution, offered by defendants and admitted. This decree was not, as near as we can find out, admitted because regularly made and entered, but as showing color of title under which defendants claimed in support of adverse possession. It was admissible for that purpose. Defendants did not claim title through this decree, and hence the cases cited by plaintiff are not in point.

Exception No. 3 was to the admission of "documentary evidence and testimony of witnesses to show title by adverse possession." None of this evidence is set out. As defendants had the right to prove that issue, we must, in the absence of the evidence, presume that it was relevant and material. The same may be said of exceptions 4, 5, and 6.

Whether the evidence was insufficient to support the findings we are unable to determine, because the evidence is not given in the transcript. An examination of the opinions in *Gregory v. Gregory*, supra, and in the appeal from the judgment in this case, will disclose the fact, we think, that the legal propositions on which appellant now relies have been passed upon adversely to her contention. Her rights were substantially determined in these appeals. So far as we can see, the questions already decided are sought to be reviewed by the appeals from the judgment and order in this action. The order should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

6 Cal. Unrep. 179

LILIENTHAL et al. v. BALLOU et al.<sup>1</sup>  
(L. A. 413.)

(Supreme Court of California. Nov. 30, 1898.)

SALE—CHANGE OF POSSESSION.

Civ. Code, § 3440, providing that transfers of personal property by a person in possession or control thereof, unaccompanied by an actual and continued change of possession, shall be conclusively presumed to be fraudulent against the seller's creditors, does not apply to a transfer of property after the same is in possession of the sheriff under an attachment against the seller.

Department 2. Appeal from superior court, San Luis Obispo county.

Action by J. W. Lillenthal and others against S. D. Ballou and another. From a judgment for plaintiffs and from an order denying a new trial, defendants appeal. Affirmed.

Wm. Shipsey, for appellants. W. H. Spencer, for respondents.

McFARLAND, J. This is an action to recover a certain stock of goods formerly owned by Phillips Bros. & Co. There was a trial by jury, and the verdict and judgment were for plaintiffs. Defendants appeal from the

<sup>1</sup> Reversed in banc. See 57 Pac. 897, 125 Cal. 183.

Judgment and from an order denying a new trial.

The goods in question were attached at the suit of creditors of Phillips Bros. & Co., and were held by the sheriff under the attachment for several weeks. While the goods were thus in the possession of the sheriff they were transferred by Phillips Bros. & Co. to the plaintiffs, who were trustees for all their creditors except the defendant Orman, who afterwards attached the goods as the property of Phillips Bros. & Co., and Orman and Ballou, the sheriff who served Orman's attachment, are the defendants and appellants in this action.

A thorough examination of the record in this case shows that there is really only one question on this appeal to be determined, and that is whether the following instruction given by the court to the jury was correct or erroneous: "If you should find from the evidence that when the property in controversy was transferred to the plaintiffs by Phillips Bros. & Co. said property was not in possession of Phillips Bros. & Co., but was in the possession of the sheriff of this county, then it is not necessary for you to pass upon the question of whether or not there was an immediate delivery or actual or continued change of possession of the property. If, however, you should find that when said property was transferred it was in possession of Phillips Bros. & Co., then you must pass upon the question of immediate delivery and an actual and continued change of possession." If this instruction be held to be correct, then there are no other points, exceptions, or specifications of error which need to be considered. We think that the instruction was correct. It is not absolutely perfect, because the words "or control" should have been used immediately after the word "possession," so as to make the clause read, "not in possession or control" of Phillips Bros. & Co.; but, for the purposes of this case, the omission of the word "control" was immaterial. No point is made upon such omission. The theory of appellants on this point was, and is, that, notwithstanding the fact that the sheriff was in possession at the time of the transfer, still section 3440 of the Civil Code applied, and the transfer was invalid unless there was an immediate delivery and actual and continued change of possession of the goods, and they asked the court so to instruct. This theory would not have been affected by the use of the word "control" in the instruction, nor is it pretended by appellants that the instruction would have been good if that word had been used. It is clear that section 3440 does not apply to the transfer involved in the case at bar. The part of that section necessary to be here construed is as follows: "Every transfer of personal property \* \* \* is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an im-

mediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those," etc. We cannot insert words into the section, and as it stands it refers only to a transfer made by a person in possession or control of the property transferred; and in the case at bar the instruction in question assumes, and it is admitted, that at the time of the transfer from Phillips Bros. & Co. to respondents the property was not in the possession or control of the former, but was in the possession of the sheriff. We are not concerned with the suggestion that under this view certain creditors might gain preference over other creditors; such preference can be had, except where the law forbids it. Of course, actual fraud would vitiate a transfer, but there is no such question as that in this case. The provision of the statute with respect to actual and continued change of possession does not apply, under its express language, to a case where a party transferring the property is not in its possession. *Williams v. Borgwardt*, 119 Cal. 80, 51 Pac. 15, is a case directly in point; but, really, the language of the statute is too clear to leave any room for doubt on the subject. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(122 Cal. 466)

#### PEOPLE v. HIGUERA. (Cr. 414.)

(Supreme Court of California. Nov. 29, 1898.)  
SEDUCTION—INDICTMENT—ADMISSIBILITY OF EVIDENCE.

1. Questions whether two sisters of prosecutrix, with whom she lived, both had children born out of wedlock, being part of defendant's evidence, are inadmissible on cross-examination of a state's witness, when such matter was not gone into in the examination in chief.

2. An indictment charging that defendant, under a promise that he would marry prosecutrix, did seduce her, etc., being in the form of the statute, is sufficient, without alleging that the promise of marriage was made to prosecutrix.

Department 1. Appeal from superior court, Los Angeles county.

Secundino Higuera was convicted of seduction, and appeals. Affirmed.

Dunnigan & Dunnigan, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. The defendant has been convicted of a felony, alleged by information to have consisted in the seduction of an unmarried female of previous chaste character, under promise of marriage. Upon cross-examination the father of the prosecutrix was asked by defendant's attorney as to the character of his other two daughters, and an objection was sustained to the question. Thereupon he offered to prove by the witness "that this girl's sisters, with whom she associated and lived, both had children out of wedlock,



and that they were all raised up together, and that these illegitimate children were born in the house with this witness, while they were all living together with the father of the prosecuting witness." Aside from other considerations, it may be said this evidence was essentially a part of defendant's case. It certainly was inadmissible at this stage of the proceedings; for the witness upon the stand had been asked nothing in his examination in chief as to such matters, and under those circumstances the offer, at that particular point of time, was clearly improper, and properly rejected by the court.

It is claimed that the information does not state a public offense. It is there charged, "did willfully, unlawfully, and feloniously, under a promise by him made that he would marry and take to wife one Josefa Valenzuela, an unmarried female person of previous chaste character, seduce," etc. It is insisted that the promise of marriage must be made to the female, and that here it is not so alleged. This allegation of the information is in the language of the statute, and we deem it sufficient. Probably it would have been better pleading if there had been a direct allegation that the promise was made to the female; but the statute clearly contemplates that the promise should be so made, and, the offense being charged in the language of the statute, we hold the information sufficient.

There is nothing in the contention of defendant that the judgment is void because the offense of which he had been convicted is there called "seduction." The defendant was found guilty by a jury of the crime of seduction as charged in the information. The facts there set out, if proven, clearly constituted the seduction of the prosecutrix; and the defendant was convicted of such seduction. In using the word "seduction" in the judgment, reference was had to the seduction referred to in the verdict of the jury.

We have examined with care the instructions given and refused. Those given embrace a full and sufficient disquisition of the law bearing upon the facts of the case, and we find no legal objection to any of them. Those refused were either not proper to be given under any circumstances, or their subject-matter was covered by others already given. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

122 Cal. 468

McFALL v. BUCKEYE GRANGERS' WAREHOUSE ASS'N et al. (Sac. 345.)

(Supreme Court of California. Nov. 29, 1898.)

JUSTICES OF THE PEACE—PLEADING—CORPORATIONS—PLEDGE OF STOCK—TRANSFER—RIGHTS OF CREDITORS—EXECUTION—RETURN—SALE.

1. Under Code Civ. Proc. § 853, providing that in the justice's court a copy of the note "upon

which the action is based" is a sufficient complaint, the failure of such a complaint to show that plaintiff is a corporation is waived, where defendant objects neither by demurrer nor by answer.

2. The failure of plaintiff to allege its incorporation, which was waived by defendant, cannot be raised by third persons on a collateral attack on the judgment for plaintiff.

3. As against creditors, a pledge of corporate stock must be accompanied by delivery and a continued change of possession. Civ. Code, §§ 2988, 3440. Delivery, momentary possession, and return are insufficient.

4. A notation by the secretary of a corporation on the margin of the stubs of certain certificates that such certificates are held by a certain person "as security for money loan," when made without authority from either pledgee or pledgor, does not amount to a transfer of the stock on the books of the corporation, as against creditors of the pledgor.

5. The title of a purchaser at a sheriff's sale is not affected by the failure of the officer to show in his return that he levied before selling.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county.

Action by T. E. McFall against the Buckeye Grangers' Warehouse Association and others. From a judgment in favor of plaintiff, and an order denying a new trial, defendants O. Michaelson and others appeal. Affirmed.

R. Clark, for appellants. C. W. Thomas and Phil. Bruton, for respondent.

BRITT, C. McFall, the plaintiff in this action, was the purchaser at a sale under execution of 14 shares of stock in the Buckeye Grangers' Warehouse Association, a corporation, one of the defendants here. The ultimate question on appeal is whether property in the stock passed by virtue of such sale. The court below held that it did. One Schautz owned the stock originally, and held certificates therefor issued by said warehouse association. Schautz was sued in a justice's court by the Bank of Winters, a corporation, on a promissory note, wherein he promised to pay a specified sum of money to "the Bank of Winters, at its office in Winters," the payee not being further described. The complaint in that action was a copy of such note. The justice issued a writ of attachment, under which the constable of the township attached the said shares of stock as the property of Schautz, in the manner prescribed by subdivision 4, § 542, Code Civ. Proc. Afterwards, Schautz having made no defense, judgment was rendered in said justice's court against him, and in favor of said bank, and an execution issued for the enforcement thereof. Thereunder the constable made the sale which gave rise to the present dispute. At the trial there was evidence that, some time before the levy of the said writ of attachment, Schautz indorsed the stock certificates,—two in number,—and delivered them to Michaelson, one of the appellants in this case, "as security for two hundred and fifty dollars." Michaelson held them in his hand for an instant, and returned them to Schautz, and

Schautz kept them among his own papers 'for Michaelson' until after said attachment, when he delivered them again to Michaelson. Forthwith after said indorsement to Michaelson, Schautz gave notice of the fact to the president and secretary of said warehouse association, but said he did not want a transfer of the shares to appear on the books; and he continued thereafter to draw dividends on the stock. The secretary, however, without authority from any source, made an entry on the margin of the stubs of the certificates, as follows: "C. Michaelson holds as security for money loan." In his return of the execution, the constable did not in terms set forth a levy of the writ, but stated that, after due and legal notice, he sold the stock by virtue thereof, and that the property thus sold had been previously held under said attachment.

Appellants urge that all proceedings in the justice's court were void, for the reason that the complaint in the action of Bank of Winters against Schautz—consisting merely of a copy of the note sued on—did not show the plaintiff to be a corporation. It was, however, in fact a corporation; and in a justice's court a copy of a note "upon which the action is based" is a good complaint, by express provision of the statute. Code Civ. Proc. § 853. The defendant in that case, if he deemed that the plaintiff had not legal capacity to sue, or that the complaint was uncertain in that particular, might have presented the objection by demurrer or answer. Failing to do so, he waived the right to object, and certainly other persons cannot assert the right in a collateral attack on the judgment. See *Montgomery v. Superior Court*, 68 Cal. 407, 9 Pac. 720.

As between the parties to a pledge of shares of corporate stock, the pledge may be effected by indorsement and transfer of the stock certificates (*Spreckels v. Bank*, 113 Cal. 272, 45 Pac. 329, and cases cited); but, when that mode of creating such a pledge is adopted, it must be subject to the same rules which govern the pledging of other instruments. The transfer, to avail against creditors, must be accompanied by delivery and continued change of possession; and it is too plain for discussion that the transaction between Schautz and Michaelson, by which the latter received momentary possession of the certificates in question, and at once returned them to Schautz, constituted no valid pledge as against creditors of the former. Civ. Code, §§ 2988, 3440; *Coleb. Coll. Sec.* §§ 9, 13. The note made by the secretary of the warehouse association on the margin of the stubs did not amount to a transfer of the stock on the books of the corporation, for the reason—among others which might be assigned—that a transfer was without authority from either Schautz or Michaelson, and was, indeed, contrary to the express desire of the former.

A further point is that it does not appear that the constable levied the writ of execution on the stock. The property having been

held under attachment to satisfy the judgment, we doubt whether any levy of the execution, beyond giving notice of sale, was a necessary step in the proceedings. Code Civ. Proc. § 550; *Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56, and 51 Pac. 195. But, however that may be, the title of the purchaser of the stock is not affected by the failure of the officer to show in his return that he levied before selling. *Hibberd v. Smith*, 67 Cal. 564, 4 Pac. 473, and 8 Pac. 46, and cases cited. The judgment and order denying a new trial should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.





122 Cal. 558

## McCURRIE v. SOUTHERN PAC. CO.

(S. F. 521.)

(Supreme Court of California. Dec. 6, 1898.)

CARRIERS—INJURIES TO PASSENGERS—NEGLIGENCE  
—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

1. A passenger on a railroad, while standing in the door of the car, the train having stopped at a station, was thrown off his balance by a sudden backward and then forward jerk of the car, and grasped the door casing for support, when the door slammed upon his fingers. *Held*, that whether the injury was caused by the company's negligence was for the jury.

2. Whether a passenger on a railroad is negligent in attempting to go upon the platform of the car while the train is standing at a regular station is for the jury.

McFarland, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

Action by J. P. McCurrie against the Southern Pacific Company. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Reversed.

F. J. Castelhun, for appellant. W. H. L. Barnes, for respondent.

HARRISON, J. Action to recover damages for personal injury alleged to have been sustained by reason of the negligence of the defendant. The appeal is from a judgment in favor of the defendant and from an order denying a new trial. The plaintiff testified that he purchased from the defendant a ticket to go from San Francisco to Tennant's station, in Santa Clara county, and that he boarded the train at Third and Townsend streets in San Francisco. He further testified: "When we arrived at Twenty-Fifth and Valencia streets, the brakeman or conductor opened and fastened the front door of the car in which we were sitting in the usual way. I waited until I saw the door was fastened and the train stopped, and then got up to look for my son, who was waiting to see us. I went to the front to beckon to him, because the train does not stop long there. As I got to the platform, the train suddenly backed with a very great jerk, so violently that it threw me off my balance, and to save myself I caught hold of the casing of the door. Just then the door swung to and struck my hand, cutting three fingers very severely;" and on cross-examination he testified: "I left my seat after the train stopped, and went to the front platform of the car, and stood partly in and out of the car,—just in the doorway. I won't be certain whether I stood on the platform or whether I was in the doorway, because the



time was short. I called my son and he came up. The car gave a lurch backward, I think. I caught hold of the casing of the door to save myself from falling, and just then the door swung to and caught my hand. I went back to my seat, led by my son." His wife testified: "We boarded the train together at Third and Townsend streets. At the Valencia street station the car stopped, and my husband went out to the platform to beckon to our son to come into the car and see me. The train gave a violent jerk backwards and then forwards. I thought it would throw him to the ground. He put out his hand to take hold of the door casing, and then the door became unfastened and swung to and struck his hand. My son assisted him back to his seat. He was very faint." His son testified that he was waiting at the Valencia street station to see his father, and said: "When I got opposite the platform I saw him coming through the door. Just as I was about to step up on the platform the train went back with a sudden jerk, and then went ahead with a jerk. I had to look out for myself, for the train was moving a little. I saw he was falling. I tried to save him. He had thrown his hand up and caught hold. I did not see the door strike his hand, but I saw it as it swung back again. I led him back to his seat. The jerk was very violent,—a jerk sufficient to make him lose his balance." Testimony tending to show the extent of the injury was also given on behalf of the plaintiff, and at the close of his testimony the court, upon the motion of the defendant, instructed the jury to find a verdict in favor of the defendant, which was accordingly done.

When the negligence of the defendant is the basis of the plaintiff's right of recovery, it is the province of the judge to determine whether the evidence submitted by the plaintiff has any legal tendency to establish negligence, and it is for the jury to determine whether it is sufficient therefor. If there is no evidence from which a jury would have the right to infer negligence, the judge may withdraw the case from them; but, if the evidence is such that negligence may be inferred, he has not the right to withdraw the question from the jury upon the ground that, in his opinion, they ought not to make such a finding, and thus substitute his judgment for theirs upon a question of fact which the plaintiff has the right to have determined by a jury. If the evidence in a case would authorize a jury to find a verdict in favor of the plaintiff, the court is not at liberty to take the case from the jury, and substitute his own determination of that question for that of the jury. The rule is the same whether the court is asked to grant a nonsuit or to direct a verdict in favor of the defendant. In either case the motion should be denied if there is any evidence from which the jury would be authorized to find a verdict in favor of the plaintiff.

The evidence on behalf of the plaintiff showed that the relation of passenger and carrier existed between him and the defendant at the time he received the injury, and there was also evidence tending to show that the injury was caused by the act of the defendant in the management and conduct of the train in which it had undertaken to carry him as a passenger. A prima facie case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the manner in which the defendant used or directed some agency or instrumentality under its control. The carrier of passengers is required to exercise the highest degree of care in their transportation, and is responsible for injuries received by them while in the course of transportation, which might have been avoided by the exercise of such care. Hence, when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part. The case then falls within the rule given by Shearman and Redfield on Negligence (section 59): "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." See, also, *Boyce v. Stage Co.*, 25 Cal. 460; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266; *Bush v. Barnett*, 96 Cal. 202, 31 Pac. 2; *Judson v. Powder Co.*, 107 Cal. 549, 40 Pac. 1020; *Madden v. Railroad Co.*, 50 Mo. App. 666; *Dougherty v. Railroad Co.*, 81 Mo. 325; *Lavis v. Railroad Co.*, 54 Ill. App. 637; *Whart. Neg. § 661*; *Cooley, Torts*, \*663. At the time the plaintiff received the injury, the train had stopped at one of its regular stations upon the road, and after it had stopped was moved backward with a sudden jerk, and then suddenly forward, by reason of which the plaintiff lost his balance, and was compelled to steady himself by taking hold of the casing of the door. The evidence tended to show that the injury to him resulted from the manner in which the train was moved by the defendant after it had stopped. If the case had been submitted to the jury upon this evidence, it would have been sufficient to authorize a verdict in his favor (*Bush v. Barnett*, supra), and the court erred in directing a verdict for the defendant. It would appear that the door swung to by reason of the jerking of the train, and, if so, the sufficiency or extent to which it was fastened back by the conductor was immaterial. It cannot be said as a matter of law that the plaintiff, by leaving his seat after the train had stopped, and

attempting to go to the platform for the purpose of meeting his son, was guilty of any negligence which contributed to his injury. The judgment and order are reversed.

We concur: BEATTY, C. J.; GAROUTTE, J.; TEMPLE, J.; HENSHAW, J.; VAN FLEET, J.

I dissent: McFARLAND, J.

6 Cal. Unrep. 182

Ex parte HENION. (Cr. 505.)

(Supreme Court of California. Dec. 5, 1898.)

HABEAS CORPUS—MOOT CASES.

Habeas corpus cannot be resorted to, to obtain a speedy decision as to the validity of an ordinance, where petitioner is not in fact suffering imprisonment, or where the imprisonment terminates on the day of the hearing.

In bank. Appeal from superior court, Solano county.

Petition by A. C. Henion for a writ of habeas corpus. Discharged.

C. P. Stevens, T. E. Dunlap, and J. A. Plummer, for petitioner. Atty. Gen. Fitzgerald, for respondent.

PER CURIAM. 'This is an application for a writ of habeas corpus.' At the hearing, it was shown that the petitioner was not in fact suffering imprisonment, and that the case was in its nature a moot case, by which a speedy decision was sought to be obtained upon the question of the validity of an ordinance of Solano county. Moreover, it was shown that the alleged imprisonment of petitioner would this day come to an end, and the judgment be fully executed by lapse of time. The business of this court between bona fide litigants is of altogether too great a magnitude to warrant or even to excuse us in pretending moot cases. The writ is discharged.

122 Cal. 504

CLARE v. SACRAMENTO ELECTRIC POWER & LIGHT CO. (Sac. 372.)

(Supreme Court of California. Nov. 30, 1898.)

APPEAL—DAMAGES—EXCESSIVENESS.

1. A verdict on conflicting evidence is conclusive.

2. Evidence that the hearing in one of plaintiff's ears had been permanently destroyed, that the sight of one eye had been seriously impaired, and that his nervous system had received a shock from which he might never recover, and which at the time of the trial impaired his facility for transacting his former business, warrants the granting of substantial damages, though the wages of plaintiff were not cut off or diminished by the injury, and he has not been subjected to any pecuniary loss.

3. A verdict for \$2,000 for such injuries is not excessive.

4. The appellate tribunal cannot amend the transcript of record on the affidavits of appellant.

Department 1. Appeal from superior court, Sacramento county.

Action by Allan E. Clare against the Sacramento Electric Power & Light Company. From a judgment for plaintiff, defendant appeals. Affirmed.

L. T. Hatfield, for appellant. A. L. Hart, for respondent.

HARRISON, J. The plaintiff brought this action to recover damages for an injury alleged to have been sustained by him by reason of coming in contact with a wire used by the defendant to sustain one of the poles by which its trolley wire is supported, and which had been so negligently placed that, when the plaintiff came in contact with the wire, he received a current of electricity with which it had become charged, and was thereby permanently injured. The cause was tried by a jury, and a verdict rendered in favor of the plaintiff for the sum of \$2,000.

The fact, as well as the extent of the plaintiff's injury, and whether it was caused by reason of the electric current, as well as whether the wire became charged with the electricity through the negligence of the defendant, were the issues which were submitted to the jury, and upon which evidence was introduced by each party. The evidence on the part of the plaintiff tended to support his allegations upon these issues, with which the evidence on the part of the defendant merely created a conflict, and the verdict of the jury thereon must be accepted as conclusive.

The jury were instructed that the plaintiff was not entitled to exemplary damages, but only such as would reasonably compensate him for the injuries which he had received; and it is urged by the plaintiff that, inasmuch as there was no evidence before the jury tending to show the amount of pecuniary injury which he had sustained, the amount of the verdict is not sustained by the evidence; that as he did not show that his earning capacity had been diminished by reason of the injury, or that he had been subjected to any pecuniary outlay or detriment, the jury should have given a verdict for only nominal damages. The evidence before the jury was such as to authorize them to find that the hearing in his left ear had been permanently destroyed; that the sight of his left eye had been seriously impaired; and that his nervous system had received a shock from which he might never recover, and which was such at the time of the trial as to impair his facility for transacting the business in which he had been engaged prior to the injury. In view of this evidence, it cannot be said that the jury disregarded the instructions of the court, or that the verdict is not sustained by the evidence. There is no standard by which the value of an eye or of an ear or of a limb can be computed, or which will determine the amount of money which will compensate a person for the loss or impairment of one of his senses. The right to compensation for



a personal injury is not dependent upon the fact that the wages of the injured person were cut off or diminished by reason of the injury, nor is the amount of compensation for such injury to be measured by the amount of his income or wages. In cases of this character, there can be no direct evidence of the amount of damage sustained, or the amount of money which will be a compensation for the injury; but it is sufficient to show to the jury the extent of the injury, and the amount of their verdict thereon is to be determined in the exercise of an intelligent discretion; and, unless the amount of the verdict is such as to indicate that it was given under passion or prejudice, it will be sustained. In view of the evidence in support of the injury to the plaintiff, the verdict in the present case cannot be regarded as excessive. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266; *Morgan v. Railway Co.*, 95 Cal. 501, 30 Pac. 601; *Sloane v. Railroad Co.*, 111 Cal. 668, 44 Pac. 320.

Various exceptions were taken by the defendant to the rulings of the court upon the admission of evidence, and we have carefully examined the record and the exceptions so taken, but find therein nothing deserving of extended consideration, or which would justify a reversal of the judgment.

The record also contains certain instructions given to the jury by the court, but does not show that any exception was taken thereto, except to those given at the request of plaintiff, and in these we find no error.

The appellant has filed certain affidavits to the effect that other instructions of the court were excepted to on its behalf, and has asked that the statement on motion for a new trial be amended so as to show that fact. It is sufficient to say that the action of the trial court is to be reviewed here upon a transcript of the records of that court, and that we have no power to amend those records. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

122 Cal. 533

EDSALL v. SHORT et al. (ACKLEY, Intervener. S. F. 1,673.)

(Supreme Court of California. Dec. 1, 1898.)

SUPREME COURT—APPELLATE JURISDICTION—JUSTICES' COURTS—EQUITY.

1. Code Civ. Proc. § 963, cl. 1, authorizing an appeal to the supreme court in an action brought into the superior court from another court, does not apply to cases commenced in a justice's court, in which an appeal to the supreme court is denied by Const. art. 6, § 4.

2. Const. art. 6, § 11, giving justice's courts concurrent jurisdiction with superior courts in cases to enforce liens on chattels, where the amount of the liens and the value of the chattels does not exceed \$300, does not give the supreme court jurisdiction of an appeal in such a case originally begun in a justice's court and appealed to the superior court; section 4 precluding the exercise of such jurisdiction in cases in equity arising in justices' courts.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Bert Edsall against William Short and another. Edward Ackley intervened. There was a judgment for plaintiff, and from an order denying a new trial the intervener appeals. Dismissed.

Moses G. Cobb, for appellant. Thomas A. McGowan, for respondents.

BEATTY, C. J. Respondents move to dismiss this appeal upon the ground that it is not within the jurisdiction of the court. The case is this: The intervener, Ackley, obtained a judgment against the defendant Short. Defendant Whelan, who is sheriff of San Francisco, levied execution upon property of Short of a value less than \$300. Edsall, for himself and as assignee of others claiming to have been employes of Short, made a demand upon Whelan, under the provisions of section 1206 of the Code of Civil Procedure, that he pay over to them the proceeds of the execution. The execution creditor, Ackley, disputed the indebtedness, and Edsall thereupon commenced an action in the justice's court to establish his own and the assigned claims, which altogether amounted to less than \$300. Ackley intervened and contested the claims, but judgment passed for the plaintiff; and on appeal to the superior court, after a trial de novo, judgment was again given for the plaintiff. Ackley moved for a new trial, which was denied, and this is an appeal from that order.

Appellant, in opposition to the motion to dismiss, contends that this is a suit in equity, of which the superior court and justice's court had concurrent jurisdiction, or that it is a special proceeding, and that, having been brought into the superior court from the justice's court, an appeal lies to this court, under the first clause of section 963 of the Code of Civil Procedure. The mere fact that this case was brought into the superior court by an appeal cannot furnish the test of our appellate jurisdiction; for, if it did, there would be an ultimate appeal to this court in every action commenced before a justice of the peace. But if the case is one in which the supreme court has appellate jurisdiction, under the constitution, notwithstanding the fact that it was commenced in the justice's court, the practice of taking an appeal first to the superior court, and next to this court, is probably correct, in view of the first clause of section 963 of the Code of Civil Procedure. The question, however, is not as to the correct practice in such a case, but is a question as to the jurisdiction conferred upon this court by the constitution. Turning to that instrument, we find that the legislature is inhibited from conferring upon justices' courts concurrent jurisdiction with the superior courts, except in cases of forcible entry and unlawful detainer, and in cases to enforce and foreclose liens on personal property when neither the amount of the lien nor the value of the property amounts to \$300. Const. art. 6, § 11. There can be no concur-

rent jurisdiction in the two courts of any special proceeding other than these two, and, since it is not pretended that this is an action in forcible entry or unlawful detainer, there was no concurrent jurisdiction, unless it was an action to enforce and foreclose liens, and therefore an action in equity. Conceding, without deciding, that such was the case, it is specially excepted from the appellate jurisdiction of this court by the fact that it arose in the justice's court. *Id.* § 4. If it was not an action to enforce or foreclose liens, it was not a special proceeding at all, but an ordinary action for wages due; the only thing to distinguish it from such an action being the fact that the claim, when established, would be the subject of a preferred lien upon the fund in the hands of the sheriff. In whichever light, therefore, it may be regarded,—as a suit in equity, or as an action at law,—no appeal lies to this court from the judgment or any order in the case. Appeal dismissed.

We concur: McFARLAND, J.; HENSHAW, J.

122 Cal. 528

In re SHEID'S ESTATE.

CLAY et al. v. WALL (two cases. L. A. 451, 504).

(Supreme Court of California. Dec. 1, 1898.)

PREMATURE APPEAL—PROBATE PRACTICE—PETITION FOR DISTRIBUTION.

1. Under Code Civ. Proc. § 1704, requiring orders and decrees to be entered on the court's minute book, and section 1715, requiring appeals to be taken within 60 days after entry of the order or judgment, an appeal from the findings and conclusions of law of a probate court directing the distribution of an estate, taken before the entry of a decree thereon, is premature.

2. Code Civ. Proc. § 1634, permits the personal representative of the deceased to file a petition for distribution with his final account. Section 1665 provides that on final settlement or thereafter the court shall make a distribution on application of the personal representative or the distributees. Section 1664 authorizes persons claiming to be distributees to apply for an order ascertaining the distributees after one year from the granting of administration. *Held*, that the court has no jurisdiction of a petition for distribution, filed by an alleged distributee before the expiration of a year after the granting of administration, after filing of the final account and before settlement thereof.

Commissioners' decision. Department 2. Appeals from superior court, San Luis Obispo county.

Petition by Mary T. Wall for a distribution to her of the estate of W. T. Sheid, deceased. From a finding that petitioner was entitled to distribution, and from a decree thereon, respectively, S. B. Clay and others appeal. The former appeal was dismissed, and judgment under the latter reversed.

Chas. A. Palmer and F. A. Dorn, for appellants. Lenham & McCall and Venable & Goodchild, for respondent.

HAYNES, C. Respondent, Mary T. Wall, filed her petition asking that said estate (consisting principally of real estate, of which there were several parcels) be distributed to her as the sole heir of said decedent, who died intestate. Appellants contested her heirship and right to distribution. Upon the hearing the court made findings of fact and conclusions of law in her favor, followed by the words: "Let distribution of said estate be made accordingly." Before the entry of any order or decree thereon, the first of these appeals (No. 451) was taken, and respondent contends that it was premature, and must be dismissed.

Section 1704, Code Civ. Proc., provides that "all orders and decrees of the court or judge must be entered at length in the minute book of the court," and it is obvious that such order or decree, when it provides for the distribution of an estate, must describe the property distributed; and section 1715, *Id.*, provides that "the appeal must be taken within 60 days after the order, decree, or judgment is entered"; "and for the purposes of an appeal it is 'entered' when it is entered at large upon the minutes." In re Blythe's Estate, 110 Cal. 226, 42 Pac. 641. This appeal (No. 451) was therefore premature, and should be dismissed.

The second of these appeals (No. 504) is taken by the same contestants from the judgment or decree subsequently made and entered pursuant to said findings and order. The transcripts in the two appeals are identically the same, except that the second transcript sets out the judgment which was entered after the first appeal was taken. The record contains two bills of exceptions, setting out the proceedings so far as is necessary to a decision of the questions made.

1. It is contended by appellants that the court had no jurisdiction to entertain the petition for distribution, or to make any order directing distribution of the estate, or to determine who were the legal heirs of the deceased, for the reason that the petition therefor was prematurely filed. W. T. Sheid died intestate March 9, 1896, leaving an estate consisting of real and personal property. An administrator was appointed March 25, 1896, and letters of administration were issued to him on April 9, 1896. On May 2d notice to creditors was given, allowing 10 months for the presentation of claims; and on April 3, 1897, the administrator filed his final account, which was allowed and settled on April 15, 1897. On April 5, 1897, Mary T. Wall, claiming to be the only child and sole heir at law of the deceased, filed her petition for the distribution of said estate to her, and notice was given that said petition would be heard on April 20, 1897. A demurrer to this petition was interposed by appellants, and was overruled by the court, and contestants thereupon answered, denying that petitioner was the daughter of the deceased, or an heir at law, or was entitled to any interest in said



estate; and also pleaded that the court had no jurisdiction to entertain or hear said petition, for reasons the substance of which is as follows: (a) That the same was filed here-in before the expiration of one year from the issuing of letters of administration upon said estate; (b) that said petition was filed before the settlement of the final account of the administrator; (c) that the same was not filed with the final or any account of the administrator. There are four leading sections of the Code of Civil Procedure relating to the distribution of estates of deceased persons. Under article 2, c. 10, entitled "Accounting and Settlements by Executors and Administrators," section 1634 provides: "If the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of settlement must state those facts, which notice must be given by posting or publication for at least ten days prior to the day of settlement. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had without further notice or proceedings." St. 1891, p. 428. Article 1 of chapter 11 provides for "Partial Distribution Prior to Final Settlement," and permits any heir, devisee, or legatee, at any time after the lapse of four months from the issuing of letters testamentary or of administration, to petition the court for his share of the estate to be given to him, upon giving bond, etc. Code Civ. Proc. § 1658. Article 2 of chapter 11 is entitled "Distribution on Final Settlement." The first section under this article (Code Civ. Proc. § 1664) relates to "determining heirship and title to estate," and permits any person claiming to be entitled to distribution in whole or in part of such estate, "at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate," to file a petition "praying the court to ascertain and declare the rights of all persons to said estate, and all interests therein, and to whom distribution thereof should be made." This section is very long, and provides for the proceedings to be had therein, the effect of the judgment, etc. Section 1665, Code Civ. Proc., is, in part, as follows: "Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time upon the application of the executor or administrator, or of any heir, legatee or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto \* \* \*." Said section 1634 permits the executor or administrator to file with his final account a petition for distribution; but whether any one else may do so it is not necessary to decide, inasmuch as in this case the petition for distribution was not filed with the final account, and was filed before the account was settled. Heirs, devisees,

and legatees are not mentioned in that section, while they are mentioned in section 1658, providing for partial distribution, and in section 1665, where it is provided that at any time subsequent to the settlement of the final account they may apply to the court for distribution. Aside from the provision in regard to partial distribution, the only express authority for the heir, devisee, or legatee to apply for distribution is found in section 1665, and such application is limited to any time "subsequent" to the final settlement of the accounts. If, therefore, it be conceded that the heir might have filed her petition at the same time, or with the filing of the final account of the administrator, she did not do so, and, having so failed, she could not regularly do so until after the final account was settled; or, if her petition be regarded as one to determine heirship, as it was filed before the expiration of one year from the issuing of letters of administration, it was premature, and conferred no authority upon the court to entertain it. The provision in section 1634, permitting a petition for distribution to be filed "with" the final account, was probably intended to enable the administrator to hasten the closing of the estate, and to make one notice and one hearing serve both purposes. But, whatever the reason may be, we find no authority for filing a petition for distribution at any time prior to the settlement of the final account, unless it is filed "with" it. This is a special proceeding based upon the statute, and involving title to property, both real and personal, and in which the jurisdiction of the court can be acquired only by the observance of its provisions. *Smith v. Westerfield*, 88 Cal. 379, 26 Pac. 206. As the petition of respondent was filed after the final account was filed, and before it was settled, the judgment should be reversed, and her petition dismissed.

After respondent's petition was filed, viz. on April 10, 1897, and after the expiration of a year from the issuance of letters of administration, appellants, claiming to be the only heirs of said intestate, filed their petition under the provisions of section 1664, Code Civ. Proc., for the purpose of determining who were the heirs of said intestate, and entitled to said estate. Notice was duly given to all persons interested to appear and show cause against said petition on July 15, 1897. The hearing of respondent's petition for distribution was concluded, and the findings therein filed, on June 24, 1897, and before the time designated for the hearing of appellants' said petition. If the petition of respondent for distribution had been filed at the proper time, all the questions made thereunder to determine heirship and title to the estate could have been properly determined under it. In *re Oxarart*, 78 Cal. 109, 20 Pac. 367.

The question as to whether the court erred in refusing a continuance of the hearing until the return of a certain commission to take depositions need not be considered.

Appellants also contend that the court erred in denying their demand for a jury to try the issues of fact raised by said petition and the answer thereto. As we cannot assume that upon a new proceeding for distribution, or to determine the question of heirship, a jury will be demanded, or, if demanded, be denied, no opinion is expressed upon it, further than to say that said issue is of a character which would render its submission to a jury entirely proper. We advise that the first appeal (No. 451) be dismissed, and that the judgment from which the second appeal (No. 504) is taken be reversed, with directions to dismiss respondent's petition.

We concur: CHIPMAN, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the first appeal (No. 451) is dismissed, and the judgment from which the second appeal (No. 504) is taken is reversed, with directions to dismiss respondent's petition,

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(6 Cal. Unrep. 185)

**EDE v. CUNEO et al. (S. F. 905.)<sup>1</sup>**

(Supreme Court of California. Dec. 9, 1898.)

**MUNICIPAL CORPORATIONS—STREET ASSESSMENTS  
—DEFECTS—PLEADING—UNCERTAINTY  
—DEMURRER.**

1. The street improvement act (section 9), authorizing a second assessment where an action to foreclose a lien for street work is defeated by reason of a defective assessment, does not authorize a second assessment where such an action is defeated for want of an engineer's certificate.

2. A demurrer to a complaint to foreclose a lien for street work, alleging that a second assessment had been made under the street improvement act (section 9) for the reason that the prior assessment and engineer's certificate were "never duly or properly or legally recorded," should be sustained for uncertainty, as the statement as to the defects in the first assessment is merely a legal conclusion.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by William Ede against Joseph Cuneo and others. From an order sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

J. C. Bates, for appellant. J. P. Langhorne, for respondents.

**HARRISON, J.** The complaint is in the ordinary form for the foreclosure of the lien of a street assessment, and alleges that the contract for doing the work was entered into August 13, 1890, and completed within the time fixed therefor, and that an assessment for the work was issued July 6, 1896. It alleges that on the 16th of November, 1891, the superintendent of streets issued an assessment for the work, with a warrant and diagram attached, upon which a suit was commenced, and in which a final judgment was entered against the plaintiffs therein, and that it appears by said final judgment that the plaintiffs were defeated by reason of the fact that neither the assessment, diagram, warrant, nor engineer's certificates were duly or properly recorded in the office of the superintendent of streets; that within three months after the entry of said final judgment, upon the application of an interested party, the superintendent of streets made an-

other assessment, with diagram and warrant attached, upon which a suit was subsequently brought, and in which a final judgment was rendered that the plaintiff was not entitled to recover thereon; that it appears by the final judgment rendered in the last-named action that the plaintiff was defeated by reason of the fact that the city engineer had never made any engineer's certificate of the work, and that the assessment, diagram, warrant, or purported engineer's certificate had not been duly or properly or legally recorded in the office of the superintendent of streets; that within three months after the entry of this judgment the superintendent of streets made and issued the assessment, diagram, and warrant upon which the present action is brought. It is alleged that the suit upon the second assessment was entitled "Joseph Wells, Assignee of Said Contract, Plaintiff, against J. W. McDonald, Defendant," but the connection of either of these parties with the subject-matter of the suit is not shown. There is no direct allegation that the contract or the assessment was ever assigned to Wells, and it is alleged that Buckman and Perrine, assignees of Vincent, to whom the contract was awarded, did all the work of the contract. Neither is there any allegation that McDonald had any interest in the land assessed, while it is alleged that the defendants herein were the owners of said land during all the times of taking the proceedings for the improvement. To this complaint the defendants demurred upon the ground that it did not state facts sufficient to constitute a cause of action, and also upon the ground that it was uncertain in failing to show the particular defects, omissions, and irregularities in the assessments upon which the court determined that the plaintiff was not entitled to recover. The court sustained the demurrer, and from the judgment thereon in favor of the defendants the plaintiff has appealed.

Section 9 of the street improvement act provides: "Whenever it shall appear by any final judgment of any court in this state that any suit brought to foreclose the lien of any sum of money assessed to cover the expense of any street work done under the provisions of this act, has been defeated by reason of any defect, error, informality, omission, irregularity or illegality in any assessment hereafter to be made and issued, or in the recording thereof, or in the return thereof, made to or recorded by said superintendent of streets, any person interested therein may at any time within three months after the entry of said final judgment" apply to the superintendent of streets, and have issued to him another assessment in conformity to law. The authority of the superintendent of streets to issue a second assessment, as well as the validity of the assessment thus issued is purely statutory, and such assessment can be issued only under the conditions therein prescribed. The statute does not authorize a sec-

<sup>1</sup> For order entering judgment on appeal, see 55 Pac. 772.



ond assessment in all cases in which the plaintiff shall fail to obtain a judgment in his favor upon the prior one, but has specified certain grounds of his defeat as the only ones which will authorize the issuance of a second assessment, and has designated the evidence by which the fact and cause of his defeat is to be shown. It has not authorized a second assessment merely because the prior one did not create a lien upon the land assessed, or because there was an error, defect, or omission in any other document or proceeding requisite to create a lien than "in the assessment, or in the recording thereof, or the return thereof, made to or recorded by the superintendent of streets"; and it has declared that the evidence upon which the superintendent of streets is authorized to issue a second assessment, and which is to be presented to him therefor, is a final judgment in a suit upon the former assessment, in which it will appear that the suit was defeated by reason of such defect. In *Gray v. Lucas*, 115 Cal. 430, 47 Pac. 354, it was said: "Under this provision of the statute the right to a second assessment does not exist, unless it 'appear' by the final judgment in a suit upon the prior assessment that the suit was defeated by reason of some infirmity in the 'assessment,' or in the recording thereof, or in some matter connected with the return of the warrant. If the suit is defeated by reason of a defect or infirmity in any other step taken in the proceedings, or by reason of a lack of evidence, or failure to prove any other fact essential to a recovery, the statute does not apply." It is unnecessary to consider the defects alleged to have existed in the assessment originally issued for the work, since, unless the conditions required by the statute for the issuance of a second assessment existed at the time the superintendent made the assessment upon which the present action is brought, this assessment was unauthorized, and created no right of action or lien upon the property assessed. Whatever may have been the defects in the original assessment, a subsequent one had been issued, and it was necessary for the plaintiff to allege facts which would authorize the issuance of another, otherwise it would be assumed that the second one was correct; and, as against the pleader, it must be assumed that there were no other defects in regard to the second assessment than he has alleged. These are that in the suit of Wells against McDonald the plaintiff was defeated "by reason of defects, errors, informalities, omissions, irregularities, and illegalities in recording said last-mentioned assessment, diagram, warrant, and purported engineer's certificates, and the failure of the city engineer of said city and county to make any engineer's certificate for said work, in this: that it appears from said last-mentioned final judgment as follows: That the city engineer of said city and county had at the time of said last-mentioned judg-

ment never made any engineer's certificate of said work; that neither said last-mentioned assessment, diagram, warrant, nor purported engineer's certificates were duly, or properly, or legally recorded in the office of said superintendent of streets." The words used at the close of this allegation of the cause of the defeat, viz. "in this: that it appears from said last-mentioned final judgment," limit the allegation in general terms of the cause of the defeat to the defects thus enumerated, and show that the failure of the plaintiffs to recover judgment was not the result of any defect in the assessment, but from the fact that the city engineer had never made any certificate of the work. In *Gray v. Lucas*, supra, it was held that the certificate of the engineer is no part of the assessment, and that the mere want of such certificate did not constitute a defect in the "assessment" which would authorize the superintendent of streets to issue a second assessment. A distinction is observed by the statute itself (section 9) between the several documents essential to the creation of a lien, each of which is to be complete in itself. In *Dougherty v. Hitchcock*, 35 Cal. 512, it was held that the assessment must be authenticated by the signature of the superintendent, and that his signature to the warrant attached thereto was insufficient. See, also, *Shipman v. Forbes*, 97 Cal. 572, 32 Pac. 599. As the provision of section 9, above quoted, does not authorize the issuance of a second assessment for a defect or omission in respect to any other document essential to the creation of a lien than the "assessment," if we should hold that its provisions include defects or omissions in reference to other documents we would be adding terms to the statute which the legislature has not seen fit to enact.

The allegation in the complaint that the prior assessment, diagram, warrant, and purported engineer's certificates were "never duly or properly or legally recorded" in the office of the superintendent of streets, is the averment of a legal conclusion, and not of a fact. This allegation imports that the assessment was recorded, but whether it was "properly" or "legally" recorded was to be determined by the court upon the facts shown in reference thereto, and the opinion of the plaintiff as to the effect of these facts could not be substituted for the judgment of the court. He should have pointed out the defect in the record upon which he relies, in order that the court might determine whether it impaired its sufficiency. The demurrer upon the ground of uncertainty was also properly sustained. The plaintiff should have pointed out and specified the defects or omissions which appeared in the judgment as the ground upon which the suit upon the former assessment was defeated. The judgment is affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

122 Cal. 509

BENNETT v. WILSON et al. (Sac. 440.)

(Supreme Court of California. Nov. 30, 1898.)

JUDGMENTS—CONCLUSIVENESS—FRAUD—EXECUTION  
SALES—REDEMPTION—TENDER—CONFLICTING  
REDEMPTIONS—AGENCY—ACTION TO REDEEM—  
PARTIES.

1. Property was sold under execution, and a judgment lienor redeemed, and demanded a sheriff's deed. A junior judgment lienor redeemed afterwards, but before the deed was demanded, and paid the sheriff an amount sufficient to redeem from the prior judgment. *Held* that, as the prior lienor acquired the title of the purchaser under the execution sale, he had such an interest beyond the right of redemption as he was entitled to protect by showing that the subsequent judgment, though regular on its face, was void.

2. The rule that a judgment debtor may confess judgment before expiration of the time for redemption for the purpose of making the judgment creditor a redemptioner is inapplicable to judgments void for fraud as against a prior redemptioner.

3. While it is immaterial whence the money comes with which a redemption from an execution sale is offered to be made, it must be tendered by a lawful redemptioner.

4. A complaint to establish a right of redemption over another redemptioner by showing that the judgment under which the latter redeemed is void need not allege that there was a defense to such judgment on the merits.

5. Under Code Civ. Proc. § 704, authorizing the sheriff to receive money paid by a subsequent redemptioner from an execution sale for a prior redemptioner, the sheriff is not such an agent in receiving the money as will bind the prior redemptioner to accept it.

6. Where property has been redeemed from a purchaser under execution sale, such purchaser is not a necessary party to a suit by his redemptioner to enforce the right of redemption against a subsequent redemptioner.

7. A redemptioner of corporate property from execution sale does not prejudice a subsequent redemptioner who is a stockholder by joining the corporation with him in an action to establish as against him a prior right of redemption.

Commissioners' decision. Department 2. Appeal from superior court, Plumas county.

Action by Sanford Bennett against J. B. Wilson and others. There was a judgment dismissing the complaint, and plaintiff appeals. Reversed.

Goodwin & Webb, for appellant. L. N. Peter and W. W. Kellogg, for respondents.

CHIPMAN, C. Action to determine the invalidity of a certain judgment lien, and that the holder thereof is not a redemptioner, and that plaintiff, under his redemption, is entitled to sheriff's deed. A demurrer, interposed to the amended complaint upon several grounds, was sustained, and defendants had judgment dismissing the action, from which plaintiff appeals.

The facts alleged which are necessary to illustrate the main question discussed by counsel may be briefly stated. Defendant company is a foreign corporation, and owned and operated mining property in Plumas county. Defendant Bransford is sheriff of said county. Defendant Wilson is a stock-

holder in, and the managing agent and in actual control and management of, the property of defendant corporation. In 1885 one Swearingen obtained a judgment lien against the property of defendant corporation, which was sold on execution; and one Cole became the purchaser at sheriff's sale, July 18, 1896. The defendant corporation did not redeem. Plaintiff obtained a judgment lien before the time of redemption expired, and with it redeemed from the purchaser, and 60 days thereafter demanded a deed from the sheriff, which was refused, for the alleged reason that defendant Wilson was a lawful redemptioner, and had within the 60 days provided by law made redemption. Wilson's judgment lien was junior to plaintiff's. It is alleged that Wilson's judgment was obtained by fraudulent collusion between him and said sheriff, whereby the sheriff made a false return of service of summons on defendant corporation; that no service was in fact made, and said corporation had no knowledge or notice of the action commenced by Wilson, and did not appear or answer, and judgment was obtained by default, and said judgment is fraudulent and void. Plaintiff refused to accept the money tendered, and demanded a deed from the sheriff, which was refused.

The demurrer admits that defendant Wilson is seeking to enforce the rights of a redemptioner while holding a judgment which is void. Plaintiff admits that defendant Wilson paid to the sheriff money sufficient to fully redeem from plaintiff's judgment and the original judgment and all attendant costs, interests, and charges. Plaintiff's injury therefore consists, not in losing any money he has paid out, nor any of the money due on his judgment, but in losing whatever of advantage he might gain by acquiring the property of the judgment debtor.

The contention of appellant is: That the corporation debtor, by failure to redeem in time, lost all equitable title, to which plaintiff succeeded by redemption, and the corporation now holds only the naked legal title to be conveyed by the sheriff. The title being in this condition, defendant Wilson presented himself to the sheriff as a redemptioner, with a judgment regular in form, and must stand upon his strict legal rights arising from his judgment. He has no equities, nor can he urge any. That plaintiff acquired an inchoate right to the property by his redemption, and became the equitable owner, and that equity will protect him in the enjoyment of such right against a void judgment; and the judgment which gives the right to redeem must be a bona fide existing judgment. The position of respondents, briefly stated, is: That the Wilson judgment, being regular on its face, is valid as against the corporation until the latter proceeds to set it aside, and became a valid lien at its entry. If it was a fraud on the corporation, it was not such on plaintiff, as it was subordinate to his judgment. No collu-



sion is charged between Wilson and the corporation, and no rights of plaintiff have been violated. He has received all he can rightfully ask, and has shown no injury by Wilson's redemption, and no relief can be asked where no injury is shown. That Wilson's judgment was voidable, but not void; and no person not a party to the original action can be heard to call it in question in equity unless the rights of such person were injuriously affected by it at its rendition. That plaintiff does not seek to set aside Wilson's judgment, but to have it declared not to be a lien, as entitling Wilson to the right of redemption, and the attack is collateral, and not direct.

1. There is no dispute that Wilson on the face of his judgment was a redemptioner, under section 701, Code Civ. Proc., and the only question is: Can plaintiff, as a prior redemptioner, prevent Wilson from redeeming by showing that his judgment is void? Plaintiff, by his redemption from the purchaser, acquired something more than a lien by which was secured the right to be reimbursed what he had paid out, and the amount of his judgment and attendant charges. He succeeded to the rights of the purchaser, to which are to be added the rights of a redemptioner. The interest of the purchaser has been defined to be "an inchoate right, which may be perfected into a perfect title, without any further act than the execution of a deed in pursuance of a sale already made. \* \* \* The purchaser has already bought the land, and paid for it. The sale is simply a conditional one, which may be defeated by the payment of a certain sum by certain designated parties, within a limited time." Page v. Rogers, 31 Cal. 294. It was there shown that the purchaser acquires an equitable estate in the lands, and, although conditional, it may become absolute by mere lapse of time. The legal title remains in the judgment debtor, with a right to defeat the sale within the statutory time, failing in which the estate of the purchaser becomes indefeasible, and only the dry, naked title remains in the judgment debtor, which may be divested by the sheriff's deed; and during this redemption period the statute regards the purchaser as the owner in equity, and gives him the rents and profits. As a further incident of this estate, it is shown that the purchaser's interest may be attached and sold on execution both before and after the expiration of the time for redemption. *Id.* This case has been frequently cited, and the general propositions above stated were reaffirmed as late as *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120. Section 700, Code Civ. Proc., provides that, where real estate is sold by a sheriff, "the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto," subject only to redemption as the statute prescribes. In *Footman v. Wallace*, 75 Cal. 552, 17 Pac. 680, it was held that a sheriff's certificate of sale of real

property is the evidence of the equitable interest which the purchaser has in the land, and is an instrument whereby an interest or title is created, within the meaning of section 1107 of the Civil Code. See *Freem. Ex'ns*, § 323. See *Walker v. McCusker*, 71 Cal. 594, 12 Pac. 723, as to right of purchaser and redemptioner to rents, issues, and profits, under section 707, Code Civ. Proc. It seems to us very clear that the law should give to the holder of such an estate in land some appropriate proceeding by which to protect it against the operation or lien of a void judgment. "A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one." *Freem. Judgm.* § 117. The general rule is that none but the parties to a judgment can have it set aside. But this rule is not without its exceptions, and third parties—persons not nominal parties—who are necessarily affected by the judgment may be protected from its operation. *Id.* § 92.

Respondents urge with great earnestness that when plaintiff was tendered all he had paid out, and all penalties and the amount due on his judgment and interest, he had no right to ask more; and whether defendant Wilson's judgment was void or valid was of no concern to him. He was not injured, and only the judgment debtor could complain. It is true that only such strangers to the judgment as would be prejudiced thereby in some pre-existing right should be allowed to impeach the judgment. But we think the interest or estate vested in the purchaser or redemptioner, as already shown, was something more than the right to what respondents would limit him; and to permit plaintiff to be deprived of this estate by the lien of a void judgment would prejudice his pre-existing rights. Respondents claim under a judgment procured through alleged fraud,—a default judgment obtained against defendant corporation, that was never served with summons, and did not appear at the trial, and did not redeem from the sale. Plaintiff was not a party to that action, and had no opportunity to be heard in any way to impeach the validity of the judgment in that action. Unless he can do so by bill in equity, he can never have relief, but must surrender the rights acquired as a redemptioner under a valid judgment to a junior redemptioner who holds a judgment alleged to be void because the judgment debtor was not served with process, and void also because of alleged fraudulent collusion between the judgment creditor and the sheriff who made return of service. We think plaintiff's right of action comes clearly within the principles discussed by Mr. Freeman, and supported by the cases cited in his work upon Judgments, in sections 334-337. Among the cases cited is that of *Downs v. Fuller*, 2 Metc. (Mass.) 135. In that case the junior redemptioner (plaintiff) held a judgment

obtained as the judgment is alleged to have been obtained in this case, i. e. without due service of summons; but no fraud was alleged. His offer to redeem was refused, and he brought a bill in equity to enforce redemption. Defendant pleaded that plaintiff's judgment was void, and his plea was sustained, and the bill dismissed. The court said: "Although the judgment in favor of the plaintiff in the present case was not recovered by collusion with the debtor, or with any fraudulent intention, yet we think the defendant has a right to avoid it in the same manner, because he is neither party nor privy to the plaintiff's judgment, and is not entitled by the rules of law to reverse it by a writ of error. This was so decided in *Warter v. Perry*, Cro. Eliz. 199, and in *Randal's Case*, 2 Mod. 308; and the same principle is laid down in *Com. Dig. Error, D*, and in 5 *Dane*, Abr. 255. This rule of law does not appear, in any case, to have been controverted; and it seems reasonable and just that where a judgment is recovered contrary to law, and prejudicial to a third party, he should have a right to avoid it." The principle was applied in favor of a junior judgment creditor who was permitted to show that a prior sale of the premises under execution was invalid. *Clark v. Fowler*, 5 Allen, 46. See other instances cited in note to *Downs v. Fuller*, supra. *Downs v. Fuller* is cited approvingly in *Pierce v. Strickland*, 26 Me. 277, and the principle was also fully affirmed in *Caswell v. Caswell*, 28 Me. 232.

Respondents cite several cases and *Freeman on Executions* to show that the judgment debtor may confess judgment before the time of redemption has expired for the express purpose of making the judgment creditor a redemptioner. It was held in *McMillan v. Richards*, 9 Cal. 365, that a creditor of a mortgagor, obtaining a judgment after sale under foreclosure, but before the execution of the conveyance thereunder, acquired a lien on the estate entitling him to redeem. And Mr. Freeman states that it is immaterial whether the judgment is the result of contested litigation, or was confessed for the purpose of creating a right to redeem after the sale was made. *Freem. Ex'ns*, § 317. But the cases cited and the author quoted have reference to valid judgments,—judgments confessed or entered in good faith. They can have no reference to a void judgment obtained by fraud, and without the knowledge or consent of the debtor.

*People v. Doane*, 17 Cal. 476, is cited to the proposition that it is immaterial whence the money comes with which redemption is offered to be made. That may be true, but it must be tendered by a lawful redemptioner. The statute declares who alone are redemptioners. In the case cited, the board of supervisors were empowered to redeem the property of the city and county of San Francisco; and having the power to protect the property, but having no money with which

to redeem, it was held that the redemption was good, and it was immaterial who furnished the money.

Respondents further claim that the complaint is not sufficient, because it does not appear that there is any defense to Wilson's judgment on the merits; citing *Freem. Judgm.* § 486, and numerous California cases. The principles discussed in these cases relate to the rights of the parties to the action, and have no application to a case such as the present one. Respondents' contention would shut out relief where the judgment was collusive between the debtor and creditor, and had no merit whatever. It is because the judgment is in fact void, not because it might have been made valid, that the relief is afforded.

Respondents further contend that plaintiff is estopped by section 704, Code Civ. Proc. The part of the section relied upon reads: "The payment mentioned in the last two sections may be paid to the purchaser or redemptioner, or for him to the officer who made the sale." It is claimed that the sheriff is, by this section, made the agent for plaintiff, and payment to and acceptance by such sheriff (*Bransford*) of the money paid by Wilson on redemption was conclusive as against plaintiff. There is nothing in the point. The sheriff is authorized to receive the money of a redemptioner or a purchaser for a previous redemptioner; but the statute does not make the sheriff such an agent as that, by receiving the money, it would necessarily bind the purchaser or previous redemptioner to accept it.

2. It is claimed that there is a defect of parties defendant, because *Cole*, the purchaser of the property sold, was not made a party. The complaint shows that plaintiff redeemed from him. He is not a necessary party.

3. It is claimed that there is a misjoinder of parties defendant, because it does not appear from the complaint that the corporation is either a necessary or proper party. We do not at this moment see why the corporation should have been joined as a defendant, but we do not see that respondents would be injured thereby.

Respondents state in their brief that the trial judge overruled the demurrer upon the special grounds alleged, and sustained it on the general ground of insufficiency of facts. We think the court erred in sustaining the demurrer on the grounds alleged, and advise that the judgment be reversed, and the cause remanded, with leave to the defendants to answer.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with leave to defendants to answer.



122 Cal. 522

## WINCHESTER v. MABURY et al. (L. A. 376.)

(Supreme Court of California. Nov. 30, 1898.)

CORPORATIONS—MISAPPROPRIATION BY OFFICERS—  
INDIVIDUAL LIABILITY OF DIRECTORS—  
REMEDY OF CREDITORS—EQUITY.

Under Const. art. 12, § 3, providing that "the directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association during the term of office of such director or trustee," the only proper remedy of a creditor of a bank, where certain sums of money are alleged to have been misappropriated by a certain officer thereof, is a bill in equity, in which all the creditors are parties or represented, and under which there can be an accounting, after all the facts have been ascertained, as the moneys misappropriated constitute a fund for the benefit of all the creditors who have been injured by such wrongful acts.

In bank. Appeal from superior court, San Diego county.

Action by John Winchester, trustee, against Hiram Mabury and others. From a judgment for defendants on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Withington & Carter and C. H. Rippey, for appellant. S. F. Leib and W. F. McNally, for respondents.

McFARLAND, J. This is an action at law brought by the plaintiff, as assignee of some of the creditors of the Savings Bank of San Diego County, against Mabury, Howard, and Witherby, directors of said bank, for certain sums of money alleged to have been misappropriated by the defendant Bryant Howard, who was president, treasurer, etc., of the bank, for which it is alleged Mabury and Witherby were liable under the latter clause of section 3, art. 12, of the constitution of the state. That clause reads as follows: "The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association during the term of office of such director or trustee." The defendant Mabury demurred to the complaint upon various grounds. The demurrer was sustained by the court below, and judgment was rendered for defendants, and from this judgment the plaintiff appeals.

It is conceded that the alleged liability of the respondents rests entirely upon the clause of the constitution above quoted. There has never been any legislation with respect to said constitutional provision. No legislative act has been passed touching any character of action that may be brought under the provision, or defining its meaning, or referring to it in any manner whatever. Conceding, therefore, for the purposes of this case, that the clause of the constitution in question is self-executing, and requires no legislative aid in carrying it

into effect, its meaning, the parties who may take advantage of it, and the form of action by which its provisions may be enforced, are all matters of judicial construction. Whether or not the averments in the complaint constitute "misappropriations," within the meaning of the constitution, and as construed in *Fox v. Mining Co.*, 108 Cal. 422 et seq., 41 Pac. 308, need not, under our view of the case, be here determined. There are also some other questions raised by the demurrer which are not necessary to be here discussed. It is stated in the brief of appellant that the court below sustained the demurrer upon the ground that the action should be one in equity and for the benefit of all the creditors, and we think that the demurrer was properly sustained on that ground. The clause in question provides that in case of embezzlement or misappropriation the directors shall be liable "to the creditors and stockholders" for moneys embezzled or misappropriated, and the phrase "the creditors" evidently means all the creditors. For the purposes of this case, we need not consider the other phrase, "and stockholders." The moneys embezzled or misappropriated constitute a fund for the benefit of at least all the creditors who have been injured by the wrongful acts; and the only proper remedy in such a case is a bill in equity, where all the creditors are parties, or are represented, and in which there can be an accounting, and equities adjusted, after all the facts have been ascertained. The equitable principle applicable here is that, "as between creditors, equality is equity." *Cavin v. Gleason*, 105 N. Y. 262, 11 N. E. 504. The above view is amply sustained by the authorities, and the rule cited has been held to apply even under statutes imposing liabilities like those here in question, which provide that "a creditor," or "any creditor," or "any person," wronged, etc., may sue. Our attention has not been called to any statutory or constitutional provision exactly like the one here involved; but there have been many decisions under statutes of states and of congress imposing liabilities of similar character on directors and officers of corporations, and the principles declared in those decisions are equally applicable to the case at bar.

The rule above stated is declared to be law in *Mor. Priv. Corp.* § 910, and reference is there made to the case of *Hornor v. Henning*, 93 U. S. 228. The syllabus of that case, which correctly states the matter decided, is as follows: "The act of congress (16 Stat. 98) under which certain corporations are organized in the District of Columbia contains a provision that, 'if the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company.' Held: (1) That an action at law cannot be sustained by one creditor among many for the liability thus created, or for any part

of it, but that the remedy is in equity; (2) that this excess constitutes a fund for the benefit of all the creditors, so far as the condition of the company renders a resort to it necessary for the payment of its debts." In that case a demurrer had been sustained to the complaint, and Mr. Justice Miller, delivering the opinion of the court, said: "The demurrer raises the right of a single creditor, among many, of the corporation, to bring his separate action at law for his own debt, and recover a judgment for it against the trustees, though the allegations of his declaration be true." After some discussion he says: "Nor can we believe that an act intended for the benefit of the creditors generally, when the bank proves insolvent, can be justly construed in such a manner that any one creditor can appropriate the whole or any part of this liability of the trustees to his own benefit, to the possible exclusion of all or of any part of the other creditors. But such may, and probably would, often be the result, if any one creditor could sue alone while there were others unsecured. We are of opinion that the fair and reasonable construction of the act is that the trustees who assent to an increase of the indebtedness of the corporation beyond its capital stock are to be held guilty of a violation of their trust; that congress intended that, so far as this excess of indebtedness over capital stock was necessary, they should make good the debts of the creditors who had been the sufferers by their breach of trust; that this liability constitutes a fund for the benefit of all the creditors who are entitled to share in it, in proportion to the amount of their debts, so far as may be necessary to pay these debts. The remedy for this violation of duty as trustees is in its nature appropriate to a court of chancery." He further says: "In the supreme judicial court of Massachusetts, under the identical form of words which we are construing in the present case, it has been repeatedly decided that the only remedy is a suit in equity, in which all the creditors are parties, and that even in equity one creditor cannot sue alone, but must either join the other creditors, or bring his action on behalf of himself and all the others." In *Stone v. Chisolm*, 113 U. S. 302, 5 Sup. Ct. 497, it was held (we quote from the syllabus) as follows: "A suit in equity is the proper remedy, in the courts of the United States, to enforce the statutory liability of directors to a creditor of the corporation (organized under the act of legislature of South Carolina of December 10, 1869) by reason of the debts of the corporation being in excess of the capital stock. An action at law will not lie." Although the statute under review there provided that, when the officers of a company were liable, "any person to whom they are so liable may have an action against any one or more of said officers," still it was held that an action at law would not lie, but that a bill in equity was necessary, in which all creditors were made par-

ties. Mr. Justice Matthews, in delivering the opinion of the court, said that the directors liable had a right to have all the facts determined "once for all, in a proceeding which shall conclude all who have an adverse interest, and a right to participate in the benefit to result from enforcing the liability. Otherwise, the facts which constitute the basis of liability might be determined differently by juries in several actions, by which some creditors might obtain satisfaction, and others be defeated. The evident intention of the provision is that the liability shall be for the common benefit of all entitled to enforce it, according to their interest, an apportionment of which, in case there cannot be satisfaction for all, can only be made in a single proceeding, to which all interested can be made parties. The case cannot be distinguished from that of *Hornor v. Henning*, 93 U. S. 228, the reasoning and result in which we reaffirm. It is immaterial that in the present case it does not appear that there are other creditors than the plaintiffs in error. There can be but one rule for construing the section, whether the creditors be one or many. To the question certified, therefore, it must be answered that an action at law will not lie, and that the only remedy is by a suit in equity." *Bank v. Dillingham*, 147 N. Y. 603, 42 N. E. 338, is a case where the question under consideration is fully discussed, and decided as above stated. The individual liability of stockholders, and their relation to the creditors of a corporation, are not the same in the state of New York as they are here, and there is some discussion in the opinion in that case which is not relevant here, and it seems to have been held that an action to enforce the liabilities of directors guilty of misconduct could not be maintained until after the usual remedies against the corporation itself had been resorted to, and all those parts of the opinion are not in point here; but it was there held that in no event could the liability of the directors be enforced except by suit in equity. The full syllabus of that case, which shows accurately what was decided, is as follows: "The personal liability imposed by the provisions of section 24 of the stock corporation law (chapter 564, Laws 1890, as amended by chapter 688, Laws 1892), to the effect that the directors of a stock corporation creating or consenting to the creation of any debt of the corporation unsecured by mortgage, in excess of its paid-up capital stock, 'shall be personally liable therefor to the creditors of the corporation,' is secondary, and can be resorted to only after the usual remedies against the corporation itself have been exhausted, and then can be enforced only by a suit in equity, where all the creditors and the corporation itself are parties or represented, where an accounting can be had, all the facts ascertained, and equities adjusted." See, also, *Shoe Co. v. Thompson* (Tex. Sup.) 35 S. W. 473; *Bank v. Stevenson*, 10 Gray, 232. The fact that the lan-



guage to be construed here is a part of the constitution of the state, and not a statutory provision, makes no difference. The rules of construction by which the meaning of the language is to be ascertained, and the rights and remedies which grow out of it, are the same, no matter where the language to be construed is found. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.; HENSHAW, J.

6 Cal. Unrep. 183

PORTER v. LASSEN COUNTY LAND & CATTLE CO. et al. (Sac. 459.)

(Supreme Court of California. Dec. 8, 1898.)

APPEAL—NECESSARY PARTIES.

A defendant, who held a second mortgage, conditioned that, if the first mortgage was foreclosed, his mortgage should not be foreclosed, by cross complaint or otherwise, and who answered a foreclosure action, praying the application of surplus, if any, to his mortgage debt, and who was by the decree adjudged to hold a second mortgage, on which a certain amount of money was due, is a necessary adverse party, on whom notice must have been served of an appeal from such decree, though it merely directed the payment of the surplus into court to await a further order.

Department 2. Appeal from superior court, Lassen county.

Action by Benjamin F. Porter against the Lassen County Land & Cattle Company and others. There was a decree for plaintiff, and defendant cattle company appealed. Dismissed.

Spencer & Raker, for appellant. A. E. Bolton, for respondent.

PER CURIAM. This is an appeal by the defendant the Lassen County Land & Cattle Company from an order of the court below denying its motion for a new trial. With the final submission of the case here there was also submitted a motion by the respondent to dismiss the appeal upon the ground that the defendant George K. Porter was not served with notice of appeal. In our opinion, the motion to dismiss the appeal should be granted. The action was brought by the plaintiff, B. F. Porter, to foreclose a mortgage executed to him by the corporation defendant on the 28th day of January, 1893. The said George K. Porter was made a party defendant; it being averred in the complaint that he claimed some interest in the lands and premises mortgaged, which, it was alleged, was subsequent and subordinate to the mortgage of plaintiff. George K. Porter filed an answer, in which, after denying certain averments of the complaint as to the nonpayment of certain amounts due on plaintiff's mortgage, he averred that subsequent to the date of plaintiff's mortgage, to wit, on January 22, 1894, the

said corporation defendant executed to him a mortgage upon the property described in the complaint, as well as upon certain other property, to secure the sum of \$16,061.50. This mortgage was set out in full in his answer, and it provided that, in the event of a suit brought by plaintiff to foreclose his mortgage, George K. Porter should not ask to have his mortgage foreclosed, by cross complaint or otherwise, and that he should not ask to have his mortgage foreclosed, except in a separate action brought by him. He averred in his answer that no part of the principal or interest of his mortgage had been paid, and prayed "that the proceeds of sale of the mortgaged premises over and above the amount found due to the plaintiff be applied to the payment of the amount found due to this defendant, and that he have such other and further relief as may be meet in the premises." The court found that a mortgage had been executed by the corporation to George K. Porter, as averred in his answer, to secure the said sum of \$16,061.50, and that no part of the principal or interest thereof had been paid. It was further found and decreed that any balance that should remain after paying the amount due on plaintiff's mortgage, with costs, expenses of sale, etc., should be "paid into court to await the further order and judgment of said court." Appellant's notice of appeal was not addressed to, or served upon, the said George K. Porter. George K. Porter was an adverse party, upon whom the notice of appeal should have been served, within the rule declared by numerous decisions of this court. In *re Castle Dome Mining & Smelting Co.*, 79 Cal. 246, 21 Pac. 746, and cases there cited; *Harper v. Hildreth*, 99 Cal. 265, 33 Pac. 1103; *Lancaster v. Maxwell*, 103 Cal. 67, 36 Pac. 951; *Society v. Lewis*, 111 Cal. 519, 44 Pac. 175. It was adjudged that he held a subsequent mortgage on the premises described in the complaint, and that a certain amount of money was due thereon; and, under the decision, he was entitled to have any surplus of the proceeds of the sale, over and above that necessary to satisfy the plaintiff's judgment, applied on his mortgage. He seemed to have been satisfied with the judgment, as he did not appeal from it, and he was interested in having his rights under the judgment maintained. A reversal would have altered his position, and left him without his right to said surplus. He was a second mortgagee, with certain rights secured to him by the judgment. His position of advantage as to the surplus was not affected by the fact that the court in its decree did not expressly declare that he was entitled to the surplus. The surplus was ordered to be paid into court, "to await the further order and judgment" of the court, and he was entitled to have the surplus under such further order and judgment. He was, therefore, an adverse party, upon whom it was necessary to serve the notice of appeal in order to give this court jurisdiction thereof. The appeal is dismissed.

122 Cal. 583

PEOPLE v. WORTHINGTON. (Cr. 474.)

(Supreme Court of California. Dec. 8, 1898.)

MURDER—EVIDENCE—MANSLAUGHTER—INSTRUCTIONS—MENTAL CONDITION—ANIMUS OF WITNESS.

1. Shortly prior to the killing, accused had a fight with deceased and his son, during which accused threatened to get his gun. Being separated, accused went to the house, and, on seeing a man coming towards it, procured a gun and extra shells, and awaited the arrival of the man, who turned out to be deceased. An altercation arose, and, when a distance of several paces divided them, accused told deceased to come no nearer, which command being unheeded, he shot him. *Held*, that a verdict of murder would not be disturbed, since the question whether the two affrays were separate and distinct encounters was for the jury.

2. A homicide is not manslaughter because defendant had shortly prior thereto become incapable of acting with deliberation and premeditation, by reason of injuries inflicted on him, unless they were caused by the unlawful act of deceased.

3. An instruction that if, at the time of the homicide, accused was suffering from injuries, so as to be in a dazed condition of mind, impairing his faculties, that must be considered in determining whether he was guilty of murder or of any criminal offense, and that no one is guilty of murder unless at the time of committing the act he is able to act deliberately, sufficiently submits the issue of the effect on accused's mind of injuries inflicted on him by deceased shortly before the homicide.

4. Where accused testified that immediately following a fight with deceased, after which he had gone into the house, he saw a man coming towards it; that he knew the man was coming after him, and then he got his gun, and, after having repeatedly warned him to keep away, shot him while he was approaching and threatening to kill accused,—the issue of accused's irresponsibility by reason of injuries inflicted on him shortly prior thereto need not be submitted.

5. Where the homicide was committed shortly after a fight between accused and deceased, which had terminated, and during which deceased used no deadly weapon, the question who was the aggressor in such fight is immaterial.

6. In a prosecution for homicide, a witness' animus is sufficiently established by showing that he is a son of deceased, and that he was an active participant in behalf of his father in a fight between the parties shortly preceding the homicide.

Department 1. Appeal from superior court, Fresno county.

Charles Worthington was convicted of murder, and from the judgment of conviction, and from an order denying a new trial, he appeals. Affirmed.

F. H. Short and N. C. Coldwell, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. Defendant has been convicted of the crime of murder in the first degree, and sentenced to imprisonment for life. His counsel now strenuously contend that the evidence, at most, only shows a case of manslaughter. The facts surrounding the homicide are few, and it can hardly be said that a substantial conflict is disclosed by the evidence upon any important matter. The defendant, Worthington, the deceased, Mot-

ley, and Capt. Motley, his son, all worked upon a ranch. In its general features the trouble may be pictured by the following statement: In the early morning, angry words arose between the deceased and the defendant, and they engaged in a scuffle. Thereupon, possibly at the suggestion of the deceased, his son injected himself into the altercation, and struck the defendant a violent blow upon the head with a heavy stick. Thereafter the defendant struck deceased with a stick, and the parties were then separated. Defendant at this time threatened to go to the house and get his gun. The deceased and his son turned towards the barn, and defendant proceeded to the house, a distance of 413 feet. Almost upon his arrival at the house, he saw a man coming from the direction of the barn. He thereupon secured from the Japanese cook a loaded shotgun and some extra shells, which he placed in his pocket, and, standing upon the porch, awaited the arrival of the man, who at this time was disclosed to be the deceased. When a distance of several paces still divided them, angry words arose, the defendant testifying to the effect that he "ordered the deceased to come no nearer, but deceased gave the command no heed, whereupon he fired both barrels of the gun, inflicting mortal wounds." The deceased was unarmed.

If this lamentable occurrence from beginning to end may be said to comprise but a single broil or affray, then the killing by the defendant of the deceased may well have been declared by the jury to have constituted the crime of manslaughter; but, if the immediate affray resulting in the death of the deceased may be considered as a separate and distinct encounter,—and this was a pure question of fact for the jury,—then, clearly, this court cannot say in law that the killing was not murder. The first trouble may well have filled the heart of the defendant with malice,—a malice that satisfied itself only with Motley's death. The deceased was not armed when killed. He was several paces distant, standing upon the ground. The defendant was upon the porch, at an elevation of several feet, with his gun loaded and ready, and extra ammunition at hand. It was an open question, also, whether deceased came to the house in pursuit of defendant. Again, before going to the house, defendant had threatened to use his gun. Under all these circumstances, we are not prepared to say that the evidence is too weak to support a verdict of murder. In *People v. Bruggy*, 93 Cal. 476, 29 Pac. 26, the question here presented is fully discussed, and the conclusion now declared is in direct line with the views of the court as embodied in that decision.

There was no claim made at the trial that defendant was insane, but a great number of instructions—entirely too many under any conceivable state of facts—were asked by defendant to be given to the jury bearing



upon the condition of defendant's mind, viewed in the light of the blow upon his head administered by the son of the deceased. There is some evidence that this blow was given by the son at the request of his father, and for that reason it may be conceded that the case as to this branch of it stands exactly as though the blow had been given by the deceased himself. For present purposes, it may also be conceded that the blow was unjustified by the law. Upon close inspection, we find these instructions differ more in form than in substance. They were refused, and, as illustrative of the general principle attempted to be covered by them, we cite the following: "If you believe, gentlemen of the jury, from the evidence, that in the same combat in which the fatal shot was fired, or immediately prior thereto, the defendant received at the hands of the deceased, or his son acting by his direction, such injuries as produced in him a dazed condition of mind, impairing his reasoning faculties, judgment, and powers of perception, and that, after receiving such injury, the defendant in good faith abandoned such struggle, and notified the deceased of his so doing, and thereafter the deceased followed the defendant, and used towards him threatening and abusive language, and advanced upon him, and that at that time the defendant was in a dazed condition of mind, and his faculties, judgment, and powers of perception were impaired by reason of having just before received such injury, and that he (the defendant) was not at that time capable of acting with deliberation, premeditation, and clearness, but was dazed and uncertain and apprehensive of mind, by reason of said blow, and his condition resulting therefrom under such state of facts,—if you find the same to be the facts from the evidence in this case,—you cannot find the defendant guilty of murder, but must find him not guilty of murder."

It is attempted by the aforesaid instructions, illustrated by the one quoted, to raise the novel proposition of law discussed at length in the case of *People v. Button*, 106 Cal. 628, 39 Pac. 1073; but, in passing, it might be well suggested that the principle discussed in that case may almost be said to be a new departure or a new principle in criminal law. The facts of the two cases are entirely different in this: that in the *Button Case* the deceased had received the blow upon the head, while here the defendant received the blow. And, if we should consider a second application of the principle upon a different state of facts, we would be groping to some extent in unknown seas. In the application of the principle contended for by defendant's counsel, this variance in the facts of the two cases may not be material, and the principle of law may be equally invokable in both. Yet in the present case we will not enter into a discussion of that matter, for the record does not squarely present the question. This is ap-

parent from the reasons hereinafter stated.

As an incidental objection to this class of instructions, we find in substantially all of them inherent defects, some of these defects appearing in one, others appearing in another. For example, in the instruction quoted, a vital element is omitted, the presence of which element is absolutely necessary in order that the principle contended for might be presented. This defect is found in the fact that the unlawfulness of the blow inflicted by the deceased or his son upon defendant's head is a material element; yet the instruction makes no mention of it. If the blow was justified in law, then the fact that it was received at the hands of deceased or his son is wholly immaterial, and the case under such circumstances would stand exactly as though it were administered by a stranger. Conceding defendant was in a dazed condition of mind, if such condition was not caused by the unlawful act of the deceased, then, surely, the defendant may not be held guiltless of murder of the second degree, at least. Voluntary intoxication may prove such a condition of mind; yet a defendant is not guiltless of crime for that reason. If this condition of mind is not produced by the deceased, and does not amount to insanity, then the defendant may not be acquitted of the crime of murder for such reason.

Presumably in the exercise of extreme caution, the trial court gave the jury the two following instructions, bearing generally upon the proposition under discussion, and, if instructions were demanded, they fairly and sufficiently cover the ground: "If you believe from the evidence that, at the time of the killing, the defendant was in pain and suffering from a painful injury inflicted upon his head a few minutes before by a blow received from a heavy club, sufficient to produce a dazed condition of mind, and impairing the reasoning faculties, judgment, and powers of perception of the defendant, then you should take such condition of the facts and circumstances into consideration in determining whether the defendant was guilty of murder or any criminal offense at the time he fired the shot resulting in the death of the deceased." "No person can be found guilty of the crime of murder unless he is at the time in such a condition of mind that he is able to act with deliberation and premeditation; and, if you find from the evidence that the defendant at the time of the killing was not in such a condition of mind, you cannot find him, the defendant, guilty of murder, but must acquit him of that offense." In view of the giving of the instructions just quoted, the court was justified in declining to go to greater depths in the matter of further instructions to the jury upon this question of the condition of defendant's mind at the time of the killing. This is so for the additional reason that the evidence does not justify it. While the doctors testified to the nature of

the wound upon defendant's head, and gave their opinions as to the possible temporary results following to him in the nature of concussion, etc., from such wound, yet defendant's own evidence shows that he was in no such dazed condition of mind as is pictured for him by the instructions refused. Let us look at his mind in the light of his account of the killing, commencing at his arrival at the house. We quote: "I seen a man coming from the barn. I couldn't tell exactly who it was at that time. I knew it was one of the men coming after me, because I knew they had not done their work, and they had no other business at the house. So, I rushed to the door, and told Ben, the cook, to get me the gun. Ben came and got the gun for me as quick as he could, and I walked out on the porch; and Mr. Motley was coming then six or seven feet, I suppose, from the porch, and he says: 'Get off this ranch, you damned son of a bitch, or I will kill you.' I says: 'Stop, Motley, stop. I don't want any more trouble. I am hurt. I can't stand any more of this.' He says: 'Yes, damn you, if you don't get off this ranch, I will kill you.' I told him to stop, and, when I told him to stop the second time, he says: 'You go, damn you. I will make you stop.' And he was right on the second step there, and I told him to stop again, and he kept coming right along, and I shot the first time, and says, 'Stop now!' He kept coming right along, and I shot again, and the last time I shot he says, 'Oh, you have shot me,' or 'You have killed me,'—I don't recollect. He rushed on into the kitchen. That was the last I saw of him for a while, and I went over into the hall, and was trying to reload the gun. I asked the Jap to unbreech the gun for me. He took the gun, and gave it back to me, and said he need not unbreech it. When I saw Mr. Motley coming towards the house, I looked at him, and could see his left hand. I couldn't see his other hand. He had his right hand in his coat pocket,—arm up like that. I looked as carefully as I could. I looked close. I couldn't see whether he had any weapon or not; but I supposed from his action and the way he was coming that he surely did have, or he wouldn't be coming at me in that manner. When I came out on the porch with the gun, I supposed that the man certainly would stop if he didn't aim to kill me; and I intended to bluff him if I could, and stop him. That was my intention. I supposed when I ordered him to stop, and he saw I had a gun, that he would stop. When I shot, I believed that I had to, or that he would come right along and assault me. I supposed from his actions that he intended to do violence." We are quite clear, upon this state of the evidence, the court was justified in refusing the instructions asked.

There is no merit in the exception taken to the rulings of the court upon the cross-examination of young Motley. As to that portion of the cross-examination tending to show who

was the first aggressor, it is sufficient to say no deadly weapons were used by the deceased in the first altercation, and under such circumstances it is immaterial as to who in fact began it. As showing the bias, prejudice, and animus of the witness Motley, it may be suggested that he was a most active participant in the first fight, and also a son of the dead man. Under such circumstances, his animus, interest, and bias in giving his testimony was sufficiently established. For the foregoing reasons, the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

122 Cal. 471

RAYMOND v. GLOVER et al. (L. A. 344.)

(Supreme Court of California. Nov. 29, 1898.)

PURCHASE OF MORTGAGE—NOTICE—HARMLESS ERROR—EXCEPTIONS TO EVIDENCE.

1. The owner of land sold it through an agent, who fraudulently inserted his own name as payee in the note given for the price and as mortgagee in the mortgage to secure its payment, and borrowed money from a bank thereon. There was evidence that when the loan was made the deed from the owner to the purchaser was of record; that the transfer was made about a month before the loan was made; that the agent told the bank that he sold the property as the owner's agent, and the mortgage was made payable to him in settlement of accounts between himself and the owner, and also told the cashier of the bank, while inspecting the property, that he purchased the mortgage of the owner. *Held*, that there was evidence to sustain a finding that the bank was put upon inquiry, and took the mortgage with notice of the owner's equities.

2. The opinion of a nonprofessional witness as to whether two people were within hearing distance of each other is inadmissible, but, having stated that they were sitting together in a carriage, its admission is harmless error.

3. An exception to the admission of evidence need not be taken until the court finally rules upon its admission.

4. An exception to the admission of evidence should be ruled on in time to allow the admission of other evidence.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by Ellen D. Raymond against George W. Glover and others. From a judgment for plaintiff, defendant German-American Savings Bank appeals. Reversed.

Walter Bordwell and J. S. Chapman, for appellant. Lee & Scott, for respondent.

SEARLS, C. This action was brought by Ellen D. Raymond, the plaintiff, to procure a decree that the defendant the German-American Savings Bank holds a certain note and mortgage as the trustee of the said plaintiff, or that in lieu thereof she be decreed to have a vendor's lien upon the land covered by said mortgage. Plaintiff had a decree in her favor, from which defendant the German-American Savings Bank appeal-



ed to this court, where such proceedings were had that the cause was finally remanded, with directions to the court below to find whether or not the defendant bank took the note as security without notice of the facts showing the equities in favor of the plaintiff; such fact to be determined from the evidence already taken, with such further evidence as might be adduced, etc. 37 Pac. 772, 918. Upon the return of the cause to the superior court additional evidence was taken, whereupon it was found as follows: "The defendant German-American Savings Bank, at and before the time of the assignment by defendant George Munroe to it of the note and mortgage from defendants George W. Glover and Sarah J. Glover to said Munroe, mentioned in the pleadings and original findings herein, and at and before the time of the payment by said defendant bank to said defendant Munroe of any part of the money loaned by said bank to said Munroe on the security of said note and mortgage, had notice that the plaintiff, Ellen D. Raymond, had sold the land described in the complaint to said defendants Glover and wife, and that there was, at the time of said assignment, owing and unpaid to plaintiff from said defendants Glover and wife, on account of the balance of the purchase price of said property on said sale, the sum of thirteen hundred dollars, with interest from the 11th day of February, 1892; and the court finds that said defendant German-American Savings Bank took the assignment of said note and mortgage with notice of the facts showing the equities of plaintiff in the premises, as alleged in her complaint." And judgment was entered in favor of the plaintiff. The defendant bank again appeals from the judgment, and supports its appeal by a bill of exceptions. By stipulation, the record on the first appeal to this court (except the bill of exceptions contained therein) is made a part of the record here. A synopsis of the facts as found in such record may be stated thus:

Ellen D. Raymond, the plaintiff, a resident of the state of Massachusetts, was the owner of a tract of say 10 acres of land, situate in the county of Los Angeles, state of California. About July, 1892, plaintiff contracted with defendants George W. Glover and Sarah J. Glover to sell to them said 10-acre tract of land for \$1,800, to be paid for as follows: \$500 cash, and \$1,300 by note, payable in three years, with interest at 9 per cent. per annum, to be secured by a mortgage on the premises executed by Glover and wife to the said plaintiff. The defendant George Munroe was the agent at Los Angeles of plaintiff, and conducted the negotiations leading up to the sale. Under date of January 11, 1892, plaintiff executed a deed to Glover and wife of the land in question, which was duly acknowledged January 22, 1892, and forwarded to Munroe, with instructions to deliver the same to Glover and wife upon the ex-

ecution to her of the note and mortgage aforesaid. Munroe, without authority, fraudulently inserted his own name as payee of the note and as mortgagee in the mortgage, and Glover and wife, being deceived by Munroe, and supposing the papers ran to plaintiff, signed the same without reading them, and paid the \$500 in cash. The date of the note and mortgage is February 11, 1892. About February 22, 1892, Munroe presented the note and mortgage to the appellant bank, and applied for a loan of \$1,000, offering said note and mortgage as collateral security for the payment thereof. The offer was accepted, the money loaned to him, and the note and mortgage taken as such security. Upon this state of the case the question is, was the evidence at the second trial sufficient to uphold the finding of the court that the defendant "German-American Savings Bank took the assignment of said note and mortgage with notice of the facts showing the equities of plaintiff"? Appellant attacks this finding as being unsupported by evidence.

(1) The deed from plaintiff to the Glovers was of record, and imparted constructive notice to the appellant that plaintiff had conveyed the property to said Glovers.

(2) Munroe, when applying to appellant for a loan, produced to it a certificate of title to the mortgaged premises, showing, among other things, that on February 15, 1892, the plaintiff was the owner of the premises, and that on the 16th day of the same month the defendants Glover and wife held the title thereto, and that on February 23d it was still vested in the latter.

(3) Munroe, the agent of the plaintiff, in his deposition, testifies that he informed the bank he was the agent of plaintiff in selling the property to Glover and wife, and that the mortgage offered as security was for the unpaid balance of the purchase money, and was made payable to him (the witness) in settlement of accounts between him and the plaintiff.

(4) U. S. Glover and G. E. Glover, sons of defendant George W. Glover, testified in substance, that Munroe and Moses N. Avery, agent and cashier of the defendant bank, visited the mortgaged land, where it was stated that the bank was about to loan Munroe money on the mortgage, and that Munroe then said, while sitting in a buggy with Avery, that he (Munroe) had purchased the mortgage of Mrs. Raymond, the plaintiff.

We think this evidence taken together was sufficient, if believed by the court, to warrant it in finding that the defendant bank was put upon inquiry, and, having failed to probe the facts, was, as a matter of fact, to be deemed as taking the mortgage with notice. In other words, that there was such a substantial conflict in the evidence as to preclude us from disturbing the finding of the court that appellant took the mortgage with notice of the equities in favor of plain-

tiff. The court below was the judge of the credit to be given to the several witnesses, and we cannot disturb its conclusions in the premises except in cases of patent error. At the last trial of the cause counsel for plaintiff, for the purpose apparently of proving that Mr. Avery, the cashier of the defendant bank, heard the declaration of Munroe that he had purchased the note and mortgage from the plaintiff, asked of his witness U. S. Glover, "Where was Mr. Avery at the time that Mr. Munroe made that statement to your father?" Counsel for the defendant bank (appellant) objected to the question upon the ground that on the former trial there had been a finding upon that question, and that it was incompetent to again go into the matter. We may here state that the finding of the court on the first trial was that the declaration in question was made by Munroe without the hearing of Avery. The court admitted the evidence, reserving its ruling as to its admissibility, and, so far as appears from the record, failed to decide the question. The witness answered that "Avery was with Munroe in the—" when counsel for plaintiff said, "And he was within hearing of the remark made by Mr. Munroe?" Counsel for the bank objected, which objection was overruled and an exception noted. The witness answered, "Yes, sir." The witness then stated, in answer to other questions, that at the time Munroe made the statement that he had purchased the note and mortgage he and Avery were sitting side by side in the buggy, and that witness and his brother and father were standing beside the buggy. The brother and father testified to like effect, the brother adding that Mr. Avery "was listening to the conversation."

Nonprofessional witnesses are allowed to express opinions based on facts within their personal observation, when the facts cannot be so described as to enable another to draw any intelligent conclusion therefrom. Under such circumstances, opinions, it is said, must be received in evidence from the necessities of the situation. Examples of this kind are cases in which the identity of a person, his apparent age, appearance, whether intoxicated or sober, angry or not, or sad, or nervous, etc., become important. Also in matters of size, color, weight, and quantity; in estimates of time and distance; in questions of value, etc. *Rog. Exp. Test.* pp. 10-13. But the opinions of a witness are not admissible where the jury, or the court acting as such, are equally capable with the witness of forming an opinion from the facts stated. *Id.* p. 13, and cases there cited. In the case at bar the opinion of the witness was not asked as to whether Avery did in fact hear what was said, but whether said Avery was within such distance that he might have heard. The evidence of other witnesses showed that Avery and Munroe were sitting side by side in a buggy beside which the witnesses stood, and the witness was permitted without objection

to testify that he (the witness) heard what was said, and that Avery seemed to be giving attention to the conversation. We think the evidence comes within the rule as above stated, but at all events, under the circumstances, the ruling was not injurious to appellant.

The more important error alleged by appellant relates to the failure of the court to pass upon the question of the admissibility of the evidence which was taken subject to a subsequent ruling as to such admissibility. Respondent contends that no exception was taken to the testimony on the part of appellant, and hence it is not in a position to avail itself of the error, if any there was. The manifest answer to this objection is that appellant never had an opportunity to except. An exception is an objection upon a matter of law to a decision, and must be taken when the decision is made, except as provided in sections 646, 647, Code Civ. Proc. As no decision was ever made by the court, appellant had no opportunity to except. The error of the court consisted in failing to decide the reserved question at all. The bill of exceptions containing the errors assigned shows that this is the gist of error assigned. From the adjudicated cases in this state, including *Sharp v. Lumley*, 34 Cal., at page 614, *Mayo v. Mazeaux*, 38 Cal., at page 445, and *Martin v. Lloyd*, 94 Cal. 204, 29 Pac. 491, it may readily be seen that this court has repeatedly discouraged the practice of deferring rulings upon the admissibility of proffered evidence, but that to do so is not necessarily erroneous. When, however, the practice is indulged in, the ruling should be made at such time and under circumstances allowing the party against whom the ruling is had to supply other testimony, if that proffered and taken is rejected, provided he desires and can do so, and, if the testimony is admitted, that the party deeming himself aggrieved thereby may rebut the same if in his power so to do; non constat, but that in the present case appellant, if advised by a decision of the court admitting the evidence, might have rebutted such evidence by showing, as it must have done on the former trial, that the declarations of Munroe were made without the hearing of Avery, its cashier and agent. At all events, it was error to not decide the question. For this error we recommend that the judgment be reversed and the cause remanded, with directions to find whether or not the bank took the note as security without notice of the facts showing the equities in favor of the plaintiff. This fact may be found upon the evidence already taken, with such further evidence upon that subject as the parties may see fit to submit. If the court finds that the appellant took the note as security without notice of the facts showing such equities, judgment should be rendered giving to the appellant a first lien upon the property for the amount of its claim, and to the plaintiff a second lien thereon to the



extent of \$1,300 and interest, as provided in the contract of sale.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions as above stated.

122 Cal. 517

HINES et al. v. MILLER et al. (Sac. 409.)  
READER et al. v. SAME.

(Supreme Court of California. Nov. 30, 1898.)

MINES—MECHANIC'S LIEN—JUDICIAL NOTICE.

1. Code Civ. Proc. § 1192, providing for a lien on property for labor done thereon with knowledge of the owner, does not necessitate a notice to the owner, where the labor was done at the request of one in charge of the work, and who was believed by those performing the labor to be the agent of the owners.

2. Under Code Civ. Proc. § 1875, providing that courts will take judicial notice of "the true significance of all English words and phrases and of all legal expressions," courts will take notice that the terms "shafts, tunnels, levels, chutes, stopes, uprisers, crosscuts, and inclines," as applied to mines, are instrumentalities by which mines are opened, developed, prospected, improved, and worked.

3. One who performs labor on a mining shaft, tunnel, level, chute, stope, uprise, crosscut, or incline is entitled to a mechanic's lien on the mine for such services.

4. The owners of a mine contracted to sell it on time, and authorized the purchasers "to enter into immediate possession," "and proceed to work and develop the same in such manner as may be deemed most expedient and advisable"; and one-fourth of the gross product of the mine was to be paid on the purchase price. Held, that the owners had sufficient notice of improvements on the mine by the purchasers to entitle those who performed the labor to a mechanic's lien.

Commissioners' decision. Department 2. Appeal from superior court, Tuolumne county.

Action by William Hines and others against Frank Miller and others, and by H. G. Reader and others against Frank Miller and others. The actions were consolidated, and from judgments for plaintiffs defendants appeal. Affirmed.

E. A. Rogers and F. W. Street, for appellants. F. P. Otis, for respondents.

SEARLS, C. Two actions to foreclose mechanics' liens upon the Pampa Hill quartz mine, situated in the county of Tuolumne. The actions were consolidated, the cause tried by the court sitting without a jury, and written findings filed, upon which judgment of foreclosure was rendered in favor of the plaintiffs. Defendants appeal from the judgment, and from an order denying their motion for a new trial.

Appellants interposed a demurrer to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was properly overruled. The precise objection to the complaint is that it shows that certain of the defendants (the appel-

lants here) were the owners of the mining claim, and that it fails to show that they had notice of the performance of the labor performed thereon by plaintiffs, while it was being so performed, as provided by section 1192, Code Civ. Proc. The response to this contention is that the complaint does not show that the labor was performed for any person or persons other than the owners. It avers that the several plaintiffs performed the labor at the special instance and request of one William Moorehead, who was in charge of and superintending the work, and who was, as they are informed and believe, during said time, "the agent of defendants in the working of said claim." If this was true, the doctrine of notice to the defendants required in cases where the improvements are made by others than the owners had no application. There are several causes of action set out by the several plaintiffs in each of the cases, but, as they are all precisely alike in the respect noticed, what is said of one applies equally to all.

2. The contention that plaintiffs failed to show that the labor which they performed entitled them to a lien upon the mine cannot be maintained. The allegations of the complaint are (and the evidence sustains them) that the several plaintiffs performed labor as miners in sinking a shaft on that certain mining claim, describing it as a "quartz mining claim." Section 1875 of the Code of Civil Procedure provides that courts will take judicial notice of certain things, among which are "the true significance of all English words and phrases, and of all legal expressions." The true meaning of such expressions as shafts, tunnels, levels, chutes, stopes, uprisers, crosscuts, inclines, etc., when applied to mines, signifies instrumentalities whereby and through which such mines are opened, developed, prospected, improved, and worked. *Helm v. Chapman*, 66 Cal. 291, 5 Pac. 352; *Silvester v. Mine Co.*, 80 Cal. 512, 22 Pac. 217. He who engages in the construction of those prime requisites upon or in a mine is engaged in mining, equally with one who extracts the gravel or ore therefrom. It follows that there was no error in this respect in the findings or conclusion of law deduced therefrom.

3. The third and fourth assignments of errors may be considered together. The third avers a want of evidence to support a finding that certain of the defendants (lessees of a mine) were working the mining claim "under a written agreement so to do with the owners thereof." The fourth assignment of error is based upon an alleged want of evidence to support a finding that the labor of the lienholders "was performed with full knowledge of all of said defendants," among whom were the owners of the mining claims. The answer of the defendants, Frank Miller, R. B. Lane, Andrew Sweetzer, and Ellen Staples, who are the appellants here, sets up, and the evidence shows, that they were the owners of the mining claim known and designated as the "Pampa Hill Quartz Mine";

that on the 28th day of August, 1895, they entered into a written agreement with H. S. Brown, whereby they agreed to sell and convey said mine to the latter for \$7,000, to be paid in installments between that date and on or before June 1, 1896. The agreement contains the following clause: "And the said above-named Frank Miller, R. B. Lane, Andrew Sweetzer, and Ellen E. Staples, owners of said Pampa Hill gold quartz mine, hereby grant permission unto the said H. S. Brown, or to his heirs, associates, or assigns, to enter into the immediate possession of said Pampa Hill mine, and proceed to work and develop the same in such manner as may be deemed most expedient or advisable, either by sinking shafts, running tunnels, or otherwise, and granting permission to remove and mill, or mill upon the premises, all ore extracted from said mine during the life of this agreement," etc. The agreement then provides that one-fourth of the gross product taken from the mine shall be paid to the owners, and applied as a partial payment on the purchase price. E. W. Roberts and W. H. H. Hart became equally interested in the contract with H. S. Brown, and they caused the shaft to be sunk on the mine, for which the liens were taken by the laborers thereon; one William Moorehead acting as superintendent under them, and employing the lienholders. The lessees (so called) and superintendent were made parties defendant, duly served with process, and made default. The foregoing quotation constituted the only notice to appellants of the prosecution of the work, and there was no proof that they gave the notice provided for in section 1192 of the Code of Civil Procedure. Under that section every building or improvement constructed upon any lands with the knowledge of the owner shall be held to have been constructed at the instance of such owner, and his interest is subject to a lien, unless he shall, within three days after he shall have obtained knowledge of the construction, etc., or the intended construction, etc., give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place on the premises. Was the evidence offered by the agreement sufficient to authorize the finding that appellants had notice? In *Evans v. Judson*, 120 Cal. 283, 52 Pac. 585, Judson held a lease from the owner, which provided that the lessee might remove all improvements made by him on the premises, unless the same should be so incorporated with existing structures that removal would leave the latter in worse condition than at the date of the lease, in which case the added improvements were to become the property of the lessor. Judson made improvements, for the construction of which liens were filed. The court below found that the owners had knowledge at the date of the lease of the contemplated improvements by Judson, the lessee, and that the lessor had no other or further notice or

knowledge of the said intended improvements until after the liens were filed. The lessor posted no notice disclaiming responsibility.

On appeal this court held that the lease being a short one (six months), and the lessor being entitled thereunder, in a contingency, to the benefit of the improvements, and being a party thus interested, it had notice of circumstances sufficient to put a prudent man on inquiry as to the improvements which followed shortly thereafter, and was charged with knowledge thereof, etc.,—citing *Civ. Code*, § 19; *Moore v. Jackson*, 49 Cal. 109; *Gould v. Wise*, 18 Nev. 253, 3 Pac. 30; *Mill Co. v. Hege*, 119 Cal. 376, 51 Pac. 555. The validity of the liens against the lessor was upheld. In *Mill Co. v. Hege*, 119 Cal. 376, 51 Pac. 555, Hege, being the owner of a lot of land in the town of Santa Monica, upon which there was a dwelling house, verbally leased the same to one Naumann. Subsequently, Naumann, being in possession, obtained leave from his lessor to construct certain additions to the building, in the construction of which he purchased certain materials from the plaintiff, for the price of which a lien was taken. A judgment of foreclosure having been entered against the lessor, an appeal was taken to this court. It was here held "that the building was constructed with the knowledge of the appellant, and that his failure to give the notice required by section 1192, Code Civ. Proc., rendered his interest in the land subject to the lien." See, also, *Mill Co. v. Hege* (Cal.) 48 Pac. 69. We think those cases are, in principle, on all fours with the case at bar. Here the agreement specially authorized, among other improvements on the mining claim, the sinking of a shaft. The lessors were to receive 25 per cent. of the gross output of the mine, and to that extent were interested therein. It is quite apparent that the appellants contemplated the working of the mine, and the making of such improvements was essential thereto. Having so consented, they must be deemed to have had notice of the contemplated improvements; and, having failed to disclaim liability by giving the notice as required by section 1192, the findings and judgment are correct, and we recommend that the judgment and order appealed from be affirmed.

We concur: BRITT, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

122 Cal. 606

PEOPLE v. BOO DOO HONG. (Cr. 420.)  
(Supreme Court of California. Dec. 8, 1898.)

PHYSICIANS—LICENSE—BURDEN.

In a prosecution for illegally practicing medicine, the burden is on accused to show that



he had a license to practice as required by law, since it is a matter peculiarly within his own knowledge.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county.

Boo Doo Hong was convicted of practicing medicine without a license, and, from the judgment and an order denying a new trial, he appeals. Affirmed.

J. T. Matlock, for appellant. Atty. Gen. Fitzgerald, for the People.

**BELCHER, C.** The defendant was charged by information, filed in the superior court of Tehama county, with the crime of willfully and unlawfully practicing medicine in the state of California, without having first procured a certificate to so practice as required by law. He demurred to the information, and, his demurrer being overruled, then pleaded not guilty. He was subsequently tried, and found guilty of the offense charged; and judgment was entered that he pay a fine of \$350, etc. From that judgment and an order denying his motion for a new trial, he has appealed.

The demurrer was properly overruled. The facts stated in the information were sufficient to constitute a public offense, and it was not necessary to allege the existence of the medical societies referred to. *People v. O'Leary*, 77 Cal. 30, 18 Pac. 856. At the trial, uncontradicted evidence was introduced by the prosecution sufficiently showing that, for several months prior to the filing of the information, defendant had been practicing medicine at Red Bluff, in the county of Tehama. *People v. Lee Wah*, 71 Cal. 80, 11 Pac. 851. But no evidence was introduced on either side showing, or tending to show, that defendant had or had not a certificate to so practice, as required by law. St. 1875-76, p. 792, and St. 1877-78, p. 918. And, at the conclusion of the evidence, the court instructed the jury quite fully upon all the questions of law involved in the case, and, among other things, told them, in effect, that the burden was upon the defendant to establish that he had a certificate to practice medicine as provided by law, and, if he failed to prove that he had such certificate, then it must be taken as true that he had not procured a certificate to so practice medicine.

It is contended for appellant that the said instruction was erroneous and misleading, and that the verdict was not justified by the evidence, because in a criminal action the defendant is presumed to be innocent until he is proved guilty beyond a reasonable doubt, and this presumption continues through the entire trial, and the burden is upon the people to establish his guilt by proving every material allegation of the information; and that, as the information charged that defendant had practiced medicine without having a certificate to do so, it devolved upon the people to prove that fact, and, having entirely failed to offer any such proof, he ought not to have been convicted, and his motion for new trial should have been granted. The general rule is undoubtedly as

above stated, but there is a well-recognized exception to the rule, where there is a negative averment of a fact which is peculiarly within the knowledge of the defendant. Mr. Greenleaf, in his work on Evidence (volume 1, § 79), under the heading "Negative Allegations," says: "But, when the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great,"—citing a large number of cases. See, also, 3 Rice, Ev. § 260, where the same rule is declared. In 1 Jones, Ev. § 179, under the heading "Burden as to Particular Facts Lying Peculiarly within Knowledge of a Party," it is said: "This is often illustrated in prosecutions for selling liquors or doing other acts without the license required by law. By a few authorities the rule is prescribed that in such cases the prosecution must offer some slight proof of the fact that no license has been granted, for example, by producing the book in which licenses are recorded; and, if the book fails to show that a license has been granted, the burden is shifted upon the defendant to prove the fact claimed by him; but the greater number of authorities hold that, where a license would be a complete defense, the burden is upon the defendant to prove the fact so clearly within his own knowledge,"—citing cases. We think the rule upon this subject generally recognized and followed the correct one, and therefore conclude that the court did not err in giving the instruction complained of, and that the verdict was justified by the evidence. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

**PER CURIAM.** For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

122 Cal. 555

SLOCUM et al. v. BEAR VALLEY IRR. CO.  
et al. (L. A. 305.)

(Supreme Court of California. Dec. 5, 1898.)

STATUTES—SPECIAL LEGISLATION—CORPORATIONS  
—LABORERS' LIENS.

Act March 31, 1891 (St. 1891, p. 195), giving liens on the property of corporations for the wages of only such mechanics and laborers as may be employed by the week or month, is repugnant to the constitution prohibiting special legislation.

Beatty, C. J., dissenting.

In bank. Appeal from superior court, San Bernardino county.

M. L. Slocum and three others bring separate actions against the Bear Valley Irrigation Company and others. From a judgment for plaintiffs, and an order denying their motion for new trial, the receivers of said company appeal. Reversed.

Wm. J. Hunsaker, for appellants. Paris & Allison, for respondents.

PER CURIAM. This is an appeal by the receivers of the corporation defendant from a judgment declaring and enforcing certain asserted liens of plaintiffs upon the property of the corporation, and from an order denying a new trial. The liens are based upon the act of the legislature entitled "An act to provide for the payment of the wages of mechanics and laborers employed by corporations," approved March 31, 1891 (St. 1891, p. 195). The act is quoted in full in former decisions of this court hereinafter referred to, and need not be republished here. It is contended by appellants that the act in question is unconstitutional for various reasons, and, among others, for the reason that it is special legislation, inhibited by the constitution, because it attempts to provide for the creation of liens in favor of a special class of laborers, and thus attempts a mere arbitrary classification not founded upon natural differences, or differences defined by the constitution, within the meaning of the principle declared in *Darcy v. City of San Jose*, 104 Cal. 642, 38 Pac. 500, and other decisions of this court to the same point. This contention is correct if the said act provides a lien only for those laborers and mechanics who are employed by the week or month, and does not provide liens for those who are not thus employed. But this court has already declared such to be the construction of the act in two cases,—one decided by one department of this court, and the other by the other department. In *Keener v. Irrigation Co.*, 110 Cal. 627, 43 Pac. 14, the court, referring to this act, and quoting it in full, says: "By the terms of the first section of this act it does not apply to all corporations, but only to those who, while doing business in this state, employ laborers and mechanics by the week or month, whose wages, under the terms of their employment, are payable weekly or monthly. It does not purport to impose upon those corporations any duty or liability towards all the mechanics or laborers whom it may employ, or to create a right in favor of those of its employes whose wages are not earned or payable by the week or by the month." The petition for a hearing of the case in bank was denied. In *Ackley v. Mining Co.*, 112 Cal. 42, 44 Pac. 330, the same construction was given to the act, and the language of the court in *Keener v. Irrigation Co.* was quoted and approved. The former of these two cases was decided in 1895, and the latter a few months afterwards. They must be held to have definitely

established the construction of the act as therein declared. Since the date of the decisions in those cases the legislature has been in session, and has not seen fit to change the statute; and whether the statute as thus construed is a proper and wise law, or whether it should be in any manner changed, are now questions for legislative discretion. Following the construction given to the act by the decisions above noticed, we hold it to be unconstitutional. In this case there are four separate complaints, each made by a different plaintiff; and, as there were no liens to be enforced, of course these different causes of action were not properly joined. The judgment and order appealed from are reversed, and the cause remanded.

BEATTY, C. J. I dissent. The first section of the act of March 31, 1891 (St. 1891, p. 195), reads as follows: "Every corporation doing business in this state shall pay the mechanics and laborers employed by it the wages earned by and due them, weekly or monthly, on such day in each week or month as shall be selected by said corporation." No rule of statutory construction is more firmly established than this: that if an act of the legislature is open to two constructions, one of which harmonizes with the constitution and the other does not, the latter must be rejected. Now, whatever may be the more obvious meaning of the section above quoted, regarded by itself, and without reference to the constitutional limitations upon the power of the legislature, it cannot be denied that, without doing violence to the language employed, it may be held to mean simply this: that every corporation employing laborers and mechanics is required to establish a regular pay day in each week or in each month, as it may elect, and on that day to pay all wages then earned and due, no matter what the term of employment. No reason can be given for rejecting this construction, except that in two cases formerly decided the law was otherwise construed. But in those cases the point here presented was not raised or considered. If it had been foreseen that the construction then adopted would have the result of nullifying the law, there can be no doubt that it would have been rejected in favor of the construction above suggested, which has always seemed to me the more reasonable of the two. Now that our attention is called to this unforeseen consequence of our former decision, it is not too late, in my opinion, to rectify the error.

122 Cal. 547

CROCKER et al. v. CUNNINGHAM. (Sac. 441.)

(Supreme Court of California. Dec. 5, 1898.)  
ATTACHMENT—PROPERTY SUBJECT—CLAIMS OF  
THIRD PARTIES—SALE—DELIVERY.

1. Plaintiffs contracted with E. to crop their land for half the grain raised, the grain to be



divided "on the ground" at the conclusion of the threshing, and E. to deliver "the remaining one-half of the crop retained" by plaintiffs at a place to be designated by them. The entire crop was to be the property of plaintiffs until their half was so delivered. When all the grain but one stack was threshed, E. delivered one-half of the threshed grain at a certain place under plaintiffs' directions, and in sacks marked with their names. The remainder, together with the unthreshed stack, was levied on by the sheriff under an attachment against E. *Held*, that plaintiffs could recover from the sheriff only the unthreshed grain.

2. Where there is no delivery or change of possession of grain conveyed by a bill of sale, the right of an officer who attaches it under a writ in an action against the vendor is superior to that of the purchaser, under Civ. Code, § 3440, providing that transfers of such personal property without delivery are fraudulent as to creditors of the vendor.

3. Plaintiffs contracted with E. to crop their land, and were to give him half the crop, but were to retain possession of his half until he paid all advances made to him. *Held*, that such a lien could not be enforced as against E.'s creditors on E.'s share of the grain after it had been divided where the possession remained in E.

Department 1. Appeal from superior court, San Joaquin county.

Action by Crocker and others against Cunningham. From a part of the judgment in favor of defendant, plaintiffs appeal. Affirmed.

Woods & Levinsky, for appellants. James A. Louttit, for respondent.

HARRISON, J. Action of claim and delivery to recover from defendant, as sheriff of the county of San Joaquin, certain grain held by him under a writ of attachment against one John Enos. By the terms of an agreement between the plaintiffs and Enos, commonly called a "cropping contract," Enos agreed to perform the labor required for the cultivation in grain during the year ending September, 1896, of a tract of land on Roberts Island, in San Joaquin county, belonging to the plaintiffs, and at the maturity of the crop to harvest and sack the same, and haul and deliver one-half thereof at such place on the river bank as the plaintiffs might direct. In consideration thereof the plaintiffs agreed to give to Enos one-half of the crop, the said one-half to be segregated on the ground at the conclusion of the threshing and sacking of the grain. The agreement also contained a provision that the entire crop should remain the exclusive property of the plaintiffs until said one-half part should have been delivered to Enos in payment and satisfaction as aforesaid. During that year Enos raised upon the land the grain in controversy, with other grain, and on the 23d of July all of the grain, with the exception of one stack of wheat, had been threshed and sacked, and one-half of it had been hauled by him to Frewert's landing, upon the river bank, for the plaintiffs, and under their direction, and the sacks were there marked "McLaughlin Company." (The plaintiffs constitute the

McLaughlin Company.) On that day there were remaining in the field the 1,056 sacks of barley and 183 sacks of wheat in controversy herein, together with the above stack of unthreshed wheat, and the same were attached by the defendant, who was the sheriff of that county, as the property of John Enos, under a writ of attachment issued out of the superior court of that county in an action against him. The defendant had received a writ of attachment against him on the 18th of July, and by virtue thereof had taken the grain into his possession on that day, and on the 23d of July, while it was still in his possession, he made a levy upon it by virtue of the writ then issued, and the levy under the prior writ was subsequently released. At the trial the jury, under the directions of the court, rendered a verdict in favor of the plaintiffs for the wheat that was in the unthreshed stack, and upon the evidence before them awarded to the defendant the right of possession for the 1,056 sacks of barley and the 183 sacks of wheat. The plaintiffs have appealed from the judgment entered upon this portion of the verdict, and from an order denying their motion for a new trial.

From the evidence before the jury they were authorized to find that at the time the defendant levied upon the grain there had been a division and segregation of that which had been threshed and sacked, and that the sacks of wheat and barley then in the field and taken by the defendant were the property of Enos, and consequently subject to seizure under the writ of attachment against him. By the terms of the contract the one-half of the crop which Enos was to have was "to be segregated on the ground" at the conclusion of the threshing and sacking of the crop. Under this provision the parties could have postponed the division and segregation until the whole of the crops were ready for division, but they were not required to do so. The crops might mature at different times in the year, and it was reasonable that they should divide the different crops from time to time as they were sacked and ready for division, rather than postpone the division until the entire products had been harvested. If they so desired, it was competent for them to make such division; and it was shown that at the time the defendant levied the writs an actual division had been made of all except the unthreshed stack of wheat. The provision in the contract that Enos was to haul and deliver "the remaining one-half of the crop retained by the plaintiffs," to their order, at such point on the river bank as they should direct, implies that the division or segregation was to be made before he was to haul their half of the crop, as does also the use of the phrase "the remaining one-half retained by the plaintiffs." There would be no "remaining" half until after the crop had been divided into halves, and one-half had been set apart; and designating the remaining half as "retained" by the plaintiffs carries with it the idea that

they had parted with the other half. The fact that at this time Enos had hauled and delivered one-half of the sacked grain to the order of the plaintiffs at Frewert's landing leads to the conclusion that this portion of the crop had been divided, and that the other half had been segregated to Enos "on the ground," and was his property, and subject to seizure by the defendant. The plaintiffs could not claim that, after such division and delivery to them of their half of the crop, they would have had a right to demand from Enos a delivery to them of any portion of the half which had been segregated to him and left on the ground. On the 17th of July Enos made a bill of sale to the plaintiffs of his interest in the grain in consideration of the sum of \$150 then received by him from them. This transaction was had at Stockton, and the grain was at that time in the sacks upon the ground at Roberts Island. There was no act between them purporting to be a delivery of the grain, nor was there any change of possession from Enos to the plaintiffs, but the grain remained upon the ground in the same condition until it was taken by the defendant upon the next day. As there was no change of possession or delivery of the grain, the right of the creditors of Enos to attach it in an action against him was not affected by this transaction (Civ. Code, § 3440), and, consequently, the right of the defendant as the attaching officer to the possession of the grain is superior to that of the plaintiffs.

It was also provided in the contract between the plaintiffs and Enos that they might retain possession of Enos' half of the crops until they should have been fully paid the amount of any loans or advances they should make to him; and evidence was introduced on their behalf tending to show that at the time the defendant took the grain Enos was indebted to them for moneys advanced to him. But the principles which governed the right of the creditors of Enos to attach the grain in his possession, after he had made the bill of sale to the plaintiffs, are equally applicable under this provision. The plaintiffs' claim to hold the grain as security for the indebtedness of Enos rests upon the proposition that the grain belongs to him, since there would be no occasion to provide that they might retain their own property to secure the payment of his debt to them; and the provision in the contract that they might retain the one-half of the crop "hereinbefore agreed to be given to him," and might sell the same, and out of the proceeds pay and discharge their claim against him, and pay the surplus to him, implies that it is his property which is to be retained and sold. A secret lien of this kind cannot be enforced against the claims of the lienor's creditors. *Palmer v. Howard*, 72 Cal. 293, 13 Pac. 858; *Society v. Purvis*, 112 Cal. 236, 44 Pac. 561. Irrespective of these considerations, moreover, the division of the grain and segregation to Enos of the half belonging to him must be regarded as a surrender to him of any possession which the plaintiffs might have previously had, and

would supersede the declaration that it might be held as security for his indebtedness. The judgment and order are affirmed.

We concur: HENSHAW, J.; GAROUTTE, J.

122 Cal. 580

**LANGLEY v. RODRIGUEZ.** (Sac. 370.)

(Supreme Court of California. Dec. 8, 1898.)  
EVIDENCE—CONTRACTS—PAROL PROMISE—FRAUD—  
CONDITION PRECEDENT.

1. In an action for damages for defendant's failure to deliver certain personality, pursuant to a contract in writing, effected through the agent of plaintiff's assignor, and providing for payment on delivery, where it was averred in the answer that defendant had been induced to enter into such contract by means of a fraudulent parol promise, by such agent, that a portion of the agreed price should be paid in advance of the time of delivery, it was error to reject evidence that such promise was made without any intention that it should be performed, and was therefore one of the forms of actual fraud, as defined in Civ. Code, § 1572, though, if honestly made, it was within the rule forbidding proof of a contemporaneous or prior oral agreement to detract from the terms of a contract in writing.

2. The fact that no damages were shown to have resulted from the breach of a promise was immaterial, where the performance of such promise was a condition precedent, and the breach was set up as a defense.

Commissioners' decision. Department 1. Appeal from superior court, Kings county.

Action by T. E. Langley, assignee of the Cutting Fruit-Packing Company, against Joseph V. Rodriguez. From a judgment for plaintiff, defendant appeals. Reversed.

H. L. Smith, for appellant. L. L. Cory, for respondent.

BRITT, C. Rodriguez, the defendant here, and the Cutting Fruit-Packing Company, a corporation, the latter acting by one Bates, its agent, made and signed a contract in writing, of date July 6, 1896, by the terms whereof Rodriguez agreed to sell to said packing company his crop of raisin grapes, then growing, and said company agreed to pay him at the rate of two cents per pound for the same when delivered "in sweat boxes" at its packing house. This is an action by the assignee of the packing company to recover damages for defendant's refusal to deliver the goods pursuant to said written agreement. In his answer, defendant pleaded, in substance, that his signature to said instrument was procured by fraud of said Bates, consisting in this: To induce defendant to sign the paper, Bates orally promised and agreed, on behalf of the packing company, that, when the grapes should be ready to gather, said company would advance to defendant, on the said agreed price thereof, the sum of \$350, to enable him to pick and cure the same; that, without the prior promise of such advance, defendant would not have signed said writing; that Bates, when he made the said oral promise, did not know and was without rea-



sonable ground to believe that the packing company would advance anything on the contract price, as promised by him; that said company refused such advance when, at the proper time, defendant requested the same; and that, because of such refusal, defendant on his part refused to deliver the raisins as stipulated in said instrument of writing. At the trial, defendant submitted evidence tending, though with varying degrees of cogency, to prove the said allegations of his answer. The court seems to have held the affirmative defense pleaded to be itself insufficient, and rejected the evidence offered in support thereof, and rendered judgment for plaintiff.

The oral promise to pay part of the agreed price in advance of the curing of the crop was in conflict with the provision of the written contract that payment would be made on delivery of the raisins at the packing house; and, if the promise was honestly made, it was undoubtedly within the rule forbidding proof of a contemporaneous or prior oral agreement to detract from the terms of a contract in writing. The rule cannot be avoided by showing that the promise outside the writing has been broken. Such breach in itself does not constitute fraud. *Feeny v. Howard*, 79 Cal. 525, 21 Pac. 984; *Fisher v. New York Common Pleas*, 18 Wend. 607. But a promise made without any intention of performing it is one of the forms of actual fraud (Civ. Code, § 1572); and cases are not infrequent where relief against a contract reduced to writing has been granted on the ground that its execution was procured by means of oral promises fraudulent in the particular mentioned, however variant from the terms of the written engagement into which they were the means of inveigling the complainant. *Newman v. Smith*, 77 Cal. 22, 26, 18 Pac. 791, and authorities cited; *Hays v. Gloster*, 88 Cal. 560, 26 Pac. 367.

Now, if, as defendant alleged, and as the evidence he offered had some tendency to show, when Bates agreed that the company would make an advance payment he had no reasonable ground to believe that it would do so, it is impossible to see how his promise could have been made in good faith; that is to say, with intent that it would be kept. Therefore it was equivalent to a promise made without such intention, and was fraudulent. It was not essential that the answer should charge in so many words that there was no intention to fulfill the promise at the time it was made. It is sufficient that such was the effect of the averments on the subject. *Hays v. Gloster*, 88 Cal. 565, 26 Pac. 367. The case is close, but, in our opinion, the evidence produced by defendant should have been considered, plaintiff being allowed to rebut by any relevant matter, including facts tending to establish the good faith of Bates' oral promises.

Respondent makes the point that defendant was not shown to have been damaged by failure to receive the expected advances.

That is not the question. If, as defendant claims, the advances were to be made in order to enable him to pick and cure his crop,—processes necessarily preceding delivery under the contract,—then the payment of the promised advance was a condition precedent to the duty of defendant to deliver the goods. The judgment should be reversed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

122 Cal. 589

PEOPLE v. CUFF. (Cr. 473.)

(Supreme Court of California. Dec. 8, 1898.)

CRIMINAL LAW—WEIGHT OF EVIDENCE—HOMICIDE—POISONING—MOTIVE—INTENT—EVIDENCE—INFORMATIONS.

1. It is error, in a criminal case, to instruct that the evidence is to be estimated, not only by its own intrinsic weight, but according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore, that if less satisfactory evidence is offered, when more satisfactory was within the power of the party, the evidence offered should be viewed with distrust, though it is based on Code Civ. Proc. § 2061, subds. 6, 7, where there is no suggestion that any important witness who could have been produced by defendant was not produced, but it was applicable to defendant, in that he did not become a witness, but stood on his constitutional right of not testifying and requiring the state to prove the case beyond a reasonable doubt.

2. In a prosecution for an attempt to kill by poisoning, the prosecution claimed the motive to be revenge, prosecutor being a rival and more successful lover. Evidence was introduced that some time before the offense the lady had spent several nights with a friend, and that during such time defendant, on several evenings, had secretly gained entrance to the friend's house, and had taken articles of trifling value, and poisoned the dog. Prosecutor was not at the friend's house during such time. Held inadmissible, as not tending to show motive, and as entirely foreign to the issues.

3. Prosecutor was alleged to have been poisoned by defendant, a rival lover. Defendant had obtained chloroform two weeks before. The lady at whose home the feminine cause of the trouble was staying testified that she smelled chloroform in her room the morning after the night it was claimed defendant had secretly entered the house, which was some time before the attempt to kill, and when the prosecutor was not at said house, and possibly not in the neighborhood. Held irrelevant and immaterial.

4. In a prosecution for an attempt to kill by administering strychnia, evidence that defendant had purchased chloroform some time before the offense, and had it in his possession when arrested, is admissible as tending to show his intentions towards the prosecutor.

5. False reasons given by the accused for being in the town where the offense was committed on the day of the offense are admissible.

6. Evidence of the prosecutor that he saw a person resembling defendant some weeks prior to the offense, when he was in company with the lady for love of whom it was claimed defendant had attempted to poison prosecutor, is admissible.

7. In a prosecution for an attempt to kill, the state showed that defendant had been a per-

sistent and unsuccessful suitor of a lady, and that prosecutor was the successful suitor. *Held* that, while the establishment of such facts in a general manner was proper, it was prejudicial error to go into details of defendant's courtship, showing his conduct, which was such as to prejudice the jury against him.

8. Evidence that one accused of an attempt to kill by using strychnia had purchased such poison, and had it in his possession when arrested, may be rebutted by evidence that he owned a ranch, and that ranchers in that locality generally had strychnia in their possession for poisoning "varmints."

9. An information is not fatally defective because of a false date therein, where defendant suffered no possible injury by reason of the mistake, and the offense was alleged to have been committed in the proper year, and prior to the filing of the information.

Department 1. Appeal from superior court, Modoc county.

James Cuff was convicted of felony in an attempt to kill by administering poison, and he appeals. Reversed.

G. F. Harris and D. W. Jenks, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. The defendant has been convicted of a felony, alleged to have consisted in an attempt to kill one Miller by administering poison. The evidence is entirely circumstantial, but tends to show that defendant surreptitiously placed the poison (strychnia) in the sugar bowl out of which Miller was in the habit of using sugar, and out of which, in fact, upon this eventful day, he used sugar, and nearly died as a result. The evidence is sufficient to support a finding of fact that Miller suffered from strychnia poisoning, and that defendant was the instrument by which it was administered. The case is one of circumstantial evidence alone, and the prosecution at the trial relied upon innumerable and somewhat minute circumstances to establish the two aforesaid salient facts. The defendant pleaded not guilty, and, in addition to denying the commission of the act, claimed that he was insane at the time.

The following instruction of the court should not have been given to the jury: "The court instructs you that the evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore, that if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust." The basis for this instruction is found in subdivisions 6 and 7 of section 2061 of the Code of Civil Procedure. We have had occasion in the past to examine various subdivisions of this section, and to point out the error of applying the principles there declared to cases indiscriminately. *Kauffman v. Maier*, 94 Cal. 283, 29 Pac. 481; *People v. O'Brien*, 96 Cal. 180, 31 Pac. 45. Indeed, as to subdivisions 4, 6, and 7 of the section, upon the trial of

criminal cases it were best they should not be noticed, for, as generally applied, they trench upon the constitutional rights of the defendant in depriving him of a verdict rendered by jurors who should be the sole and exclusive judges of the weight and effect of evidence. The danger lurking in these subdivisions of the section is found in the fact that they attempt to deal with the weight and effect of evidence,—matters for the jury, and not matters for legislative action. The aforesaid section of the Code declares that the principles stated in the various subdivisions thereof may be given by the court to the jury upon all proper occasions. In criminal cases the proper occasions are so few, and the improper occasions are so many, that it were best that they should be given rarely, if at all. The instruction given in this case fully and fairly illustrates the danger suggested. Let us consider one objection to it. Here there is no suggestion whatever in the record that any important witness could have been produced by the defendant before the jury, and was not produced. Under such circumstances, certainly, the occasion was not a proper one upon which to give the instruction. But, upon the other hand, the defendant did not take the witness stand, and the practical application of the instruction necessarily points to that fact as a strong circumstance to be taken against him. To the ordinary mind there seems to have been no other reason or purpose in the giving of the instruction. Yet a defendant has the constitutional right to stand mute, and demand that the prosecution prove a case against him beyond a reasonable doubt. *People v. Streuber* (Cal.) 53 Pac. 918. Aside from the exception mentioned in the *O'Brien* Case, we think the principles embraced in these subdivisions of section 2061 had best not be given to juries in criminal cases.

The defendant was a rejected suitor for the hand of a young lady, Miss Lush. Miller, the man alleged by the information to have been poisoned, was apparently more successful in securing her kind graces. It is claimed upon the part of the prosecution that, for these reasons, revenge was the motive actuating the defendant in the administration of the poison. Presumably in support of this theory of revengeful motive actuating the heart of the defendant, a great mass of evidence was introduced under objection. We say this evidence was introduced presumably in support of the motive theory, for we are entirely unable to conjecture any other ground upon which to base even a contention of its legal admissibility. The scene giving rise to this case is laid in the village of Alturas, and all the parties concerned lived in and about the village. John E. Raker resided in the village. Miss Lighty lived at his residence. During the absence of himself and family, at a period shortly before the time this offense is claimed to have been committed, Miss Lush spent several nights with Miss Lighty as her companion. Miller



lived a considerable distance from the Raker residence. The mass of evidence introduced went to the effect that, upon several nights during this period, some person had secretly gained entrance to the Raker residence; that a handkerchief had been found upon the floor of one of the rooms upon the following morning after one of these mysterious visits, which handkerchief was probably the handkerchief of the defendant; that some articles of trifling value belonging to one of the young ladies had been taken from the house at these times, and were afterwards found in the possession of the defendant; that Raker's dog was found poisoned in the yard; that mysterious noises were heard in and about the house, and footprints found in the yard. Following this line of evidence, it was attempted to connect defendant with all this mysterious work; and, for present purposes alone, it may be conceded that this attempt was successful. Upon this concession, we are clear that the whole mass of evidence should have been rejected, as improper matter to go before the jury. That this character of evidence was prejudicial to defendant cannot be gainsaid for a moment; but that it in any appreciable degree tended to show the motive for the attempted murder of Miller must be denied. These events all occurred some time before the offense here under investigation was committed. Miller was not at the house of Raker at the time, and possibly not in the neighborhood. He is in no way connected with these midnight visits, and the entire evidence is collateral to the question at issue, and foreign to the investigation at hand.

The offense was committed about August 26, 1896. A doctor testified that upon the 9th of August he gave the defendant a prescription calling for chloroform. It was also shown that the chloroform was obtained by defendant. Miss Lighty testified that, after one of these mysterious midnight visits already referred to, she smelled chloroform in her room the following morning. This item of testimony was clearly irrelevant and incompetent. As to the purchase of the chloroform, and the subsequent possession of it by defendant when arrested, it was proper evidence as tending to show to some degree defendant's intentions towards Miller.

Conversations had with defendant by the witness Beecher were relevant and competent evidence. If the defendant gave false reasons for being in the town of Alturas upon this particular day, the prosecution had the right to show that fact. The same rule also applies to the statements made by defendant as to his visit to the Dorris ranch. Miller's testimony as to seeing a party resembling the defendant when he was in the company of the two aforesaid young ladies, some weeks prior to the 26th of August, was also properly admitted.

For the purpose of establishing a motive for the crime, the prosecution was permitted to show that the defendant had been a persistent and unsuccessful suitor for the hand of Miss

Lush, and that Miller was the successful suitor. While the establishment of these facts was entirely proper, the matters should have been shown generally, and the details of defendant's conduct in the manner of his courtship were not proper evidence. Evidence was introduced in detail as to this point, and his conduct was clearly reprehensible, and was such as to prejudice the jury against him. At the same time, it was not germane to the question upon trial, and should have been kept from the jury.

The prosecution offered evidence tending to show that defendant had purchased strychnia, and had it in his possession at the time of his arrest. To rebut the effect of this evidence, it was proposed to show that other persons living in the neighborhood where defendant resided purchased strychnia, and had it in their possession. Defendant owned a ranch, and it was proposed to show that ranchers generally in that locality had strychnia in their possession for the purpose of poisoning "varmints." This character of evidence was improperly rejected. It had a direct and legitimate tendency to weaken the effect of the evidence showing the possession of strychnia upon the part of defendant.

The information charging defendant with the offense was not objectionable upon the ground of duplicity. *People v. Thompson*, 111 Cal. 246, 43 Pac. 748. The further objection to the information, made by reason of the false date inserted therein, is not fatal to it. The court should have corrected the error by some appropriate proceeding; but defendant has suffered no possible injury by reason of the mistake made and the failure of correction. The pleader charged the offense to have been committed in 1896, and prior to the filing of the information. See *People v. Dinsmore*, 102 Cal. 382, 36 Pac. 661.

We have examined with care other points made by defendant's counsel, and find nothing further demanding extended consideration. We see no serious objection to the remaining instructions given by the court to the jury. For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

ELLIOTT v. WARFIELD, Sheriff. (Sac. 344.)

(Supreme Court of California. Dec. 12, 1898.)  
ATTACHMENT—SUBSEQUENT JUDGMENT AND EXECUTION—EFFECT OF INSOLVENCY PROCEEDINGS.

The insolvent act of 1880 (section 17) provides that an adjudication in insolvency shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceeding. *Held*, not to affect an execution on a judgment in an action begun by attachment within a month preceding insolvency proceedings by the judgment debtor, where judgment was obtained before such pro-

ceedings, though prior attachments before judgment against the same debtor were thereby dissolved.

Department 2. Appeal from superior court, Merced county.

Action by J. G. Elliott, assignee of the estate of C. W. Agee, an insolvent debtor, against C. A. H. Warfield, as sheriff for conversion. From a judgment for plaintiff, defendant appeals. Reversed.

C. H. Marks and F. H. Farrar, for appellant. J. W. Knox, for respondent.

McFARLAND, J. Appeal upon the judgment roll by defendant from the judgment against him as sheriff, and in favor of plaintiff as assignee of C. W. Agee, an insolvent debtor, for \$515 and costs. The only question on the appeal is whether or not a certain adjudication of insolvency dissolved or affected the lien of an execution levy which had been made by appellant before, but within one month of, the commencement of the proceedings in insolvency, and the question arises under the insolvent act of 1880. On the 18th of March, 1895, in a suit commenced in the superior court of San Francisco by John Featherston, plaintiff, against the insolvent, C. W. Agee, defendant, to recover \$380.84, an attachment issued, and was levied by appellant, as sheriff, upon a certain stock of goods belonging to said Agee. On the 20th of March, 1895, another writ of attachment was issued out of the justice's court of San Francisco in the case of Freestone Distillery Company, plaintiff, against said Agee, for \$149.62, and was levied by the appellant upon the same property. On the 22d of March, 1895, Mary Minor commenced a suit against Agee in the superior court of Merced county, where he resided, for something over \$2,000, and in said action a writ of attachment was also issued and levied upon said property. Such proceedings were had that on April 2, 1895, Minor obtained judgment against Agee in said action for \$2,360, and on the same day an execution was issued upon the judgment, and levied upon the said property; and on April 10, 1895, the appellant, as sheriff, under and by virtue of said writ of execution, sold at public auction all the said property to said Mary Minor for the sum of \$515, which sum was the value of the property thus sold. The appellant paid the \$515 realized on the sale to Mary Minor. On April 4, 1895, two days after the levy of said execution, Agee filed his petition in insolvency in the superior court of Merced county, and on said day was adjudged an insolvent by said court. The respondent was afterwards appointed assignee in the insolvency proceeding, and, after having demanded of the appellant that he pay to him, as assignee, the said \$515, and the appellant having refused to do so, he commenced this suit.

There is no doubt of the general rule that an adjudication in insolvency does not dis-

solve or affect the lien upon final process of the levy of an execution made prior to, and existing at the time of, the commencement of the insolvency proceeding. Section 17 of the insolvent act of 1880 provides that the assignment by the clerk to the assignee shall vest title to the property of the insolvent in the assignee, "although the same is then attached on mesne process as the property of the debtor, and shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings," and thus leaves a lien created by final process unaffected. This is not only the clear meaning of the section, and has been held to be the meaning under the general authorities, but it was so expressly declared by this court in *Vermont Marble Co. v. Superior Court*, 99 Cal. 579, 34 Pac. 326. In that case the court say: "By the levy of the execution upon the property of Black prior to the filing of the petition in insolvency against him, the petitioner herein acquired a lien upon that property which would not be divested by his subsequent adjudication of insolvency. *Howe v. Insurance Co.*, 42 Cal. 533. In the absence of any statute, an adjudication in insolvency does not affect any lien upon the property of the insolvent existing at the institution of the proceedings for such adjudication, but the assignee takes the property of the insolvent subject to all such liens. Section 17 of the insolvent act provides that the effect of the adjudication is to dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings, and this designation is equivalent to an express declaration that it does not affect liens of any other nature." Respondent does not deny that this is the general law, and admits that the rule would apply here if there had been no other attachments on the property at the time the execution in the suit of Mary Minor was levied; but he contends that the existence of these prior attachments for an amount in excess of the value of the property prevented the subsequent execution levy from being effective, and that the dissolution of the attachments by the proceedings in insolvency did not inure to the benefit of execution creditors. He has cited some authorities by inferior federal courts, under the federal bankruptcy law, as supporting his contention; as, for instance: *In re Klancke*, Fed. Cas. No. 7,864; *In re Steele*, Fed. Cas. No. 13,345; *Johnson v. Rogers*, Fed. Cas. No. 7,408; *In re Beisen-thal*, Fed. Cas. No. 1,236; and *In re Baden-heim*, Fed. Cas. No. 716. These cases are not all harmonious on the subject, but some of them seem to give support to respondent's contention. We have not been referred to any case in the supreme court of the United States holding any such doctrine. The reasoning of those cases cited by respondent which seem to give color to his contention is not satisfactory to us. The conclusions



arrived at in those cases seem to be based upon a consideration of the fact that the prior attachments were for an amount equal to, or exceeding, the value of the property, and upon a sort of notion that in such a case there could be no effective levying of the execution until the attachments had been in some way removed. But the fact that there were prior attachments to any amount seems to us to be immaterial. "When goods are held under one writ, they are also held under all other writs that may come to the hands of the same officer. The mere receipt of a second execution operates as a levy of the property already in the officer's hands under a former writ." 2 Freem. Ex'ns, § 267, and cases there cited. Moreover, it is difficult to see how it could be determined that prior attachments in cases which never went to judgment were equal to the whole, or any part, of the property attached. There may have been no legal causes of action in the suits in which the former attachments had been issued, and the value of such attachments is therefore an unknown quantity. In the case at bar, therefore, we see no way in which the lien created by the levy of the execution in the case of Mary Minor against Agee was dissolved, invalidated, or in any way affected by the subsequent adjudication in insolvency. Indeed, this conclusion has been declared in the recent case of Hefner v. Herron, 117 Cal. 473, 49 Pac. 586. That case involved section 21 of the subsequent insolvent act of 1895. That section provided for an enumerated instance where a dissolution of an attachment by an adjudication in insolvency should also dissolve and set aside an execution levied under certain circumstances, and it was there contended that a certain execution was set aside by an insolvent proceeding. But the court said: "The section does not provide for dissolving a lien existing by virtue of final process, except in the one enumerated instance. In the absence of any statutory provision, a levy upon property by virtue of an attachment or execution creates an interest in the property superior to the rights of the assignee in insolvency, and only an express provision to that effect will make the proceedings in insolvency paramount to such a lien." The case of Beamer v. Freeman, 84 Cal. 554, 24 Pac. 169, is not controlling here. In the case at bar there was no charge of actual fraud, and no claim that the insolvent, Agee, had wrongfully done any affirmative act with intent to give preference to any creditor. His conduct was innocent, within the rule elaborately stated by the supreme court of the United States in *Wilson v. Bank*, 17 Wall. 473. The point here involved is presented by the demurrer to the complaint, which was overruled, and upon the findings; and the court below erred in holding that the insolvency proceeding dissolved the lien of the levy under the judgment of Mary Minor. The judgment should have been for appel-

lant. The judgment appealed from is reversed.

We concur: TEMPLE, J.; HENSHAW, J.

122 Cal. 601

SAN FRANCISCO & S. J. V. RY. CO. v.

GOULD. (Sac. 463.)

(Supreme Court of California. Dec. 8, 1898.)

EMINENT DOMAIN — RAILROADS — CONDEMNATION  
PROCEEDINGS—DESCRIPTION OF LAND—OB-  
JECTIONS—DEMURRER—WAIVER.

1. A complaint in a proceeding for condemnation of a right of way for a railroad described the land as a strip 100 feet wide, lying equally on each side of the center line of the road, "where the same is located through" defendant's land, beginning at a point where such center line intersects the northwest boundary of such land, "at or near engineer's station 2218+66, running thence in a general southeasterly direction" for 5,090 feet, "more or less, to where said center line intersects the east boundary" of the defendant's land "at or near engineer's station 2269+56"; containing 11.7 acres, more or less. A map of the road was attached, but in neither the map nor the complaint were the points of intersection given by courses and distances, nor were any courses or distances of the line itself shown; and the radii or lengths of the curves were not given. *Held*, that the description was insufficient, under Code Civ. Proc. § 1244, subd. 4, providing that the complaint must show the location, general route, and termini, and must be accompanied by a map, and must contain a description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire tract.

2. In condemnation proceedings, defendant does not waive his right to appeal from an order overruling his demurrer by answering and going to trial.

Commissioners' decision. Department 2. Appeal from superior court, Tulare county.

Action by the San Francisco & San Joaquin Valley Railway Company against George H. Gould. Judgment for plaintiff, and defendant appeals. Reversed.

George H. Gould, in pro. per. E. F. Preston and Bradley & Farnsworth, for respondent.

HAYNES, C. This action is prosecuted by said railway company to condemn a right of way for its railroad over lands owned by defendant. The defendant demurred to the complaint specially that the description of the land sought to be condemned is uncertain, and generally that a cause of action is not stated. These grounds of demurrer are based substantially upon the same alleged defect, and are aimed at paragraph 3 of the complaint, which reads as follows: "That the following is a description of the land so as aforesaid required for the right of way of said railroad of plaintiff, viz.: A strip of land one hundred feet wide, lying equally on each side of the center line of plaintiff's railroad, where same is located through the east one-half (E. ½) of section 9, township 24 south, range 24 east, M. D. B. & M.; said center line being more particularly described as follows: Beginning for same at a point

where said center line intersects the north-west boundary of lot one of said section 9, at or near engineer's station 2218+66, running thence in a general southeasterly direction a distance of five thousand and ninety feet, more or less, to where said center line intersects the east boundary of the east one-half of said section 9, at or near engineer's station 2269+56; said tract of land containing an area of eleven and seven-tenths ( $11\frac{7}{10}$ ) acres, more or less." It is also alleged that a map of the road, so far as it is involved in this proceeding, is annexed to the complaint as an exhibit, and made part thereof. Appellant contends that the description and map of the land sought to be condemned are each and both insufficient.

Section 1244, subd. 4, Code Civ. Proc., provides: "If a right-of-way be sought the complaint must show the location, general route, and termini, and must be accompanied by a map thereof, so far as the same is involved in the action or proceeding; (5) a description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract. \* \* \*" In *Railway Co. v. Hooper*, 76 Cal. 404, 413, 18 Pac. 603, it was said: "The judgment must be so far certain as that the parties, and any ministerial officer who may be called on to enforce the judgment, may know what land is to be taken and paid for." The "description" of each piece of land sought to be taken obviously means such description as will readily and conveniently identify the land before the road is constructed, and upon which alone its construction is to be authorized by the judgment. The beginning point is alleged to be "where said center line intersects the north-west boundary of lot one of said section 9, at or near engineer's station 2218+66." The complaint does not inform us how it happens that there is a "northwest" boundary of lot 1, though the map referred to as exhibit A purports to be a map of "all of section 9 east of swamp-land line," and there is laid down a line running in a southwesterly direction, if we assume that the top of the map is north; for there is no indication of the points of the compass, nor is it marked on the map as the swamp-land line. The judgment describes the parcel taken as it is described in the complaint, without any reference to the map. It will also be noticed that the point where the center line of the road intersects the northwest line of lot 1 is not given by course and distance from the north line of section 9, and the only indication of that point of intersection is, "at or near engineer's station 2218+66." How such stations are marked does not appear; but assuming, as I think we may, that they are marked by temporary stakes, which may be readily changed, or be destroyed in the construction of the road, there could be no certainty that the road, if now constructed, is where said stations indicated it would be, or, if the stake

were found, there is no way by which it could be determined that it is now where it was when the complaint was filed. So, the point of exit from appellant's land is "at or near" station 2269+56, "where said center line intersects the east boundary of the east half of said section 9." But whereabouts on that line? How far from a section corner? The distance between these two points or stations is stated to be "five thousand and ninety feet, more or less," and the course "a general southeasterly direction." Is it a straight line, or a curved line? How is it marked between these stations, or is it marked at all? Is the point of entrance upon appellant's land, and the exit therefrom, at or near said stations? If not at, how near, or in what direction from, said stations? What distance may be included or meant by the word "near"? All that was said in *Railway Co. v. Hooper*, supra, in relation to the map in that case applies here, except that in this case the map is marked, "Scale 1,000', 1", while in that case no scale was marked. Section 1242, Code Civ. Proc., permits an entry upon land desired to be taken for public use, to "survey and locate the same"; and therefore there should be no difficulty in making a map that would show precisely the location of the road in all its parts. In *Convers v. Railroad Co.*, 18 Mich. 466, it was said: "We understand by 'map and survey,' not only a delineation on paper or other material, giving a general or approximate idea of the situation of the road, but also such full and accurate notes and data as are necessary to furnish complete means for identifying and ascertaining the precise position of every part of the line, with courses and distances throughout, so that there can be no doubt where any portion of it is to be found. A map can be made to contain all these data, so as to need no reference to field notes, but the information must exist somewhere. The map before us is singularly deficient. It purports to be drawn by a scale, but the lines of the road are not so laid down as to enable any one by the use of instruments to ascertain its location with any degree of accuracy. There is nothing to show its distance from corners or other boundaries at any part of the line. There are no courses or distances given, either on straight lines or on curves." In the case before us, as before stated, the description in the complaint does not indicate whether the line of the road sought to be condemned is straight or curved, and the judgment follows the language of the complaint. The map shows that a portion of the line is curved, but the map is neither copied nor referred to in the judgment, which becomes the evidence of title of the railway company, so that if a surveyor were to take the judgment, and go upon the land, it would be impossible for him to locate the line of the road between the two engineers' stations there named, or, if these were destroyed, he could only determine that the right of way



entered appellant's land somewhere on the northwest side, and left it somewhere on the east side. It is true, the complaint alleges "that said railroad has been definitely located by plaintiff over and through the parcel of land hereinafter described"; but it is not shown or alleged that it was marked upon the ground by stakes, or in any manner, other than the mention of two "engineers' stations," nearly a mile apart, with no intimation as to whether the line between them is straight or curved, though the map shows that a portion of the line is curved, but the radius of the curve, or where it begins, cannot be accurately determined by the map.

Respondent contends that as the appellant answered, and had a trial, to which he has taken no exceptions, the judgment should not be reversed upon the ground that his special demurrer was overruled, because it does not appear that he was injured, and cites *Shade v. Lumber Co.*, 115 Cal. 371, 47 Pac. 135. The reference is to a dissenting opinion, and not to the opinion of the court; but, without discussing the question there involved, it is sufficient to say that that case was an ordinary action upon an account, while this is a special proceeding by a railway company to acquire a portion of defendant's land without his consent and against his will, and therefore the requirements of the statute must be fully and fairly complied with. Respondent also cites several cases with reference to the significance of the word "located." *West v. Railroad Co.*, 61 Miss. 536, was an action of trespass *quare clausum fregit* to recover damages caused by the construction of the road, and the defendant justified its entry by setting up a condemnation of the land under the provisions of its charter. The second replication was that the defendant trespassed by digging other parts of the land than that condemned. It was said that "the verdict of the jury shows that the jurors had carefully examined the land along the line of the said railroad," and that "it is shown by the evidence that the road had not been constructed at the time of the award by the jury, but we think it is sufficiently shown that the 'location' had been made by visible marks indicating the line." No objection was taken by the plaintiff at the time of the proceedings to condemn. In *Sioux City & D. M. R. Co. v. Chicago, M. & St. P. R. Co.*, 27 Fed. 770, the line was first located by the defendant "over the premises by a survey thereof, and had staked off such line, and placed stakes along the center of the line upon the premises at intervals of one hundred feet." The bill in this case was to enjoin the defendants from proceeding with the condemnation of the right of way over said premises. The third case cited is *Railway Co. v. Alling*, 99 U. S. 463, and it involved the conflicting claims of two railroads to occupy the Grand Cañon of the Arkansas in Colorado, under the act of congress of 1872, and subsequent amendments, regulating the occupation of narrow cañons in the public lands. We find nothing

in this case which will aid us in deciding the case before us. Section 269, Wood, Ry. Law, cited by respondent, relates to the "mode of construction," and damages arising therefrom, and not at all to damages for right of way, or of proceedings to condemn. It may be that it is a matter of little real consequence to appellant, in a pecuniary sense, whether the road shall be constructed on any particular line across his land, which for aught we know is unimproved and of little value; but there may be cases where a proper description and a proper map may be of vital importance, and, so long as the law does not distinguish between cases, the courts cannot; for, if property of little value may be taken under materially defective proceedings, property of the greatest value may be so taken. We advise that the judgment be reversed, with directions to the court below to sustain the demurrer to the complaint, with leave to the plaintiff to amend his complaint and map.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to the court below to sustain the demurrer to the complaint, with leave to the plaintiff to amend his complaint and map.

122 Cal. 619

HODSON v. VARNEY. (Sac. 352.)

(Supreme Court of California. Dec. 9, 1898.)

#### PAROL EVIDENCE.

Oral evidence is inadmissible to show that from a sale of a photograph gallery by bill of sale transferring all the material and working apparatus and all cameras and negatives in the gallery, the parties orally reserved a lens and camera, and a stated number of negatives located therein.

Department 1. Appeal from superior court, Sacramento county.

Action by J. R. Hodson against A. K. Varney. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

J. H. McKune and A. M. Johnson, for appellant. A. E. Bolton and J. C. Brusie, for respondent.

GAROUTTE, J. This is an action of claim and delivery, and defendant appeals from the judgment and order denying his motion for a new trial. Defendant purchased the photographic business of plaintiff under a written contract of sale which provided: "It is the purpose of this agreement to transfer all the materials and working apparatus now contained in said gallery, No. 521 J street, Sacramento, Cal., including everything essential to the working of the operating room, the printing room, furnishing, dressing, and reception rooms, and all furniture therein contained, also sixteen oil paintings and other various pictures and their frames, also all signs and advertis-

ing cases, also all the cameras, material and negatives therein contained." Plaintiff now seeks to recover possession of certain personal property which he claims did not pass to defendant under this sale, evidenced by the foregoing written contract. The plaintiff sold to defendant "all the materials and working apparatus now contained in said gallery, No. 521 J street, Sacramento, Cal." Upon the same floor of the building in which this gallery is located Hodson had the possession of two rooms, Nos. 10 and 11, in which was situated certain of the property sought to be recovered in this action. By an inspection of the contract of sale it will be perceived that plaintiff only disposed of property situated in the gallery (Hodson's Art Gallery). If rooms 10 and 11 were part of the gallery, then the title to the property situated therein passed to defendant under the bill of sale. As to what constituted Hodson's Art Gallery was a question of fact upon which the evidence of witnesses was properly received, and upon the evidence introduced the court held that rooms Nos. 10 and 11 were no part of the gallery. A Mammoth Peerless lens and camera was located in the gallery at the time of the sale, but it is claimed upon the part of plaintiff that it was specially reserved from the property sold. Under objection from defendant, plaintiff offered oral evidence to show that this instrument was reserved from the sale. In the face of the written contract, which in direct and explicit language declared that title to all the property in the gallery passed to defendant, and which also declared that "all cameras therein contained" passed to defendant, this evidence was clearly inadmissible. The offer of such evidence was a bald attempt to vary and contradict the terms of a written contract, and principles of elementary law forbid it being done. If six horses are sold by an instrument in writing, oral evidence will not be allowed to show that one of these horses was excepted from the effect of the sale. The writing in such a case contains no exception or reservation, and the writing must be held to contain all the terms of the contract. Oral evidence of reservations or exceptions of certain property from the effect of the bill of sale presented in this case should have been rejected by the trial court. The 200 sample negatives located in the gallery, and which it is claimed were also reserved, stand hand in hand with the Mammoth lens and camera. They passed to defendant by the terms of the sale. If the other articles of personal property involved in this litigation were located in rooms 10 and 11 at the time of the sale, and those rooms, as a matter of fact, were no part of Hodson's Art Gallery, then they were not included in the sale, and title to them still remained in the plaintiff. For the foregoing reasons the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

122 Cal. 540

CHASE v. CITY TREASURER OF CITY  
AND COUNTY OF LOS ANGELES  
et al. (L. A. 351.)

(Supreme Court of California. Dec. 2, 1898.)

MUNICIPAL CORPORATIONS--ASSESSMENT FOR STREET  
IMPROVEMENT--INJUNCTION--CITY COUNCIL--  
JURISDICTION TO ORDER IMPROVEMENT--DELE-  
GATION OF POWERS.

1. By Street Improvement Act March 17, 1891, § 41, the provisions of the Political Code relating to sales for the nonpayment of taxes are made a part of the act. Pol. Code, §§ 3786-87, make the deed prima facie evidence that the property was assessed and the taxes levied as required by law; that the taxes were not paid, and that the sale was in all respects according to law; that the property was not redeemed, and that the person who executed the deed was the proper officer; and conclusive evidence of the regularity of all other proceedings, from the assessment up to the execution of the deed. The act makes an assessment a lien on the property of an abutting lot owner, and also the bond issued on nonpayment of the assessment executed by the city. *Held* that, where there is nothing on the face of the assessment or bond to show that the lien is invalid, an action would lie to enjoin a sale of property to pay the amount claimed to be due on such a bond, and to set aside as void the assessment and bond, since, to defeat such an assessment and bond or a deed thereunder, it would be necessary to resort to evidence extraneous of any recitals to be found therein, and either therefore constitutes a cloud on the title.

2. The fact that plaintiff neither tendered any part of a local assessment, nor offered to pay what might be found legal, does not deprive him of his right to relief against the assessment, where he shows that it is void in toto.

3. Failure to appeal to the council to correct irregularities making void an assessment, under Act March 17, 1891, for a street improvement, in accordance with provisions for appeal therein, does not preclude injunction against the assessment.

4. Street Improvement Act March 17, 1891, § 3, provides that the resolution of intention by the city council shall be published in a newspaper "designated by said council for that purpose," and, after this and other requirements mentioned have been complied with, "the city council shall be deemed to have acquired jurisdiction to order any of the work to be done \* \* \* which is authorized by this act." *Held*, that designation of a newspaper is jurisdictional.

5. The exclusive power over street improvements conferred by the legislature on the legislative department of the various city governments cannot be delegated, but must be exercised by that department as a body.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by Delia W. Chase against the city treasurer of the city and county of Los Angeles and M. N. Sheldon. From a judgment for defendants, and an order dissolving a preliminary injunction, plaintiff appeals. Reversed.

C. W. Chase, for appellant. F. W. Burnett, for respondents.

CHIPMAN, C. This action was brought to restrain the city treasurer of Los Angeles from selling the real property of plaintiff to pay the amount claimed to be due by defend-



ant Sheldon on a bond issued against said property under the provisions of the act of March 17, 1891 (St. 1891, p. 116), for work on Ohio street, in said city, which work was done under the provisions of the so-called "Vrooman Act" of March 18, 1885 (St. 1885, p. 147). A perpetual injunction was prayed for, and that said bond and assessment be declared to be void so far as they affect plaintiff's property. The court granted a preliminary injunction. Later an amended complaint was filed, to which defendants demurred for insufficiency of facts. At the hearing the demurrer was sustained, the injunction was dissolved, and defendants had judgment, from which, and from the order dissolving the injunction, plaintiff appeals. By stipulation, both appeals are to be heard upon one transcript.

The complaint sets out all the proceedings of the council, and the steps taken subsequently leading up to the issuance of the bond provided for by the act of 1891, and sets forth the notice of sale of plaintiff's property because of default in payment of said bond, and that the said city treasurer threatens to sell, and will sell, plaintiff's property, unless restrained, and will in due course execute a deed under the terms of the statute, which will be conclusive evidence of the regularity of some of the proceedings, and prima facie evidence of the regularity of all the proceedings under said acts, and will cast a cloud upon plaintiff's title to said property.

1. Appellant contends that injunction is a proper remedy, and that equity will enjoin the collection of, and set aside, a void assessment. This contention is supported by numerous citations from text-books and decisions of this and other courts of last resort. Respondents make no reply to these, but plant themselves upon *Esterbrook v. O'Brien*, 98 Cal. 671, 33 Pac. 765 (cited), it is claimed, with approval, in *Hellman v. Shoulters*, 114 Cal. 141, 44 Pac. 915, and 45 Pac. 1057, as conclusively determining the question, and as holding that, even though the assessment be absolutely void, the injured party must litigate his rights in an action at law. We do not think these cases or those to which reference is made in the opinions necessarily lead to the proposition stated by respondents. It is well settled, as a general rule, that, where an officer is about to sell real property to enforce the collection of a delinquent tax, the equity court will interpose to restrain the sale if, when consummated, it would cast a cloud upon the title. The true test by which to determine whether a deed, following such sale, would cast a cloud upon the title of plaintiff, was stated in *Pixley v. Huggins*, 15 Cal. 128, to be: "Would the owner of the property, in an action in ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery?" This test has been many times since affirmed in substantially the same but varying forms of expression. It is equally well

settled that a court will not restrain the sale for taxes when it is apparent that the sale would be void on the face of the proceedings upon which the purchaser must necessarily rely to make out a prima facie case to enable him to recover under the sale. *Bucknall v. Story*, 36 Cal. 71, and cases there cited.

By section 41 of the act of March 17, 1891, the provisions of the Political Code relating to sales for nonpayment of delinquent taxes are made a part of the act. Sections 3786 and 3787 of that Code make the deed prima facie evidence that the property was assessed, and the taxes levied as required by law; that the taxes were not paid, and that the sale was in all respects according to law; that the property was not redeemed, and that the person who executed the deed was the proper officer; and such deed is "conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed." The statute makes the assessment a lien upon the property of plaintiff, and so also the bond issued upon nonpayment, and there is nothing upon the face of the assessment or the bond to show that the lien is not in all respects valid. It is obvious that, to defeat such an assessment or such a deed, the plaintiff must resort to evidence extraneous of any recitals to be found in it; and this brings the case directly within the test as to what constitutes a cloud upon her title. In such a case it was said, in *Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 881: "Although she can assert the same matters as a defense to any action for the enforcement of the assessment, she is not required to wait until such action may be brought, and in the meantime suffer the injury of having the title in her hands impaired by this apparent lien, but may herself invoke the equitable aid of the court to remove the cloud and to enjoin the holder of the assessment from asserting any claim upon her lands by virtue thereof." In that case the plaintiff sought to stop the progress of the proceedings at a stage a little earlier than did the plaintiff here; but we cannot see that she had any greater right to maintain the action than this plaintiff. The work had been done, and the assessment levied, and the lien had attached so far as it could. The issuing of the bond gives the contractor no greater or better lien than he had under the assessment and warrant, but in effect takes the place of the warrant; and the owner of the lot may prevent the issuance of the bond by exercising the election given by section 40 of the act, "and the payee of the warrant, or his assigns, shall retain his right for enforcing collection, as if said lot or parcel of land had not been so listed by the street superintendent." We think it true here, as was said in the *Hellman Case*: "So far as the questions in this case are concerned, the bonds really cut no figure, and might as well be eliminated from the case." We are unable to discover any distinction between this

case and that of *Bolton v. Gilleran*, supra, so far as the right of action is involved. The fact that plaintiff made no tender of any part of the tax, and makes no offer to pay that portion which may be found to be legal, cannot, we think, deprive her of the right to the relief, where she shows that the entire assessment is void. Why should she make tender of a claim no part of which has any validity? If this were an action to quiet plaintiff's title, her action would lie. *Kittle v. Bellegarde*, 86 Cal. 556, 25 Pac. 55, and cases there cited. That was an action to quiet plaintiff's title, and to restrain defendant from executing a deed upon a certificate of sale given for nonpayment of delinquent street assessment. The action rested upon a showing that the assessment was void. The injunction was held to be proper as ancillary to the principal relief, and to make that relief effectual. The principal relief asked there was to have the assessment annulled and set aside, and to have the certificate canceled; here it is to have the assessment and bond declared void as against plaintiff's property. Both are equitable actions, and while one is in form to quiet title, under section 738, Code Civ. Proc., and the other is an appeal to the general equity powers of the court, both aim at the same result, and afford the same relief. We can discern no reason why the one should be afforded and the other refused.

As we regard the case, the only debatable question relating to the remedy, assuming the assessment to be entirely void, is: Did plaintiff lose her relief in this action by failure to avail herself of the opportunities afforded by the statute to correct the errors and irregularities of which she now complains? It is hardly necessary to summarize the provisions of the act as to the matters made the subject of appeal to the council. They have been frequently stated in former cases. It was held in *Manning v. Den*, 90 Cal. 610, 27 Pac. 435, that section 11 of the act of March 18, 1885, authorizing street assessments, to the effect that no assessment shall be invalid except upon appeal to the city council, etc., does not apply to a case where an appeal is not authorized, or in which, if taken, the council could not have remedied the defect, the assessment being void by reason of incurable defects; and if, in such case, the owner appeals, and the decision of the council is against him, he is not estopped. It was held in *McBean v. Redick*, 96 Cal. 191, 31 Pac. 7, that, where the contract is absolutely void, its invalidity could not have been remedied or avoided by the trustees of the city, and, this being so, the property owner was not required to appeal to the trustees for its correction. In *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764, it was said, in respect of the act of 1885: "The owners were interested in having a legal and correct assessment. If the assessment was illegal, and created no lien upon the land,

Williams (the owner) was not a person who would feel 'aggrieved,' and was not required to appeal for the purpose of giving to the plaintiff a valid assessment." See *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226; *Brock v. Luning*, 89 Cal. 316, 26 Pac. 972. If the alleged irregularities in this case were such as to show want of jurisdiction to order the work, or that the council delegated to the superintendent powers which the council alone could exercise, these, if no other, would be sufficient to render the assessment void, and no appeal by plaintiff to the council could have availed him.

2. Several defects are pointed out, the result of which, it is claimed, rendered the assessment void.

(a) It is alleged in the complaint that the only paper designated by the council for the publication of notice of intention was the *Los Angeles Daily Times*, and that the only publication of notice was in the *Los Angeles Evening Express*. Section 3 of the act of 1891 provides that the resolution of intention "shall be \* \* \* published by two insertions in one or more daily, semi-weekly or weekly newspapers published and circulated in said city, and designated by said council for that purpose." The act requires the street superintendent to post notices headed "Notice of Street Work," and to publish like notice in one or more newspapers. At the expiration of a certain period thereafter, if no objection to the work has been filed, "the city council shall be deemed to have acquired jurisdiction to order any of the work to be done \* \* \* which is authorized by this act." An act required that notice of awards of contracts by the board of supervisors should be published for five days. It was published, but without a previous order of the board. Held, that the publication of the notice was void. *Donnelly v. Tillman*, 47 Cal. 40; *Donnelly v. Marks*, Id. 187,—followed in several subsequent cases. So held with regard to the publication of ordinances. *City of Napa v. Easterby*, 61 Cal. 509. Held, in *Shipman v. Forbes*, 97 Cal. 572, 32 Pac. 599, that, "in proceedings where the property of a citizen is to be taken, every requirement of the statute having the least semblance of benefit to the owner must be complied with." No one can doubt that the purpose of notice is to give the owner of property an opportunity to object to the proposed work, and that notice is for his benefit, and is of benefit. Here the act required the council to designate the newspaper, and the ordinance directed the publication to be made in that paper. It was, we think, mandatory upon the council to designate the paper; and, being so, a publication in some paper not designated would not be a compliance with the statute, and would, in effect, be no publication. *Wade, Notice*, §§ 1106, 1108, 1123; 2 Dill. Mun. Corp. § 605, and cases cited. See, also, *Donnelly v. Tillman*, 47 Cal. 40, followed in many cases; *City of Napa v. Easterby*,



61 Cal. 509; Shipman v. Forbes, 97 Cal. 572, 32 Pac. 599; Hewes v. Reis, 40 Cal. 255.

(b) It is alleged in the complaint that amended specification No. 5 contains certain provisions which, when examined, we think, will be found to delegate duties which the council alone can perform. In Bolton v. Gilleran, supra, the question as to the power of the supervisors of San Francisco to delegate the authority given them by the statute was very fully considered. It was cited with approval in Perine Contracting & Paving Co. v. City of Pasadena, 116 Cal. 6, 47 Pac. 777. We think those cases are determinative of the point here relied upon,—that there was an unauthorized delegation of power by the council.

Counsel for appellant presents several other alleged fatal defects, but we do not think it necessary to notice them. It is obvious that sufficient has been shown to render the assessment void and the bond invalid. Respondents' counsel make no objection to the sufficiency of the complaint, except in the single contention that the case is not one for equitable relief. While we might well have assumed that the assessment was void, it appears clearly from what has been said that in at least two vital particulars the complaint shows it so to be. We think the demurrer should have been overruled, and that it was error to dissolve the injunction and enter judgment for defendants. The order dissolving the injunction and the judgment in favor of defendants should be reversed, and the cause remanded.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order dissolving the injunction and the judgment in favor of defendants are reversed, and the cause remanded.

(122 Cal. 595)

**SLINKARD v. MANCHESTER FIRE ASSUR. CO. (Sac. 430.)**

(Supreme Court of California. Dec. 8, 1898.)  
INSURANCE—USE OF INSURED PROPERTY—CHANGE OF USE—LIABILITY OF INSURER.

1. A policy of insurance on a harvester "while in use in Tulare county" does not cover a loss occurring while it is stored in a shed, and is not being actually used for harvesting purposes.

2. Civ. Code, § 2754, providing that "an alteration in the use or condition of a thing insured from that to which it is limited by the policy, which does not increase the risk, does not affect the contract of insurance," does not apply where the policy, in terms, restricts the use to certain definite purposes.

Commissioners' decision. Department 2. Appeal from superior court, Tulare county. Action by J. M. Slinkard, Jr., against the Manchester Fire Assurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

Van Ness & Redman, for appellant. C. G. Lamberson and Hannah & Miller, for respondent.

CHIPMAN, C. Action on insurance policy for loss of a combined harvester by fire. Plaintiff had judgment, from which, and from an order denying motion for new trial, defendant appeals. Defendant issued its policy to plaintiff to cover a period of three months from June 25, 1896, at noon, "against all direct loss or damage by fire, except as hereinafter provided, \* \* \* while located and contained as described herein, and not elsewhere, to wit: *Twelve hundred dollars on combined harvester, Haines-Houser, makers, while in use in Tulare county, Calif.,*" etc. The court found that at the time the policy was issued the harvester "was being actually used in the field by plaintiff for the purpose of harvesting grain upon his ranch in Tulare county, and continued to be so used by him until the 25th day of July, 1896, when said harvester was placed in a shed upon the said ranch of plaintiff; \* \* \* that the placing of said harvester in such shed was the usual manner in which such machinery is taken care of and provided for in such neighborhood, and was a proper and careful manner for the safe-keeping of such property." The court found that the risk was not thereby increased, but materially decreased, and was less liable to loss by fire in said shed than when in use in the field. On September 26, 1896, while in said shed, the harvester was destroyed by fire, without plaintiff's fault. The italicized words of the policy as shown above were in writing upon the face of the policy, and, except the signature, the rest of the policy was in print. The liability of defendant depends upon two questions: (1) Was the harvester, at the time of the loss, "in use," within the meaning of the policy? And (2) is section 2754 of the Civil Code applicable to such case as this?

1. Without reference to the section of the Civil Code referred to, we think the words "while in use" were intended to be employed, and have the effect, to limit the liability of defendant to loss by fire of the harvester while being used for harvesting purposes, and do not cover the loss as it occurred. The liability would probably attach in an interval of disuse in the field, as at night, or the noon hour, or while undergoing temporary repairs where being used; for it would be a narrow—and, we think, unwarranted—construction to hold that the policy covered those periods only while the machine was actually engaged in cutting grain, and did not include temporary stoppages. But we think it would do violence to the language used, as well as to the manifest intention of the parties, to hold that the policy covered a risk after the harvest was over, and plaintiff had ceased using it, and the machine was dismantled and stored away in a building. It had then ceased to be used in the sense contemplated. A policy insured against loss by fire a threshing machine engine and

separator "while not in use." The outfit had been used, but was hauled to another place, and was left standing near a farm house, preparatory to its intended use a few days later, and while standing there was destroyed by fire. It was held that the machines were "not in use," within the meaning of the policy. *Minneapolis Threshing Mach. Co. v. Firemen's Ins. Co.*, 57 Minn. 35, 58 N. W. 819. This is a case the converse of the one we have here, but it shows—and we think properly—that, when we speak of a machine "in use," we do not mean a machine "not in use." The language of the policies in *Benicia Agricultural Works v. Germania Ins. Co.*, 97 Cal. 468, 32 Pac. 512, and *Mawhinney v. Insurance Co.*, 98 Cal. 184, 32 Pac. 945, was not the same as in the present case, but the principle there decided governs here. Among other things, it was said in the latter of these cases: "An insurer is not liable, except upon proof that the loss has occurred within the terms of the policy, and when making the policy he is at liberty to select the character of the risk he will assume. If the terms of the risk are distinct and without ambiguity, the assured cannot complain, if the risk assumed does not cover the loss. \* \* \* Whatever may have been the motives for limiting the extent of the risk, he [the insurer] cannot be made liable for a loss that was not covered by the risk assumed in the policy." It has been similarly held in many adjudicated cases. *Wood, Ins.* § 47. Respondent contends that the language, "while in use in Tulare county," was not intended to mean any particular or special use, but was intended to mean only the general use made of such property in the county, and while it remained in such county. We are cited to *Astor v. Merritt*, 111 U. S. 202, 4 Sup. Ct. 413, and *Snow v. Insurance Co.*, 48 N. Y. 624. We are unable to see that these cases warrant our holding the intention of the parties in the policy before us to be as broad as contended for by respondent. If he had intended to have a general risk covered for the three months, why were the terms "in use" written into the policy? If such had been the intent, the expression would have been "while in Tulare county," not "while in use in Tulare county." We cannot speculate as to whether the risk was greater or less while in actual use than while stored in the shed, to ascertain the true meaning of the terms used; for, whether greater or less, we are held to the terms in fact used. When insured, the machine was in the harvest field, "in use" to harvest grain; and it seems to us that this was the use, and the only use, meant by the parties. In *Langworthy v. Insurance Co.*, 85 N. Y. 632, the policy read: "Frame, shingle-roof hop house, while drying hops," from August 15th to October 15th. The hop house was destroyed September 30th, after the plaintiff had ceased drying hops. The court said: "The defendant did not undertake to insure the hop house against fire generally during the time specified, but during the time specified only 'while drying hops.' \* \* \*

If this had been intended as an absolute general insurance for the full term of sixty days, the words 'while drying hops' were purposeless, having no signification." And so it seems to us, in the case here, the words "in use" would be purposeless, if we were to hold as contended by respondent; for we do not think a machine can be said to be in use when it is stored away in a shed after the harvest is over, and is in fact in disuse.

2. Respondent claims that, while it may be said that the use to which the machine was limited by the terms of the policy was the special use of harvesting grain, respondent has by his pleading and by the evidence shown that he is fairly within the provisions of sections 2611, 2753, and 2754 of the Civil Code. Section 2611 reads, "A policy may declare that a violation of specific provisions thereof shall avoid it, otherwise a breach of an immaterial provision does not avoid the policy." Section 2754 reads, "An alteration in the use or condition of a thing insured from that to which it is limited by the policy, which does not increase the risk, does not affect a contract of insurance." Section 2753 gives the insurer the right to rescind in the case mentioned in section 2754, under circumstances stated. It is claimed that these sections "abrogate the rule which had formerly obtained, that any change in the use or condition of a thing insured from that limited in the policy avoided the insurance." It is not to be supposed that the legislature intended by section 2611 to give the insurer the right to insert a condition in the policy which, if violated, should avoid it, and by section 2754 take away that right. Respondent's construction would abrogate the warranties specially declared to exist in certain policies as shown by section 2603 et seq., and would practically take away from the parties the right of contract altogether. We think that the term "alteration in the use or condition" has reference to policies silent upon the subject, in which case the general rule is that the contract is not thereby avoided, unless the change of use or condition materially increases the risk. But where the policy in terms stipulates against the use for certain purposes, or restricts the use to certain definite purposes, we do not think section 2754 was intended to apply; nor do we think it introduces a rule under which the insured could, by proof that there was less hazard in the changed use, enforce a policy which stipulated against such changed use. When the insurer has thus stipulated, the violation of the agreement is not to be tested by the effect upon the risk, for it makes no difference whether the risk is increased or not. The stipulation has made any change of use a material part of the contract. The cases in 97 and 98 Cal., and 32 Pac., supra, while not referring to section 2754, could not have been decided in ignorance or disregard of its provisions. The case in 97 Cal., we think, was decided with a clearly-implied ref-



erence to section 2754, and that section was cited by appellant in its brief. The court said: "The appellant took exceptions to the rulings of the court excluding certain offered evidence, by which appellant sought to show that the risk or hazard was not increased by the fact that the machine was not employed in the fields or in transit at the time of the fire; but those objections and that testimony were immaterial, under the view which we have taken of the contract itself." And so, in 98 Cal., and 32 Pac., it was distinctly held that an insurer is at liberty to select the character of the risk he will assume, and he is not liable, except upon proof that the loss occurred within the terms of the policy. The dissenting opinions clearly show that upon the point now raised there was no disagreement in the court. In *McKenzie v. Insurance Co.*, 112 Cal. 548, 44 Pac. 922, it was said: "Parties may contract as they please. When a condition precedent is adopted by them in their contract, the courts will not inquire as to its wisdom or folly, but must exact its strict, or at least substantial, observance." We do not think section 2754, *supra*, was intended to apply to such a case as this, nor that the stipulations in the policy could be avoided by showing that the risk to the machine from fire was less in the shed than in the field while in use. It was error to admit evidence under this section, over defendant's objection, upon that question of fact. *Benicia Agricultural Works v. Germania Ins. Co.*, *supra*. The judgment and order should be reversed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

122 Cal. 573

SPRIGG v. BARBER. (L. A. 311.)

(Supreme Court of California. Dec. 7, 1898.)

APPEAL—RECORD—REVIEW—PAYMENT—PLEADING—EVIDENCE.

1. On dissolution of a firm of attorneys, they divided their business, and one of them agreed to pay the other a stated sum from the proceeds of the business retained by him. A case assigned to the latter was, at the client's request, transferred to the former, in consideration of which the client agreed to pay the latter a certain sum for his fees therein, which sum the former attorney afterwards assumed and paid. *Held*, in an action to recover the sum agreed to be paid by the former from the business retained by him, wherein defendant alleged that there was but one agreement, and that the sum paid for the transfer of the case was included in the first-mentioned sum, that the payment of the latter sum could be shown as a defense.

2. An order denying a new trial, which is not reviewable because the statement contains no specifications of error, is not made reviewable because on appeal from the judgment there came before the court for review rulings on evidence admitted on a special issue, and having no other connection with the case.

3. An answer in an action to recover an agreed sum, which denies that it is owing, and alleges that all of defendant's agreements have been duly performed, paid, and discharged, and all of the demands sued for fully paid, satisfied, and discharged, makes the question of payment an issuable fact.

4. The objection that a finding is not within the issues cannot be raised on appeal, where the parties tried the question on which the finding is based without objection.

In bank. On rehearing. Affirmed.

For opinion in department, see 54 Pac. 899.

CHIPMAN, C. 1. Respondent submits, in limine, "that the record fails to disclose for review, either on the appeal from the judgment or from the order, any question arising out of any proceedings upon the trial, outside of the judgment roll; for the reason that the statement specifies no ground of alleged insufficiency of evidence, or of alleged errors of law argued before the court for the new trial." Judgment was entered March 20, 1896, and filed March 21, 1896. On March 28th plaintiff served notice of motion for a new trial. The transcript contains what purport to be minutes of the court, to show that on April 10th, the parties being present, plaintiff by his attorneys and defendant in person, plaintiff moved the court to set aside the decision rendered March 20th, wherein judgment was given, and to grant plaintiff a new trial upon the grounds stated in the notice. The motion was made upon the minutes of the court, the record in the case, and evidence taken. Motion was denied, and plaintiff excepted and served notice of appeal April 17th. This part of the record (except notice of appeal) is not authenticated in any manner except by the clerk's certificate at the end of the statement, and follows immediately after the judgment roll in the transcript. Then follows the statement, which was settled by the judge September 11, 1896. In the statement there is no copy of the notice of motion, or its specifications, and no copy of the motion itself, and no reference made to them, and no specifications of error in any form. The statement contains only the evidence introduced at the trial and the rulings of the court as they there occurred, the notice of appeal, and the clerk's certificate. The question is, can this court look beyond the judgment roll and the statement, and consider the motion and the grounds stated therein, and the specifications found with the notice of motion? These questions, we think, are answered in the negative in *Leonard v. Shaw*, 114 Cal. 69, 45 Pac. 1012. There, as here, there was a failure to embody in the statement any specifications whatever of the errors or particular reasons on which the moving party relied, and it was held that the motion could not be considered. The clerk certified, among other things, in the case now here, that certain original documents were of record and on file in his office "in said entitled case, \* \* \* to wit, judgment roll, notice of motion for new trial, order of court

denying said motion, statement on appeal, notice of appeal, and service thereof." We do not think the clerk can supply by certificate what the law requires should be made to appear in the statement. The judge settles the statement, and in this case he certified to its correctness as it appears in the transcript. The clerk has no power to add to or take from that statement as thus settled. In *Leonard v. Shaw* it was said that, although the notice contained the required particular errors and objections relied upon, "this did not, however, obviate a specification of the errors and objections in the statement to be made in such cases after a hearing of the motion." This must necessarily be so, since the notice forms no part of the record.

Appellant's counsel say in their brief: "The language of the court in repeated cases would lead the practitioner to the conclusion that the place for the specifications was in the notice, and, if found therein, they had served their purpose, and need not be brought up in the record." In support of this statement we are cited to *Buckley v. Althorf*, 86 Cal. 643, 25 Pac. 134. That case held that, where a motion for a new trial is submitted on the minutes of the court, the notice of the motion must specify the particulars wherein the evidence is claimed to be insufficient, and the errors of law relied upon; and that, failing in this, no subsequent statement is authorized, and, if made and settled, will not be considered on appeal. But it is nowhere intimated in the opinion that, having made the requisite specifications in the notice, they need not be restated in the statement. On the contrary, it was there said: "His motion for a new trial having been submitted on the minutes of the court, he could only bring to this court, on appeal, matters other than those appearing in the judgment roll by bill of exceptions, or a 'statement of the case subsequently prepared';" citing Code Civ. Proc. § 661. Subdivision 4 of section 659 prescribes that, if the ground of the motion, when made upon the minutes of the court, be for insufficiency of the evidence, or errors of law, the notice must specify the particulars, failing in which the motion will be denied; but this subdivision does not dispense with the statement, or give the slightest intimation that the statement need not contain what subdivision 3 of the same section says the statement must contain, to wit, "The statement shall specify the particular errors upon which the party will rely." In *Re Westerfield*, 96 Cal. 113, 30 Pac. 1104, cited by appellant, the question was only as to the sufficiency of the notice. *Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706, is also cited. That case would seem to be against appellant's contention. It was there held that the notice of intention to move for a new trial is not made a part of the record on appeal, and need not be embodied in the statement or presented on appeal in any form unless the respondent insists that it is insufficient. The notice was held to be the

basis of the motion, "and that, upon the proper statement being filed, and the necessary motion made and passed upon by the court below, the notice has performed its functions, and is not a necessary part of the record on appeal, or to be presented in any form. When the case comes to us, we look to the statement or bill of exceptions, and the specifications in which the court below is not sustained by the evidence, and the specifications of errors of law, as our guide in reviewing the case, and to these alone. If a question is presented by such specifications, and is properly saved in the statement or bill of exceptions, this court will look no further, but must presume that the question was properly presented to the court below, and passed upon in its rulings upon the motion for a new trial." *Southern Pac. R. Co. v. Superior Court of City and County of San Francisco*, 105 Cal. 84, 38 Pac. 627, is also cited. The opinion affirms *Pico v. Cohn* on the point as to the notice of intention above noted, and decides that the order denying the motion is deemed excepted to, and need not be embodied in the bill of exceptions. We find in the opinion no intimation that specifications of particular errors may be dispensed with in the statement beyond this. We are unable to verify from the decisions the claim that this court has encouraged the belief that the only place for the specification of errors is in the notice. It seems to us that when it was held that the notice formed no part of the record the plain inference would be that the specifications must appear in the statement, for surely they should appear somewhere. Counsel claim that this court must presume, when the trial court has settled a statement showing the exceptions, and the evidence pertinent thereto, that the ground was argued before the trial court. But this is to ask the court to supply by presumption what the Code says must be embodied in the statement. Section 659.

2. Error is claimed in admitting on behalf of defendant the judgment roll in the case of *Patterson Sprigg* (plaintiff here) against *C. L. Barber* (one of the defendants here) and *F. E. Bates*, numbered 9,458, of the cases brought in the superior court of San Diego county. The ground of objection was irrelevancy to any issue pleaded, and that it was incompetent and immaterial. The present action arises out of partnership relations between plaintiff and defendant in the practice of law. Terms of dissolution were agreed upon, and a division of the partnership assets was made by agreement in writing, by which it is alleged in the complaint defendant agreed to pay plaintiff \$7,500 from the fees to be received by defendant from certain professional business of the firm which devolved upon defendant to prosecute, and which it is alleged has been concluded, and the fees received by defendant. The answer denied that defendant had agreed to pay plaintiff the sum of \$7,500, "or



any other sum greater than \$1,000"; denies that defendant has received "the sum of \$7,500, or any other sum greater than \$1,000, or that said sum has never been paid by defendant to plaintiff, or that the same is due or payable, or that defendant refuses to pay the same. The foregoing admissions as to \$1,000 apply to one and the same sum of \$1,000, and not to more than one sum." Several special defenses are set up in the answer. In one of these it is alleged that in the division of the litigation in the hands of the co-partnership at its dissolution was a certain case entitled "Frank E. Bates [one of the defendants in the action No. 9,458, supra] vs. E. S. Babcock and the Coronado Beach Company [spoken of in the evidence and pleadings as Bates vs. Babcock]." By the agreement of dissolution plaintiff, Sprigg, was to be substituted in place of Sprigg & Barber as attorney in Bates v. Babcock. Bates had no previous knowledge of this disposition of his case, and, when informed of it, objected, and, before any services had been rendered by Sprigg, obtained the consent of Sprigg that Barber should be substituted, and in consideration agreed to pay Sprigg \$500 in full satisfaction of his interest in any fees accrued or to accrue to Sprigg, and Barber was retained by Bates to act as sole attorney in place of Sprigg & Barber. Later, Bates assigned to Barber, for certain considerations, all his interest in the pending action of Bates v. Babcock; that all sums due from Bates to Sprigg & Barber were liquidated and settled, by which settlement the share due Sprigg was adjusted at the sum of \$1,000, and Barber agreed to pay him this sum. Of this agreement Sprigg was informed, and consented thereto, and ratified the same. It is also alleged in the answer that the action No. 9,458 was brought by Sprigg December 27, 1895, and after his consent to said agreements. In this action Sprigg set up the agreement of Bates to pay plaintiff \$500, which indebtedness, it was alleged, was assumed by Barber. The liability grew out of Bates' promise to Sprigg, already referred to. Plaintiff recovered judgment for \$500 in that action, which was paid by Barber. These matters were set forth in the present case by the pleadings, and became issuable facts therein, and we think the judgment roll was, therefore, properly admitted, as it showed part payment of plaintiff's claim. As we understand plaintiff's reply brief, it is claimed further that the admission of this judgment roll opened up the whole controversy on this appeal from the judgment, even if the motion for a new trial cannot be considered. We do not so understand the effect of offering the judgment roll in No. 9,458 in evidence. It has no apparent connection with this case except as it shows a payment of \$500 to plaintiff on account of fees in Bates v. Babcock, and therefore opened up no controversy beyond this.

3. Plaintiff claims that defendant admitted a liability of \$1,000; that the findings are against this admission; and that, therefore, the judgment should be modified so as to give plaintiff judgment for \$1,000 instead of \$500, and his costs of appeal. *Ortega v. Cordero*, 88 Cal. 225, 26 Pac. 80, and numerous other cases are cited to the point that a finding at variance with an admission must be disregarded, and that findings should be confined to the facts in issue. There can be no doubt that plaintiff correctly states the rule. The court found as follows: "That said sum of one thousand dollars, so promised to be paid by defendant as aforesaid, included the sum of five hundred dollars specified in the agreement referred to in said amended answer." In addition to the matters set forth in the answer as shown above, it was alleged "that all of defendant's alleged agreements have been duly performed, paid, satisfied, and discharged." It was also alleged that by reason of the facts set forth in the answer "all of plaintiff's demands sued for were fully paid, satisfied, and discharged." The answer, taken as a whole, we think made the question of payment an issuable fact, and that the court properly found upon it. Besides, the parties seem to have proceeded to trial upon the answer, without objection to its sufficiency to raise the issue, and evidence was received as to the facts set up in the answer, and the issue was passed upon. In such case objection will not be heard in this court for the first time that the finding is not within the issues. *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 115 Cal. 285, 47 Pac. 60. The judgment and order should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(122 Cal. 644)

NELSON v. MERCED COUNTY. (Sac. 406.)  
(Supreme Court of California. Dec. 13, 1898.)

PLEADING—DEMURRER—HARMLESS ERROR—CLAIMS AGAINST COUNTIES—LIMITATIONS.

1. A demurrer to a complaint containing only one cause of action should be overruled, if there can be a recovery for any part of the account sued for.

2. After the court had erroneously sustained defendant's demurrer to a part of the items of an account sued for, no judgment was rendered on the order, and defendant answered without objection by plaintiff, but without leave of court or a vacation of said order, and the case was tried on the answer. *Held*, that plaintiff was not harmed by the irregularity.

3. St. 1893, p. 363, § 41, precluding county supervisors from allowing a claim against the county where a statement is not filed within a year after the last item of the account accrued, does not bar a claim by a surveyor for his daily compensation due under St. 1893, p. 497, for a period more than a year before the statement was filed, where it also demanded pay for a period within the year.

4. Employment by the day in the service of a county under the same contract, at a stipulated compensation, is a proper subject of an account to be embraced in a single cause of action, the statute nowhere fixing a time for the payment of per diem compensation of officers.

Commissioners' decision. Department 2. Appeal from superior court, Merced county.

Action by C. C. Nelson against Merced county. From a judgment for plaintiff for only a part of the amount sued for, he appeals. Reversed.

F. H. Farrar, for appellant. F. G. Ostrander, Dist. Atty., and W. F. Fitzgerald, Atty. Gen., for respondent.

HAYNES, C. Plaintiff brought this action to recover from the county of Merced \$1,884, for services rendered by the plaintiff as supervisor of said county while acting as road commissioner in his district. His claim for said services, itemized and verified as required by law, was duly filed and presented to the board of supervisors May 19, 1896, and by said board referred to the district attorney, who indorsed thereon the following disapproval: "The annexed claim is disapproved, the reason for disapproval being that claimant has already received compensation in full from Merced county for the services rendered by him as road commissioner during all the times mentioned in this claim; also for the reason that all that portion of the claim for services rendered prior to May 19, 1895, is barred by the provisions of the county government act (St. 1893, § 41,—County Government Act)." The claim was thereupon rejected by the board of supervisors, and this action was brought.

The first charge in the itemized account is dated February 1, 1893, and the last is April 29, 1896, and it was filed with the clerk of the board May 19, 1896. Under the act of 1893, Merced was a county of the thirty-ninth class, and by section 201, subd. 15, the compensation of supervisors in counties of that class is fixed at "six dollars per day for each day while in service of the county" (St. 1893, p. 497); and it is conceded that supervisors of said county were entitled to that compensation for each day's service as road commissioner. The complaint consisted of one count or cause of action covering the entire claim, and defendant demurred thereto (1) for want of sufficient facts; (2) that it is barred by section 41 of the county government act of 1893; (3) that it is barred by section 338 of the Code of Civil Procedure; and (4) that it is barred by section 339 of the same Code. Upon the hearing of the demurrer, the following order was made: "It is ordered that the demurrer herein be, and the same is, sustained as to all items of the account prior to one year before the filing of claim." No judgment was entered upon this order, and afterwards the defendant answered, and admitted that plaintiff performed the services alleged in the complaint, but denied that de-

fendant was indebted to the plaintiff on account thereof in said sum of \$1,884, or in any sum greater than \$540, and alleged that plaintiff's claim for all services rendered prior to May 19, 1895, is barred by section 41 of the county government act of 1893.

The ruling upon the demurrer was erroneous. There being but one cause of action pleaded in the complaint, if a recovery could be had for any part of the claim it should have been overruled. Regularly, the order should have been vacated, and the demurrer overruled, with leave to answer. But appellant was not prejudiced, and, besides, the appeal is from the judgment upon the judgment roll; and there is nothing in the record showing that appellant objected to the filing of the answer, or to the trial of the issue made thereby. It must be assumed, therefore, that the answer was filed by consent, and the judgment subsequently rendered is not affected by the irregularity.

Upon the trial, findings were waived, and the plaintiff had judgment for \$540, being that portion of the account or claim which had accrued within one year prior to its presentation to the board of supervisors, and which amount the answer conceded was a legal claim. The sole question therefore is whether the remainder of the claim was barred by section 41 of the county government act of 1893, no other defense, under other statutes of limitation or otherwise, having been pleaded. Said section 41, so far as material here, is as follows: "The board of supervisors must not hear or consider any claim in favor of any person, corporation, company or association against the county, nor shall the board credit [audit?] or allow any claim or bill against the county or district fund, unless the same be itemized, giving names, dates, and particular services rendered, \* \* \* number of days engaged, materials furnished, to whom, and quantity and price paid therefor, duly verified as to its correctness, and that the amount claimed is justly due, is presented and filed with the clerk of the board within a year after the last item of the account or claim accrued. \* \* \*" St. 1893, p. 363. The contention of respondent is—and the court below sustained it—that only those items of the claim which accrued within a year prior to the presentation of the claim could be allowed under the provisions of the section above quoted. This contention cannot be sustained. The language of the statute is too plain to admit of construction. It provides that the board shall not allow any claim against the county "unless the same be filed with the clerk of the board within a year after the last item of the account or claim accrued." The limitation imposed by said section does not begin to run until the date at which the last item accrued; and the claim may be allowed if presented at any time within a year after that date. Statutes of limitation are to be strictly construed, and the court must find



the intention of the legislature from the statute itself. *Tynan v. Walker*, 35 Cal. 634. If it had been the intention of the legislature to bar all items of a claim which did not accrue within a year before the presentation of the claim, it would have been easy to say so, or to say that no claim shall be allowed unless the first item thereof shall have accrued within a year before its presentation.

It is suggested by respondent that "the claim of the plaintiff is composed, not of items constituting one claim, but of numerous claims incorporated into one." The statute nowhere fixes a time for the payment of per diem compensation of officers. All employment by the day, under the same contract, at a stipulated compensation, is the proper subject of an account to be embraced in a single cause of action. The services rendered by the plaintiff form no exception to the rule, as clearly appears by section 51 of the same act (St. 1893, p. 365), which provides: "All claims against the county by members of the board of supervisors for per diem and mileage, or other service rendered by them, must be itemized and verified as other claims." The answer states no defense to the action, and the plaintiff might have had judgment on the pleadings upon motion therefor. I advise that the judgment be reversed, and the cause remanded.

We concur: CHIPMAN, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded.

(122 Cal. 569)

BROOKS v. JOHNSON et al. (Sac. 412.)  
(Supreme Court of California. Dec. 7, 1898.)  
PLEADING—DENIAL OF EXECUTION OF INSTRUMENT  
—DEFAULT JUDGMENT—VACATION—  
IGNORANCE—SURPRISE.

1. Code Civ. Proc. § 448, provides that, when a defense is based on a written instrument, a copy whereof is contained in the answer or is annexed thereto, the genuineness and due execution thereof are admitted, unless plaintiff files an affidavit denying the same. *Held*, that under section 462, providing that the statement of any new matter in the answer in avoidance or defense must be deemed controverted by the opposite party, an instrument set up as a defense may be controverted as without consideration, though no affidavit denying its genuineness and due execution has been filed.

2. Where plaintiff gave defendant's attorney notice, as required by the rules of court, that he would move to set the cause for trial, and defendant's attorney did not appear, misbelieving that he was entitled, under the rules, to a notice of the time for which it was set, and plaintiff, without further notice, took judgment by default, the attorney's ignorance of the rules does not authorize relief from the judgment as for surprise.

3. Unless it is shown that a different result might have been reached, a court cannot set aside its decision because of surprise or failure of the attorney to be present at the trial.

Department 1. Appeal from superior court, Butte county.

Action by one Brooks against one Johnson and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

G. H. Maxwell and W. F. Gibson, for appellants. Lucius L. Solomons, for respondent.

HARRISON, J. Action for the foreclosure of a mortgage. The complaint is in the ordinary form, setting forth the promissory note whose payment is secured by the mortgage, and alleging that it was made October 6, 1893, payable one year thereafter, and has not been paid. The complaint herein was filed September 1, 1896; and the defendant Johnson, one of the makers of the note, in his answer thereto alleged that on the 19th of February, 1895, the plaintiff, by a written instrument, extended the time of payment of the note until the 6th day of October, 1896,—setting forth in his answer a copy of said instrument,—and denied that there was any sum of money due from the defendants to the plaintiff at the time of the commencement of this action. The plaintiff did not make or file an affidavit denying the genuineness and due execution of this instrument. The cause was tried by the court, and a finding made by it that the written instrument, and the extension of time therein provided, were made by the plaintiff without consideration; and judgment was rendered in favor of the plaintiff for the amount of the note, and for the foreclosure of the mortgage. The appeal therefrom is urged here upon the ground that by failing to file the affidavit authorized by section 448, Code Civ. Proc., the genuineness and due execution of the instrument set up in the answer were admitted, and that it was not competent for the court to receive evidence, or determine that it was made without consideration. The effect of a failure by a plaintiff to file such affidavit was fully considered in the recent case of *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630, and it was there said: "Where the defendant has pleaded a written instrument in defense (not by way of cross complaint), and the plaintiff has not served and filed an affidavit denying the instrument, and has offered no evidence controverting it on any ground, the instrument is to be deemed admitted, and must be taken for what it appears on its face to be. But the plaintiff may controvert the instrument by evidence of fraud, mistake, undue influence, compromise, payment, statute of limitations, estoppel, and the like defenses, under section 462 of the Code of Civil Procedure. In short, he may by evidence controvert the instrument upon any and all grounds, except that he cannot controvert its due execution or its genuineness. By 'genuineness' is meant nothing more than that it is not spurious, counterfeit, or of different import on its face from the one executed, but is the identical instrument executed by the party. [Citing several cases in support thereof.] It

could never have been intended that the plaintiff is required to make an affidavit denying the instrument, or be precluded from making any defense whatever. There are many defenses which he is, and should be, entitled to make, while possibly compelled to admit that he executed the instrument, and that it is genuine, and which defenses it was intended by the Code he might make under section 462." In *Water Co. v. Raynor*, 57 Cal. 588, a written instrument was annexed to the answer; and at the trial the maker thereof testified, in answer to a question put to him, that there was no consideration therefor. The question was objected to by the defendant upon the ground that there was no denial of the consideration in the pleadings; and it was said by this court, upon an appeal therefrom, that there was no error in the ruling, and that "the genuineness and the execution of the instrument was not at all impeached by the evidence admitted." It was held that the provision of section 462, Code Civ. Proc., "The statement of any new matter in the answer in avoidance, or constituting a defense or counterclaim, must on the trial be deemed controverted by the opposite party," allows the plaintiff, in reply to such new matter, to introduce on the trial any evidence which countervails or overcomes it, as if it were inserted in a replication, and pleaded with all the precision and fullness which the strictest rules of law ever required. The court, therefore, did not err in receiving this evidence, and, upon its findings in accordance therewith, properly held that the plaintiff was entitled to judgment.

By the rules of the superior court of Butte county, where this cause was pending, the calendar of the causes at issue of fact in that court is made up on the first Monday of each month, and on that day set down for trial. The answer of the appellant to the complaint herein was served and filed October 22d, and on October 24th the attorney for the plaintiff served upon the attorney for the defendant a notice that on Monday, the 2d of November, he would move for an order setting the cause for trial on a day to be named by the court; and on said 2d day of November, in pursuance of said notice, the court, upon motion therefor by the plaintiff, set the cause down for trial on the 9th of November. The cause was tried on the last-named day, but neither the appellant nor his attorney were present at the trial. Upon a motion for a new trial the attorney for the appellant read an affidavit to the effect that he received the notice of the motion to set the cause for trial, but supposed that he would receive a notice of the time for which it would be set; that he did not receive such notice, or have any knowledge that the case had been set for trial, until after the trial had been had, and judgment entered. He does not, however, say that he would have been present at the trial if he had received such notice, nor does he say that he would have been able to pre-

sent any evidence to countervail the testimony of the plaintiff, or to show that there was any consideration for the execution of the instrument annexed to the answer. An attorney is presumed to know the rules of the court in which he appears, and his want of such knowledge does not authorize the relief from a judgment taken against him upon the ground of surprise. The failure of the attorney to give any attention to the notice that on the 2d of November an application would be made to have the cause set for trial cannot give him any greater right than he would have had if he had been present on that day, nor was the plaintiff required to give him any notice of the day that had been set by the court for the trial of the cause. It was, moreover, essential to show that the defendant had sustained injury by the action of the court. Unless it is made to appear that a different result might have been reached, a court is not authorized to set aside its decision on the ground merely of surprise or failure of the attorney to be present at the trial. *Haight v. Green*, 19 Cal. 113; *Ekel v. Swift*, 47 Cal. 619; *McGuire v. Grew*, 83 Cal. 225, 23 Pac. 312. The motion was addressed to the legal discretion of the superior court, and, upon the evidence contained in the record, we cannot say that this discretion was improperly exercised. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(122 Cal. 551)

FLINT v. LOVDAL et al. (Sac. 343.)

(Supreme Court of California. Dec. 5, 1898.)

FORCIBLE ENTRY AND DETAINER—BOUNDARIES—EVIDENCE.

On an issue whether defendants forcibly entered a disputed strip of land between them and adjoining proprietors, evidence that an entry had been made prior to the alleged entry mentioned in the complaint, under an agreement to establish the line by a survey, is admissible on the question of who was in possession at the time of the alleged entry.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county.

Action by Daniel Flint against T. B. Lovdal and another. There was a judgment for defendants, and from an order denying a new trial plaintiff appeals. Affirmed.

McKune & George, for appellant. R. Clark, for respondents.

BELCHER, C. This is an action to recover possession of a strip of land in Yolo county, described as being about 72 feet wide and 2,200 feet long. The complaint was filed February 13, 1893, and contains two counts, the first alleging a forcible entry upon the land by defendants on January 24, 1893, and the second alleging an entry upon the land on the same day, and a forcible detention thereof. The answer of defend-



ants denies all of the material averments of the complaint, and alleges that "they have been in the quiet and peaceable possession of the premises mentioned in the complaint for more than one whole year continuously next before the commencement of the action, and that their interest therein has not ended or determined, and that by reason thereof plaintiff is barred from asserting any claim, or complaining in any way of or concerning any forcible entry, or forcible detainer, or unlawful entry or detainer." The cause was tried before a jury, and the verdict and judgment entered thereon were in favor of defendants. Plaintiff moved for a new trial, and his motion was denied. From that order this appeal is prosecuted.

Appellant contends that the court erred in admitting certain evidence, and in giving a certain instruction to the jury, and that the verdict was not justified by the evidence. It appears that plaintiff and defendants owned adjoining farms, and that the land in controversy was a strip along the dividing line between the farms, as to the ownership of which there had been some controversy. To make out his case, the plaintiff introduced evidence showing that the land in dispute had been in his possession, and used by him partly for raising alfalfa and partly for pasturage, and had been inclosed with other land by a good substantial fence, for more than six years prior to January 24, 1893, when the defendants, in the absence of plaintiff and without his knowledge, removed the fence along the south line of said strip to the north line thereof, and there put it up in a substantial manner. On the other hand, T. B. Lovdal testified for defendants that he and his brother had had possession of the said land for the last three or four years; that he had exercised dominion over the land by going on it, keeping the levees up, cutting the timber off it, keeping others from using it, and preventing Mr. Flint from using it. The witness was then asked whether or not three or four years ago he had an agreement with Mr. Flint in relation to this particular piece of land, whereby he obtained possession, and had since had possession of it. Counsel for plaintiff objected to the question, on the ground that it was irrelevant, but the court said, "I think he can prove he went into possession under that agreement," and overruled the objection. The witness then testified that he did not remember the exact time the agreement was made, but that Mr. Flint came to him and said, "I think you are on my land; let us have a survey made to establish the lines between us;" that they agreed upon getting the county surveyor to make the survey, and so wrote to Mr. O'Farrell; that, when O'Farrell came to make the survey, Mr. Flint said, "Take my patent, and run by it;" that they took the patent, and O'Farrell ran the lines in accordance with it, and caused stakes to be set at the corners, following the survey; that Mr. Flint was

present, and saw the stakes; that witness took possession under that agreement, and the first thing he did after the line was fixed was to raise a levee in front of the piece in dispute, and that he had been raising it every year since; that Mr. Flint knew he was raising it, and did not object to it; that he cut trees a year ago, cut hop poles in front, and last fall cleared it off, commencing in November, without objection on the part of Flint; and that he had pulled up trees which Flint had planted.

The court gave to the jury an instruction reading as follows: "Defendants, for purposes of proving that they, and not the plaintiff, were in the possession of the premises at the time of the alleged forcible entry, have given evidence pertaining to a survey made by O'Farrell for the purpose of establishing the division line between plaintiff's and defendants' lands. Now, if you should believe from the evidence, taken with all the other evidence given, that the defendants, and not the plaintiff, were in possession of the land described in the complaint, or were exercising acts of ownership over it inconsistent with plaintiff's peaceable possession at the time of the alleged forcible entry, your verdict will be for defendants." We see no error in the ruling of the court upon the admission of the evidence objected to. The evidence tended to show that the parties had, by agreement, fixed the location of their dividing line, and that defendants took possession of the disputed strip with the knowledge and consent of plaintiff. So, we see no error in the instruction complained of. It was proper for the jury to consider the said agreement as a circumstance tending to show who was, in fact, in possession of the land at the time of the alleged entry. There was a conflict in the evidence, but that given on behalf of defendants was sufficient, if believed by the jury, as it must have been, to justify and support the verdict. The judgment cannot therefore be reversed on this ground. The order appealed from should be affirmed.

We concur: CHIPMAN, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(122 Cal. 609)

NOFSINGER v. GOLDMAN et al. (Sac. 378.)

(Supreme Court of California. Dec. 8, 1898.)

PARTNERSHIP AS TO THIRD PERSONS—AGENCY—MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANT—ASSUMPTION OF RISK—NOTICE—INSTRUCTIONS.

1. Merchants who owned a threshing outfit let it in consideration of half of the net profits of its operation, but the lessees were to have the exclusive management of it. In accordance with their custom, they furnished supplies on credit for operating the machine, and mon-

ey to pay the help, to be repaid them after the close of the threshing season. The lessees were operating another outfit, which they owned, and for which they purchased supplies on credit from the lessors; and to distinguish the two accounts, and without the lessors' knowledge, their bookkeeper charged the advancements for the leased outfit to a firm name composed of the names of lessees and one of the lessors. One of the lessors stated to third persons that they were running a threshing outfit, and the bills for the threshing done with such outfit were settled at their store. *Held*, that there was no actual partnership.

2. As to one employed on the outfit without knowing or relying on such facts, there was no representation of a partnership, within Civ. Code, §§ 2444, 2445, providing that a person shall be liable as a partner only where he is such in fact, unless he permits himself to be represented as a member of a firm to another who extends credit to such firm on the faith of such representation.

3. Where plaintiff seeks to hold defendant liable for negligence as master, by virtue of a contract of employment made with a third person, he must show that such person was defendant's agent.

4. Acts of ostensible agency, unknown to plaintiff until after he accepted the employment, are irrelevant.

5. A master may be liable to a servant if he employs an incompetent co-servant, though the latter be not negligent in the performance of his duties.

6. Instructions not addressed to the evidence are properly refused.

7. A servant's knowledge of defects in machinery about which he is employed does not relieve the master from liability for injuries to the servant caused by such defects, unless the servant knew of the danger and risk incident to the defects.

8. A person, not an engineer, employed about an engine which is inadequate for the work being done with it, and makes steam badly, is not chargeable with knowledge of the specific dangers to which his employment subjects him.

Department 2. Appeal from superior court, Tulare county.

Action by one Nofsinger against J. Goldman and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed as to defendants Hannaford Bros., and reversed as to defendants Goldman & Co.

Bradley & Farnsworth and G. N. Zartman, for appellants. C. L. Russell and W. B. Wallace, for respondent.

HENSHAW, J. These appeals are from the judgment, and from the order denying defendants a new trial. Plaintiff sued the defendants as co-partners, doing business under the firm name of Hannaford & Goldman, to recover damages for injuries which he received by the explosion of the boiler of a threshing machine engine. He averred that the defendants engaged him to labor in and about their business of threshing grain, and that in the discharge of his duty it was necessary for him to be about and close to the threshing engine; that the engine and boiler were inadequate, unsafe, and defective in specified particulars; that by reason of its defects the boiler exploded, causing the injuries complained of. The defendants

G. Hannaford and W. E. Hannaford answered, denying that they were or ever had been partners with J. Goldman, I. W. Goldman, and J. Wolfrom, the other defendants, or with any or either of them, but averred that they two, as sole partners, were engaged in the business of threshing grain, under the firm name of Hannaford Bros. They admitted their employment of plaintiff to labor about the threshing machine, but denied the defectiveness of the machine and any negligence upon their part. The defendants J. Goldman, I. W. Goldman, and J. Wolfrom, answering separately, denied that they ever had been in the business of threshing grain under the firm name of Hannaford & Goldman, or under any other name, or that they were ever partners with the Hannaford Bros., or with either of them, and denied that they ever employed the plaintiff to labor in and about the threshing machine, or in the business of threshing grain. Upon the issues joined, trial was had, and a verdict in favor of plaintiff and against all of the defendants followed.

Of the questions presented upon the appeal, some may be quickly disposed of. The Hannafords admit the employment of defendant. That plaintiff was horribly injured, nearly flayed, by the escaping steam, is abundantly shown. From the evidence given as to the nature of his injuries, it may not be said that the verdict of \$5,000 is excessive. That the engine and boiler were old, rusty, defective, and imperfect is left in no doubt by the evidence, and in as little doubt is left the question that the boiler exploded because of its defects. Defendants Hannaford admit that they were engaged as partners in the threshing business with this machine, and that they employed plaintiff to labor upon and about it. Their responsibility for the injury and their liability for damages in compensation thereof are thus both established.

Coming to the defendants Goldman and Wolfrom, a very different case is presented. These defendants, it appears, were themselves partners, engaged in business under the firm name of J. Goldman & Co. The firm of J. Goldman & Co. was doing a general merchandise business in Tulare city. The members of the firm owned the threshing machine the boiler of which exploded; that is to say, the engine and boiler belonged to the three members, while the separator and other parts of the outfit belonged to the two Goldmans alone. The Hannaford Brothers rented the threshing outfit, and the firm or J. Goldman & Co. leased the threshing outfit to the Hannaford Brothers for one-half of the net profits which might be made by the latter in the threshing of grain. The Hannaford Brothers were engaged in the business of threshing grain, or of 'running threshing machine outfits.' They had one such outfit of their own, and, after taking into possession under their lease the outfit in question, they were engaged in operating two.



They purchased supplies for both their outfits at the store of Goldman & Co., as they had been wont to do in previous years. In accordance with their method of doing business, Goldman & Co. would furnish supplies to threshing outfits upon credit, receiving their pay from time to time as money for the threshing was paid in. In their dealings with the Hannaford Brothers they do not seem to have departed from their usual business methods. When Hannaford first went to the store of Goldman & Co. to purchase supplies for the threshing outfit which had been leased from the firm, he requested the bookkeeper to keep the accounts of the two threshing outfits separate, in order that there might be no confusion in arriving at the true state of their business affairs. The clerk thereupon, without consultation with any of the members of the firm, caused an account to be opened upon the books of the firm in the name of Hannaford & Goldman, thus to distinguish the supplies bought for that outfit from the supplies bought for the other outfit, which were charged against the account of Hannaford Bros. Not until some time afterwards did a member of the firm discover the account of Hannaford & Goldman upon their books; and demanding to know what it meant, and by whose authority it was opened, the explanation was made to him, in accordance with the foregoing statement, that it was for the sake of accuracy and convenience in keeping the accounts.

By respondent it is insisted that the evidence establishes three propositions: First, that the defendants Goldman and Wolf from permitted themselves to be represented as partners with the Hannafords, and held themselves out as such, and thus incurred liability to plaintiff, under section 2444 of the Civil Code; second, that, regardless of such holding out, the evidence establishes that the defendants were in fact co-partners; and, third, aside from the question of partnership, that the evidence proves that plaintiff was employed by the firm of J. Goldman & Co., whose members therefore became liable for his injury. Upon the first two of these propositions, it is maintained that the evidence establishes the following facts: That the business was done under the name of Hannaford & Goldman; that the books of J. Goldman & Co. showed an account in the name of Hannaford & Goldman; that the books kept at the threshing machine outfit were likewise in the name of Hannaford & Goldman; that orders for supplies and drafts for moneys were drawn upon Goldman & Co., and signed by the bookkeeper in the name of Goldman & Hannaford, and that such orders and drafts were always honored; that the arrangement between the Hannafords and the firm of Goldman & Co. was for a division of the profits; that the defendants, members of the firm of J. Goldman & Co., owned and furnished the machinery the groceries and pro-

visions, and the money to pay the employes, and received all the earnings; that J. Goldman stated that they were running a threshing outfit; that Wolf from and J. Goldman stated that Raymond was employing help on the machine; that Raymond did employ men to labor on the machine; that the books were closed at the business place of J. Goldman & Co.; and that that firm claimed all the earnings of the venture when the moneys were garnished.

Upon the first contention of respondent—viz. that the evidence establishes an ostensible partnership, and a holding out by the Goldmans and Wolf from as partners with the Hannafords—little need be said. Whatever force the evidence might have to establish such a partnership, the fact remains that there was no such holding out to plaintiff. The rule of responsibility and liability declared in section 2444 of the Civil Code is founded upon the equitable principle of estoppel. One who has suffered another to give credit or incur a liability upon the strength of his representations, made or permitted, that he is in fact a partner, will not thereafter be allowed to deny those representations. But, as is declared in the succeeding section of the Code (2445), no one is liable as a partner who is not such in fact, excepting as is provided in section 2444. The facts and circumstances which respondent contends establish such ostensible partnership lose all force in the light of the fact that none of the so-called "representations" was made directly or indirectly to plaintiff, and, indeed, that few, if any, of the facts set forth were even known to plaintiff until after his injury. There was, then, no holding out to plaintiff by these defendants; nor did this plaintiff, upon the faith of any of defendants' representations, "give credit to the partnership."

Upon the second proposition—that is to say, upon the question of an actual partnership—respondent insists that, considering all of the evidence in the case, there was sufficient for the jury to have found the fact as it must have found to have rendered its verdict as it did. In this discussion all question of ostensible partnership or of holding out must be eliminated, and the question narrowed to this single consideration, were they in fact partners? For, as there was no holding out of the partnership relation to plaintiff, it is not to be forgotten that the defendants are not liable as partners unless in fact they were such. Whatever weight or value the facts which respondent contends are established by the evidence would have in a case where ostensible partnership was sought to be shown, those facts, even if established, cease to be of weight against the proved contract and relationship of the parties, by which it unmistakably appears that in law they were not partners. The contract between the firm of Goldman & Co. and the Hannaford Brothers was, as has been stated, a mere contract of leasing and hiring, whereby the firm of Gold-

man & Co. leased to the Hannaford Brothers a threshing machine outfit, for the use of which they were to receive one-half of the net profits which might be earned by the Hannafords in their exclusive management and conduct of it during the threshing season. Such a contract, this court has more than once declared, does not constitute a partnership. *Vanderhurst v. De Witt*, 95 Cal. 57, 30 Pac. 94; *Bank v. Same*, 97 Cal. 78, 31 Pac. 744. But, more than this, the evidence urged as constituting a partnership is found to be entirely conformable to the evidence of the defendants. Thus, the fact that an account was opened upon the books of Goldman & Co. in the name of Hannaford Bros. is explained. The circumstance that supplies were furnished and moneys advanced is shown by uncontradicted evidence to have been in accordance with the uniform business method of the firm in dealing with Hannaford Bros., as well as with other threshing outfits, and to have been not at all peculiar to this particular transaction. The fact that after the explosion the accounts were settled in the office of J. Goldman & Co. is quite natural, in view of the advances that had been made by Goldman & Co., and of the further fact that, in the final adjustment of accounts, they were entitled as rents to one-half of the profits which the outfit earned. Cases may arise where an actual partnership will be denied to escape legal liability. Men may go even further, and offer false evidence as to the relations which existed between them to escape a partnership liability. In such cases a fraud would have to be met and overcome; but, as the law never presumes fraud, the evidence to overcome it should be inconsistent with any reasonable theory of truth and right dealing. But in the vast majority of cases, as here, where the question of ostensible partnership is eliminated, the proved relationship between the parties must overcome any slight evidence tending to show that the relations of the parties bore a likeness to the partnership relation, and particularly must that be so when, as in a case like the present, the acts of the so-called "partners" are shown to be quite consistent with their general method of business, and with the contractual relations which they proved to have existed between themselves and their fellow defendants.

Upon this branch of the case there is left for consideration the third proposition, viz. that the defendants Goldman and Wolfrom are liable because they employed the plaintiff to labor upon the machine. Plaintiff testified that one Raymond employed him to work upon the machine, and told him that Hannaford & Goldman were going to run the machine, and that he would get his pay through J. Goldman, the same as he did when previously he had been employed by J. Goldman; that afterwards Raymond presented him to one of the Hannaford brothers, and said, "Here is the man I hired to go on the machine; I want you to reserve a position for

him on the machine, sure;" that thus he was employed, and went to work in due time. Aside from the fact that this evidence is stoutly contradicted by Hannaford and by Raymond,—the one testifying that he and his brother employed all the men, the other testifying that he never employed the plaintiff nor any other man to labor upon the machine, and had no authority from anybody so to employ labor,—and aside, also, from the fact that this evidence is impeached by witnesses who testified that Nofsinger told them that he was going to work for Hannaford Bros., that Mr. Raymond had told him that the Goldmans had leased the machine to Hannaford Bros., and that he would try and get him a job, which facts but raise a conflict in the evidence,—it must be shown, before the defendants Goldman and Wolfrom can be legally held to have employed the plaintiff, that Raymond, who, by the plaintiff's own testimony, did the employing, was actually or ostensibly the agent of the defendants, with power so to do. Upon this there is a total failure of evidence. Raymond disclaimed such authority; the members of Goldman & Co. did the same. As to the question of ostensible agency, one witness testified to a conversation which he had with Raymond, looking to his employment as engineer upon the engine; but it nowhere appears that this conversation with Raymond was made known to plaintiff, so that it cannot be contended that the plaintiff could have relied on any ostensible show of authority. Saving for this evidence, there is nothing which we have been able to discover upon the question.

The conclusion is thus reached that the evidence is insufficient to support the verdict of the jury and the judgment of the court against the defendants Goldman and Wolfrom. In reaching this conclusion, consideration has been paid to all of the evidence admitted in the case. To the introduction of much of this evidence, however, the defendants objected, and some of it was unquestionably improperly admitted. It becomes unimportant, however, to consider in detail these specifications of error, since most of them are addressed to alleged errors in the admission of evidence to prove the partnership relation, and since, as has been said, the admitted evidence, taken as a whole, fails to establish that relationship. The judgment and order as to the Goldmans and Wolfrom must therefore be reversed. There are other propositions upon the appeal of the Hannaford Brothers which demand consideration.

Plaintiff also sought to fix responsibility upon the defendants by charging them with the employment of an unfit and incompetent engineer. Defendants asked an instruction to the effect that there was no evidence of any special acts of carelessness upon the part of the engineer from which the jury would be authorized to find that the engineer was either careless or incompetent. This instruc-



tion was properly refused. The carelessness of the engineer was not made a charge. An engineer might not be careless. He might exercise extreme care within the limitations of his knowledge, and yet, for lack of adequate knowledge, might be unfit and incompetent for the position. Defendants' proposed instruction 9 was to the effect that when an employé assents to occupy a place prepared for him, and to incur the dangers to which he will be exposed thereby, if the employé have sufficient intelligence and knowledge to enable him to comprehend the risks and dangers, his assent dispenses with the performance upon the part of the employer of the duty of making the place reasonably safe. If an employé agree with his employer to undertake the performance of a specific task, either working in an unsafe place, or with unsafe and inadequate appliances, and in so contracting the employé knows and understands the danger of the situation, and knows and understands that the appliances are unsafe, and further appreciates the risks which may follow the use of such inadequate appliances, it is truly said that in these respects he has by his contract and by his assent relieved his employer from duty in these particulars. So far as the proposed instruction bears upon this proposition of law, it is unobjectionable; but it is not, as we read the record, addressed to the evidence in this case. It was properly refused.

Defendants' proposed instruction 17 was correctly refused, as not containing an exact statement of the law. It declared that, if the plaintiff knew of the alleged defects in the machinery, or had equal opportunity with the defendants of knowing such defects, he could not recover. The instruction omits the important element that the employé must not only know of the defects, but must know the dangers and risks attending the operation of the machinery by reason of the defects. *Sanborn v. Trading Co.*, 70 Cal. 261, 11 Pac. 710; *Colbert v. Rankin*, 72 Cal. 197, 13 Pac. 491; *Magee v. Railroad Co.*, 78 Cal. 430, 21 Pac. 114.

The instructions given by the court upon behalf of the plaintiff relative to the duty of the employer and the knowledge of the employé were unobjectionable as propositions of law.

The contention that plaintiff was guilty of contributory negligence is not tenable. He was employed as a "roustabout" for the threshing outfit, and worked at various occupations as need arose, at times carrying water, and again firing upon the engine. He does not appear to have contributed to his injuries, other than by being at his post of duty at the time of the explosion. He did know that the engine seemed to be inadequate for the performance of the work, and made steam badly; but he was not an engineer, and was not chargeable with knowledge of the specific dangers to which he was subjected in his employment. Considering

the nature of his injuries, the damages awarded may not be said to be excessive.

As to the defendants Hannaford Bros., the judgment and order are affirmed. As to the defendants Goldman and Wolfrom, the judgment and order are reversed.

We concur: TEMPLE, J.; McFARLAND, J.

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123 Cal. 24

**CLARKE v. POLICE LIFE & HEALTH INS. BOARD.** (S. F. 1342.)

(Supreme Court of California. Dec. 19, 1898.)

MUNICIPAL CORPORATIONS—INSURANCE TO POLICEMEN—NONCONTRACTUAL CHARACTER—SURRENDER THEREOF—STATUTES—SCOPE OF TITLE—SPECIAL LEGISLATION—AMENDMENT AND REVISION.

1. St. 1877-78, p. 879, which created a police life and health insurance fund, and provided that, on the death of a member of the police force after a certain date, \$1,000 be paid to his legal representatives, did not constitute a contract of life insurance with such officers.

2. Act March 4, 1889, entitled "An act to create a police relief, health and life insurance and pension fund in the several counties, cities and towns in this state," is sufficiently comprehensive in its title to include section 13, providing that such fund provided by a former named law should be merged with, paid into, and constitute a part of the fund under the latter act.

3. Act March 4, 1889, creating a police relief, health, and life insurance and pension fund in the several counties, cities, and towns in the state, is not unconstitutional as being local or special legislation.

4. Act March 4, 1889, § 13, providing that any fund created under St. 1877-78, p. 879, for a police life and health insurance fund, should be merged with and paid into a fund to be created under the latter act, does not violate Const. art. 4, § 24, requiring statutes which are amendatory of other statutes to set out in full the statute as amended.

5. Under St. 1877-78, p. 879, creating a police life and health insurance fund, and providing

that, on the death of a member of the police force, a certain sum should be paid to his legal representatives, a police officer was not entitled to a surrender of the value of his share in such insurance on the passage of act of March 4, 1889, merging such fund into a new fund to be created, since the officer has no contractual right in the former fund, it being subject to legislative action.

Department 2. Appeal from superior court, San Francisco county.

Action by Alfred Clarke, administrator, against the police life and health insurance board. A demurrer to the petition was sustained, and from a judgment refusing a writ of mandate plaintiff appeals. Affirmed.

Alfred Clarke, in pro. per. H. T. Cresswell, for respondent.

TEMPLE, J. This appeal is from the judgment of the superior court refusing a writ of mandate, entered on sustaining a demurrer to the petition. From this petition or complaint it appears that plaintiff, as administrator of one Joseph Maguire, sought to compel the board to pay \$1,000 out of the funds as insurance upon the life of said Maguire. Maguire became a member of the police department of San Francisco on the 10th day of February, 1889, and continued to be a member until the 10th of November, 1895, when he died. The claim is made under the provisions of an act of the legislature passed April 1, 1878 (St. 1877-78, p. 879), which made provision for a police life and health insurance fund, and which also provided that upon the death of any member of the police force after the 1st day of June, 1878, there should be paid from such fund, to his legal representatives, \$1,000. On the 4th day of March, 1889, the legislature passed another act, entitled "An act to create a police relief, health and life insurance and pension fund in the several counties, cities and towns in this state." By section 13 of that act it was provided that any such fund as that provided in the law of 1878 should be merged with, paid into, and constitute a part of the fund created under the provisions of the later act.

Appellant contends that section 13 of the act of 1889, which is the section which contains the provision above set out, is unconstitutional and void, for many reasons, the most important being that: (1) The first statute amounted to a contract of life insurance with the members of the police department, and the later act, if valid, would impair the obligations of the contract. (2) The title of the later act is not sufficiently comprehensive to include section 13; the purpose is not stated in the title. (3) It is special and local legislation. (4) In many ways it violates the prohibitions contained in section 25 of article 4 of the constitution of the state. And (5) it revises or amends the law of 1878 in a mode not warranted by section 24 of article 1 of the constitution. Counsel also claim that the deceased was entitled to a surrender value of his alleged policy of insurance. I do not



think he would have any such right even if the earlier statute had not been repealed; but, conceding that his representative can make such claim, his alleged rights would rest upon the same legal propositions as his claim to the insurance. In either event, to be entitled to any consideration as a claimant to any part of the fund, he must have had a contract which legislation could not impair. All the other questions could as well be made under one claim as the other. The act of 1889 took effect long before the death of Maguire, and, if valid, there was at the time of his death no fund from which he could be paid.

*Pennie v. Reis*, 80 Cal. 266, 22 Pac. 176, was the same in all essential respects as the case at bar. It was there held that the later act did repeal the act of 1878 by implication, and did effect a merger of the insurance fund created by the first act with the fund created by the later act; that the act did not violate the constitution of the United States, because the member of the police department had no contract which he could assert against the legislative will. The office was accepted with the distinct understanding that the legislature may modify or amend all laws providing for his compensation during the term. The other points raised here were also determined adversely to the contention of appellant. The points and objections to the act of 1889 were presented in a different manner, but they are really the same objections. The case of *Pennie v. Reis* was taken by writ of error to the supreme court of the United States, and all questions raised under the limitations imposed by the constitution of the United States were determined in accordance with the conclusion of the state court. The main question was again determined by this court in *Clarke v. Reis*, 87 Cal. 543, 25 Pac. 759. Under the circumstances, we do not feel that it is incumbent upon us to restate the argument against the appellant. Upon a careful review of the case and the authorities, we are content with the former rulings. The judgment is affirmed.

We concur: MCFARLAND, J.; HENSHAW, J.

(122 Cal. 563)

GREEN et al. v. SOUTHERN PAC. CO. (L. A. 393.)

(Supreme Court of California. Dec. 7, 1898.)

RAILROADS—ACTION FOR WRONGFUL DEATH—EVIDENCE—INSTRUCTIONS—EXCEPTIONS—REVIEW—WITNESSES—IMPEACHMENT—MEASURE OF DAMAGES—NEGLECT—NOTICE.

1. In an action by a child against a railroad company for negligently causing her father's death, evidence that she has no property is inadmissible, though she is an adult.

2. A party who has once formally excepted to a line of evidence need not renew the objection on the examination of other witnesses in order to have the exception reviewed.

3. It is error, in impeaching a witness by in-

consistent statements, not to comply with Code Civ. Proc. § 2052, providing that a witness may be thus impeached, provided the statements are related to him, with the circumstances of time, place, and persons present, and he is asked whether he made such statements, and, if so, allowed to explain them.

4. The measure of damages for the death of a relative is the pecuniary loss suffered by plaintiff, and not the loss of society, comfort, and care, regardless of pecuniary loss.

5. Where an instruction improperly leaves the jury to infer that a verdict for plaintiff may not be confined to his pecuniary damages, it is not cured by instructing, at defendant's request, that they should confine their verdict to the pecuniary damage.

6. In an action against a railroad company for killing a person at a crossing, an instruction that defendant's negligence may be inferred, if it did not sound the whistle "continuously" for 80 rods before reaching the crossing, is erroneous, since Civ. Code, § 486, provides that the whistle shall be sounded only "at intervals" within that distance.

7. Where there is no evidence to the contrary, it will be presumed that a man strong and healthy is in full possession of his faculties, though he is comparatively advanced in years.

8. Unless a railroad company knows or has reason to believe that a person on a crossing does not possess ordinary ability to care for himself, it may presume that he possesses such ability, and will take ordinary precautions to protect himself from injury.

Department 1. Appeal from superior court, Ventura county.

Action by Mary Green and others against the Southern Pacific Company. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Reversed.

R. B. Canfield, for appellant. Murphey & Gottschalk, for respondents.

VAN FLEET, J. Action by the widow and children of George N. Green to recover damages suffered by them as heirs at law of said George N. Green, through his death, alleged to have been occasioned by defendant's negligence. Plaintiffs had judgment, and defendant appeals therefrom, and from an order denying a new trial. It will not be necessary to notice the ground of contributory negligence by deceased, urged by appellant, nor that of excessive damages, since those questions will not necessarily arise upon another trial, and the judgment and order must be reversed because of errors of law occurring at the trial of the case, to the manifest prejudice of the defendant.

1. The trial court very clearly committed prejudicial error in admitting before the jury, over defendant's objection, the testimony of the witness Hayes, to the effect that the plaintiff Salona Green, one of the daughters of deceased, who was living with him at his death, had no property of her own upon which to maintain herself. This evidence had no pertinent or competent bearing upon the extent of injury suffered by plaintiffs, for which defendant could be held responsible; and its only effect and inevitable tendency was undoubtedly to excite the sympathies of the jury, and improperly influence their finding upon the question of damages. Such evidence

is never admissible in a case of this character, for the very simple reason that the extent of a defendant's responsibility for the results of his negligence is not to be measured by the condition, as to affluence or poverty, of the injured party at the time of suffering the injury, since that is a condition for which the defendant is in no way responsible; and as suggested by this court in *Mahony v. Railway Co.*, 110 Cal. 471, 476, 42 Pac. 968, in discussing the same question, "Such testimony could have been offered for no other purpose than to create prejudice, and should have been excluded." See, also, *Malone v. Hawley*, 46 Cal. 409; *Railway Co. v. Johnson*, 103 Ill. 512; *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Railway Co. v. Moore*, 61 Ga. 151. Respondents contend that the evidence was material and relevant on behalf of this plaintiff, to show that she had not the means of support, otherwise there would have appeared no obligation on the part of her father to support her, the evidence in the case showing that she was beyond the age of majority at his death; and it is urged that, being dependent upon her father, she had, under the law, a greater right or interest in his life than the other children, who, although of age, were able to maintain themselves. But, obviously, whatever additional right or claim upon her father the fact of her indigence may have given her, it conferred no higher right against this defendant, nor put her in any different legal attitude, as to the latter, from that of her co-plaintiffs. Whatever her condition in life, she was entitled, under the law, in common with her co-plaintiffs, to maintain the action as one of the next of kin and heirs at law of the deceased; and it was solely in that capacity that the action was prosecuted. The suggestion that the objection cannot be entertained because the plaintiff Salona was subsequently permitted, without objection, to testify to substantially the same matter as that stated by the witness Hayes, is without weight. Where a party has once formally taken exception to a certain line or character of evidence, he is not required to renew the objection at each recurrence thereafter of the objectionable matter arising in the examination of other witnesses, and his silence will not debar him from having the exception reviewed. None of the other witnesses referred to in the brief made any mention of the question of the plaintiff Salona's property, and consequently no occasion for objection to their testimony on this ground arose.

2. The court also erred in admitting, for the purpose of impeaching the witness Harbard, the statements of the witness Todd as to the conversation had by the latter with Harbard, for the reason that no foundation was laid for such impeaching testimony. The conversation about which Harbard was interrogated was one supposed and referred to in the examination of the witness as having taken place between Todd and Harbard during the progress of the trial of this case in the court

below in March, 1896, while the conversation about which Todd was permitted to testify, for the purpose of contradicting him, occurred in September, 1895. Apparently, there was no serious attempt made to comply with the requirements of the provision of the Code of Civil Procedure (section 2052) prescribing the method of impeaching a witness by showing that he has made contradictory or inconsistent statements, and the testimony of Todd should, therefore, not have been admitted. *Birch v. Hale*, 99 Cal. 299, 302, 33 Pac. 1088.

3. On the subject of the measure of damages the court charged the jury, at the request of the plaintiffs, in the twelfth instruction, that in determining the amount of damages they had the right to take into consideration "the pecuniary loss, if any, suffered by these plaintiffs by the death of said George N. Green, \* \* \* and also the relations proved to have existed between the plaintiff Mary Green, the wife of the deceased, and the deceased at the time of his death, and the damage, if any, sustained by her by the loss of his support, society, comfort, and care"; and again, in the nineteenth instruction, that the jury could "take into consideration the loss of the comfort, society, and protection of the deceased to his widow and children; and also you may take into consideration what the deceased would have probably earned by his labor in his business or calling during the residue of his life, and which would have gone for the benefit of his heirs or personal representatives, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditure. And the jury have the power to assess such pecuniary damages as, under all the circumstances of the case, may be just." These instructions do not correctly state the rule or measure of damages in such cases. In *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 30 Pac. 603, it was held that in an action like the present, to recover damages for the death of a relative caused by negligence, the plaintiff can recover only for the pecuniary loss suffered by the plaintiff through the death of the relative, and that the loss of society, comfort, and care, suffered through the bereavement, can only be considered for the purpose of estimating such pecuniary loss. And this rule has been repeatedly upheld by this court in other cases. *Pepper v. Southern Pac. Co.*, 105 Cal. 389, 38 Pac. 974; *Harrison v. Railway Co.*, 116 Cal. 166, 168, 47 Pac. 1019. We think the instructions here given are clearly obnoxious to these principles. While the court did not in express terms so charge, its language is such as to clearly convey the impression to the minds of the jury that they were at liberty to assess the damages upon a basis outside of and beyond that solely of mere pecuniary loss. As said in the *Harrison Case*, *supra*, in discussing an instruction of precisely similar import: "While the jury have the right in such



a case to consider the loss suffered by the widow in being deprived of the comfort, society, and protection of her husband, they can regard these things only for the purpose of fixing the pecuniary value of his life. The form of the instruction here was calculated to lead the jury into the error of supposing that they could on this account add something more than pecuniary loss." This vice in the charge was not cured by the instruction, given at the request of the defendant, that they should confine their verdict to the pecuniary damage suffered, since it cannot be told which instruction the jury followed. *Pepper v. Southern Pac. Co.*, *supra*.

4. At the request of the plaintiffs the court instructed the jury that negligence of the defendant might be inferred, if it did not "ring the bell or sound the whistle continuously for the distance of eighty rods before reaching the crossing." This instruction imposes a greater burden upon the defendant than that with which it is charged by the statute. Civ. Code, § 486. That provision requires that the bell shall be rung at a distance of 80 rods from the crossing, and kept ringing until it is past the crossing, or that the whistle be sounded at the like distance, and kept sounding at intervals. The fault in the instruction is that it contemplates the necessity by the defendant of either ringing the bell continuously, or that the whistle shall be continuously sounded. In this respect the instruction is not in accord with the statute.

5. The court also gave to the jury, at plaintiff's request, the following instruction: "The jury are further instructed that an elderly person has a right to drive and travel upon the highway and cross railroad tracks. And while such persons must use ordinary care and prudence in crossing a railroad track, and use such ordinary care as is necessary to protect themselves, having in view their condition, yet the railroad company must also conduct its business, and it and its servants must keep in view that old persons may have occasion to cross its tracks on a public road." This instruction was not only not pertinent to anything in the case, but it did not correctly state the law. It would seem to imply that there was that in the age or condition of the deceased which called for the exercise of greater care by defendant than in the case of an adult person of less advanced years. There was nothing in the evidence to sustain such implication. While the deceased was a man of comparatively advanced years, he was strong and healthy; and, the evidence being silent on the subject, he was presumptively in the full possession and enjoyment of his faculties, including the senses of sight and hearing. But, moreover, had the evidence disclosed a different state of facts in this regard, the instruction wholly ignores the element of knowledge on the part of the defendant or its servants of any such defect. Unless the defendant knew or

had reason to believe that the deceased was from some cause not possessed of the ordinary ability to care for himself, it had the right to presume that he possessed such ability, and would take the ordinary precautions to protect himself from injury. *Holmes v. Railway Co.*, 97 Cal. 161, 168, 31 Pac. 834. There are some further criticisms upon the instructions, which we have examined, but do not deem it necessary to notice particularly, as, in our judgment, they involve no material error. For the reasons given the judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

122 Cal. 535

PEOPLE v. WEINEKE et al. (L. A. 441.)  
(Supreme Court of California. Dec. 2, 1898.)  
LIMITATION OF ACTIONS — ACTION AGAINST TAX COLLECTOR.

Pol. Code, § 3753, requires the tax collector on the first Monday in each month to settle with the county auditor for all moneys collected, and pay the same to the county treasurer; and section 3754 provides that a failure so to do for five days shall render such collector liable for the full amount of taxes on the assessment roll, for which suit may be brought. It is also provided (section 3758 et seq.) that the collector shall on the third Monday in January, at the office of the auditor, compare his duplicate with the original assessment book, and deliver the delinquent list to the auditor, who shall thereupon make a final settlement with him. In an action against a tax collector and his sureties, the complaint, which was filed December 29, 1896, alleged that such collector was elected for two years from the first Monday after the first day of January, 1891, and that on the first Monday in December (December 7) 1891, and for five days thereafter, he wholly failed to settle with the county auditor for the taxes collected by him, and had ever since wholly failed to settle therefor, but had ever since December 7, 1891, wrongfully retained a certain balance thereof. *Held*, that such action was barred by the limitation of four years prescribed by Code Civ. Proc. § 337, as to actions founded on instruments in writing, as the complaint set up a cause of action which accrued December 7, 1891, and failed to state a cause of action accruing at any other time, and such statute began to run on the third Monday of January, 1892, at least, though the term of office of such collector expired within such period of limitation.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

Action by the people of the state of California against H. W. Weineke, lately tax collector of San Diego county, and the sureties on his official bond. Judgment was rendered in favor of the state and against defendant Weineke by default, and in favor of the other defendants on demurrer to the complaint. From the judgment on the demurrer, the state appeals. Affirmed.

A. H. Sweet, for the People. Collier & Evans, H. E. Doolittle, and Haines & Ward, for respondents.

**CHIPMAN, C.** This is an action to recover the sum of \$15,946.27 from defendant Weineke, lately tax collector of San Diego county, and the other defendants, his sureties upon his official bond. Judgment was given against defendant Weineke by default, and in favor of the other defendants upon their demurrer to the complaint. The appeal is from the judgment on the demurrer.

The complaint alleges: That defendant Weineke was the duly qualified and acting tax collector for two years from the first Monday after the first day of January, 1891. "On the first Monday in December, 1891, and for five days thereafter, the said defendant H. W. Weineke, as said tax collector, wholly failed and neglected to settle with the county auditor of said county for all moneys collected for said state and county taxes for the fiscal year ending June 30, 1892, and wholly failed to pay the same to the county treasurer of said county, and has ever since said first Monday in December, 1891, wholly failed to settle, and has never settled, with the county auditor of said county for all said moneys collected by him, the said Weineke, \* \* \* and has wholly failed and neglected to pay, and has never paid, all the moneys, \* \* \* and failed, and ever since said day has failed, to deliver to or file in the office of the said county auditor the statement showing an account of all his transactions and receipts as such tax collector, and the payment of all the money collected by him as tax collector." The complaint further alleges: That defendant Weineke on December 7, 1891, had collected and received for the use of the state and county \$24,532.73 as state and county taxes for the fiscal year ending June 30, 1892, of which \$15,946.27 has never "been paid to the county treasurer of said San Diego, as required by law. \* \* \* Defendant Weineke never at any time settled with the auditor of said county for said balance, \* \* \* or any part thereof, \* \* \* and has ever since said December 7, 1891, wholly failed and neglected to settle with the county auditor for said balance, \* \* \* and has never paid said sum, or any part thereof, to the county treasurer, \* \* \* and the whole thereof is still wrongfully and unlawfully retained, \* \* \* and is wholly unpaid, due, and owing," etc.

The only question discussed by counsel is whether the action is barred by the four-year limitation of the statute. The complaint was filed December 29, 1896,—more than five years after December 7, 1891, but less than four years after Weineke's term of office expired. Section 3753, Pol. Code, is as follows: "On the first Monday in each month the tax collector must settle with the auditor for all moneys collected for the state or county, and pay the same to the county treasurer, and on the same day must deliver to and file in the office of the auditor a statement, under oath, showing: (1) An account of all his transac-

tions and receipts since his last settlement. (2) That all money collected by him as tax collector has been paid." The next section (3754) is as follows: "A tax collector refusing or neglecting for a period of five days to make the payments and settlements required in this title is liable for the full amount of taxes charged upon the assessment roll." The next section (3755) makes it the duty of the district attorney to "bring suit against the tax collector and his sureties for such amount," and, if he fails to do so, the board of supervisors or controller of the state "may require him to do so." The contention of appellant is that, although section 3753 made it the duty of the tax collector on December 7, 1891, to account for and pay over the moneys he then had on hand, and a failure to do so created a statutory liability, under section 3754, yet it was not exclusive, and there was still a liability at the expiration of his term for the failure to pay over the same money for which his sureties were liable. The argument is that this same duty was placed upon him each month under the statute, and the liability was a continuing one, and the statute of limitations did not begin to run until his term of office expired. Respondents concede that there may be a liability, in a certain sense, resulting from the default of the officer at the expiration of his term of office, but they say that the complaint is not so framed as to charge such liability. It is contended that the complaint fixes the liability definitely and specifically, as having accrued on the first Monday of December (December 7th), and must be so treated. The complaint, we think, clearly sets forth a cause of action which accrued December 7, 1891, and fails to set forth a cause of action accruing at any other time. The allegations that the tax collector has ever since failed to pay over the money, and like allegations, are nothing more than would be required to negative payment at some date subsequent to December 7th, and before action brought. None of these allegations refer to any delinquency, except the one specifically alleged; and none of them point to the withholding of, or failure to pay over, any other moneys. If plaintiff had desired to charge a liability by reason of failure to turn over funds in the hands of the collector at the expiration of his office, or without fixing any period for the default other than during his term of office, plaintiff might have done so by a separate count, or otherwise framing the complaint to allege the facts, in which case defendants would probably have been compelled to plead the statute of limitations by answer. As the complaint stands, we do not feel warranted in treating it as stating more than one cause of action; and for that reason we need not decide whether the liability was a continuing one, which became a new liability each succeeding month, and did not finally accrue, so as to start the



statute in motion, until the close of the collector's term of office.

It may be contended that sections 3753, 3754, and 3755 do not authorize the action for any balance collected but not turned over, and therefore the statute of limitation does not then begin to run. Possibly the settlements referred to in these sections are not such as would start the statute in motion when these monthly payments and settlements referred to occur. It is not necessary, in the case now here, to decide that question. Subsequent sections, however, require the tax collector, on the third Monday in January of each year, "to attend at the office of the auditor with the duplicate assessment book, and carefully compare the duplicate with the original assessment book, and every item marked 'Paid' in the former must be marked 'Paid' in the latter." Section 3758. "The tax collector must, at the time specified in the preceding section, deliver to the auditor a complete 'delinquent list' of all persons and property then owing taxes." Section 3759. "The auditor must carefully compare the list with the assessment book, and, if satisfied that it contains a full and true statement of all taxes due and unpaid, he must foot up the total amount of taxes so remaining unpaid, credit the tax collector who acted under it therewith, and make a final settlement with him of all taxes charged against him on the assessment book, and must require from him the treasurer's receipt, or, if the treasurer is the collector, require from him an immediate account for any existing deficiency." Section 3761. After this settlement he is charged with the delinquent list, and it is to be delivered to him by the auditor (section 3762); and "within ten days after the final settlement the auditor must transmit \* \* \* a statement to the controller of state," etc. We think that, in any view of these provisions and the pleadings, the statute of limitations would certainly begin to run in this case on the third Monday of January, 1892, and as the action was not brought until December 29, 1896, it was barred by section 337, Code Civ. Proc. *People v. Melone*, 73 Cal. 576, 15 Pac. 294; *San Francisco v. Ford*, 52 Cal. 198; *People v. Burkhardt*, 76 Cal. 607, 18 Pac. 776. See, also, *Board v. Van Slyck* (Kan. Sup.) 35 Pac. 299.

Appellant claims that *San Francisco v. Heynemann*, 71 Cal. 155, 11 Pac. 871, is decisive of plaintiff's contention, where it was said, "There can be no doubt that the tax collector is bound to pay over to the treasurer all public moneys in his possession upon the expiration of his term of office." Undoubtedly this is so, but that is far from deciding that the cause of action alleged in this complaint did not accrue at the time alleged. What we should hold if the action had been laid as a breach of duty occurring at the close of Weineke's term of office (1893), and the facts had shown the breach

to have first occurred in December, 1891, need not be considered, for the pleadings present no such case. *People v. Van Ness*, 79 Cal. 86, 21 Pac. 554, is also relied upon by appellant. It was there held that for a breach of the official bond the statute did not begin to run until the expiration of the officer's term of office. Van Ness was a commissioner of immigration. The question as to whether the statute commenced to run when he converted the funds was not considered, but it was assumed, as the most favorable to defendants, that it did not commence to run until the close of the term of office. When this default arose there was no law requiring the commissioner to pay over to the state treasurer monthly the moneys received by him. Section 2969, Pol. Code, requiring him to do so, was passed March 15, 1883. The case is therefore unlike the one here. We think the trial court was right in sustaining the demurrer, and therefore advise the affirmance of the judgment appealed from.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

122 Cal. 486

#### PEOPLE v. DOLE. (Cr. 257.)

(Supreme Court of California. Nov. 29, 1898.)

FORGERY — RAISED CHECK — SUFFICIENCY OF INFORMATION — EVIDENCE — WITNESSES — CROSS-EXAMINATION OF DEFENDANT — EXPERTS — INSTRUCTIONS — PRINCIPAL OFFENDERS — PRESUMPTIONS — CIRCUMSTANTIAL EVIDENCE — DEFINITION OF OFFENSE — WEIGHT OF EVIDENCE — REASONABLE DOUBT — DUTY OF INDIVIDUAL JURORS — CONTENTS OF WRITING — PROOF OF INCORPORATION.

1. An information charging that defendant, having in his possession a certified check for a certain amount, raised it to a greater amount, forged certain indorsements on it, and, knowing its fictitious character, passed it on a certain corporation, with intent to defraud such corporation, was not vitiated because it failed to show that the bank on which such check was drawn had any existence, or that the person whose name was signed to the certification had any authority to certify, as defendant was well charged with the forgery and utterance of a check uncertified.

2. Where an information, charging defendant with the forgery and utterance of a certain check, alleged that, after raising such check, defendant forged several indorsements on the back thereof, and passed it on a certain corporation, with intent to defraud such corporation, but one offense was charged, as the whole series of acts charged against defendant was alleged to have been done with the single intent to defraud the corporation named.

3. Where defendant, on trial for the forgery of a certain check, testified in his own behalf that he had won such check in a game of poker, it was proper to ask him, on cross-examination, whether he had stated such fact to the arresting officer, or to the officers of the prison, on being informed of the nature of the charge against him, in order that the jury might determine whether or not his conduct was consistent with his testimony. *McFarland, Henshaw, and Temple, JJ.*, dissenting.

4. On trial for forgery of a check, where it was claimed that certain writing thereon had been removed and other writing substituted, testimony of an expert was admissible to prove that writing may be removed from paper by means of a certain fluid, without first showing that the writing in question had been so removed, or that defendant was conversant with the use of such fluid.

5. An instruction that if the jury believed from the evidence, beyond a reasonable doubt, that defendant committed the offense charged, or aided, abetted, "or assisted" in the commission thereof, they should find him guilty, was erroneous, under Pen. Code, §§ 31, 971, declaring guilty as principals all persons concerned in the commission of a criminal offense, whether they directly commit the act constituting such offense, or aid "and" abet in its commission, where defendant was on trial for having raised and passed as genuine a certain check; but such error was cured where the jury were also instructed that, if the evidence did not establish, beyond a reasonable doubt, that defendant fraudulently altered the check in question, or uttered such check, knowing its spurious character, and with intent to defraud, the mere possession thereof by him, and his indorsement and negotiation thereof, were not, in the absence of a guilty intent or guilty knowledge, sufficient to convict.

6. Where defendant, who was on trial for the forgery and utterance of a certain check, testified that he received such check from one of two persons named, in a game of poker,—having won from them a sum less than the face thereof and paid them the difference, after which they both disappeared,—it was error to instruct that "where weaker evidence is produced, when in the power of the party to produce higher, it is presumed that the higher evidence would be adverse if it had been produced," as the presumption referred to (Code Civ. Proc. § 1963, subd. 6) is "that higher evidence would be adverse from inferior, being produced," and as such instruction was inapplicable to the testimony of defendant, which was of as high a character as would have been that of the persons mentioned, if they had been called as witnesses.

7. An instruction that, "where the evidence is entirely circumstantial, yet it is not only consistent with the guilt of defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eyewitnesses would have been," though inexact and illogical, in intimating that a conviction may be had on less satisfactory evidence where it is circumstantial than would be required where it is direct, was corrected by special instructions to the effect that every fact essential to sustain the hypothesis of guilt, and to exclude the hypothesis of innocence, must be fully proved.

8. It was not error, on a trial for forgery, to give to the jury, as a definition thereof, Pen. Code, § 470, defining such crime.

9. A request for an instruction as to the weight and effect of evidence was properly refused.

10. On a criminal trial, defendant was entitled to an instruction that "if, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror \* \* \* not to vote for a verdict of 'guilty,' nor to be influenced in so voting for the single reason that a majority of the jury should be in favor of a verdict of 'guilty.'"

11. On trial for forgery by raising a certain check, where there was no theory on which defendant could be convicted, under the information and the evidence in the record, if such check was not raised as charged, it was error to refuse an instruction that, if the jury enter-

tained a reasonable doubt as to whether or not the check in question had been so raised, they should acquit.

12. It was error to permit the cross-examination of defendant, on trial for forgery of a check, for the purpose of showing that he obtained money on passing it, where he had not testified as to such matter in his direct examination.

13. Where there was no material variance between a certain check offered in evidence and the paper set out in an information charging the forgery thereof, such check was properly admitted.

14. On an issue as to whether defendant had an account with a certain bank, at a time specified, testimony of an employé of such bank that he had made an examination for such purpose, and ascertained that he had not, was competent, under Code Civ. Proc. § 1855, subd. 5, authorizing parol proof of the general result of an examination of numerous books and accounts, where they cannot be examined in court without great loss of time.

15. It was error to permit a witness to testify, over objection, that a certain bank was a corporation, where it was competent and sufficient to prove by reputation that it was a de facto corporation.

Garoutte and Harrison, JJ., dissenting.

In bank. For opinion in department, see 51 Pac. 945. Reversed.

BEATTY, C. J. The defendant appeals from a judgment convicting him of forgery and from an order denying a new trial.

The specific charge in the information is that the defendant, having in his possession a certified check for \$2.50, raised it to \$850, forged certain indorsements on it, and, knowing its fictitious character, passed it on the State Loan & Trust Company, a corporation, all with intent to defraud said corporation. A demurrer to this information was overruled, and this ruling is the first error assigned in support of the appeal.

The most serious objection to the information is that it does not show that the Exchange Bank, upon which the check was drawn, had any existence, corporate or otherwise, or that the person whose name was signed to the certification had any authority to certify. It may be conceded that this criticism is just, but it does not follow that the information is therefore bad. An uncertified check is as much the subject of forgery as a certified check, and, if it does not appear from this information that the check was certified, it remains true that the defendant is well charged with the forgery and utterance of a check uncertified.

Another objection to the indictment is that it charges more than one offense. This objection is based upon an allegation that defendant, after raising the check, forged several indorsements on the back of it. This part of the charge is not well laid in the information, because the words "falsely" and "feloniously" are omitted, and there is therefore nothing to negative the authority of defendant to make the indorsements. But, even if the charge had been sufficient in itself, it would not have specified a distinct offense. The intent to defraud is the essen-



tial element of the crime of forgery, and the whole series of acts charged against defendant is alleged to have been done with the single intent to defraud the State Loan & Trust Company. But one offense, therefore, was charged, and the court did not err in overruling the demurrer.

It is next contended that the court erred in overruling defendant's objections to certain questions asked him on cross-examination. He had testified in his own behalf that he had won the check in a game of poker from one Adams in the rooms of one King, at Los Angeles. He was soon after arrested in San Francisco by an officer from Los Angeles, and it appeared from his own statements that at the time of his arrest, or shortly thereafter, he was informed that the charge against him was the forgery of this check, i. e. the raising of a check for \$2.50 to \$850. He was then asked whether he stated the manner in which he became possessed of the check to the arresting officer, or to the officers in whose custody he was subsequently placed, or to the person who informed him of the particulars of the charge against him. Being compelled, against his objection, to answer these questions, he admitted that he had not stated to any of the persons mentioned anything in regard to the manner in which the check came into his possession. It is contended that evidence of the silence of defendant while under arrest and in the presence of his keepers would not have been competent evidence against him if offered by the state as part of its case in chief, and that *a fortiori* the fact could not be drawn out of him on cross-examination.

Whether silence under accusation of crime amounts to an admission of guilt, or whether the failure of a person accused to dispute an incriminating statement made in his presence amounts to a tacit admission of the truth of such statement, depends upon circumstances, and undoubtedly there is very high authority for holding that the silence of the accused cannot be given in evidence against him without first showing that the circumstances of the accusation or incriminating statements were such that he would feel at full liberty to reply and would be called upon to reply. Accordingly it has been held that the silence of a prisoner in the presence of the arresting officers or jailers was incompetent as evidence of guilt. *Com. v. McDermott*, 123 Mass. 440, and cases there cited. But upon this point the authorities are not uniform, and the decisions of this court do not furnish us a precedent. None of the cases cited by appellant is clearly in point, and the one upon which he principally relies (*People v. Elster* [Cal.] 3 Pac. 884) is rather against him. In that case the court was discussing instructions to the jury, not rulings upon the admission of evidence, and the error pointed out was not in the admission of the evidence,—as to which no question seems to have been made,—but in the

inference of guilt which the trial court assumed was to be drawn from the silence of defendant. What this court said with respect to this was: "If such an inference could be drawn at all from the conduct or statements of the defendant, it was for the jury to draw it. They only could determine whether the conduct of the defendant on the occasion of his arrest was contrary to the ordinary behavior of a person charged with crime, or attributable to his mental characteristics, or evinced guilt or innocence." From this expression it would seem that the court decided, not that evidence of this character is incompetent, but merely that the weight of such evidence must be left for the jury to determine, unaffected by any intimation from the court that it tends to prove the guilt of the defendant.

It is not necessary, however, to decide in this case whether the silence of the accused, while in custody, can be given in evidence against him by the people as a part of their case in chief. The question here is a very different one, viz. whether when an accused person, testifying in his own behalf, has offered an explanation of circumstances tending to incriminate him, he may be asked on cross-examination whether he has not done, or omitted to do, something which it might be thought he would probably have done, or omitted to do, if his explanation was true. Such was the course pursued in this case. Defendant testified that he won the check from Adams in the presence of King, and he was asked if he stated that fact to the arresting officer, or to the officers of the prison. He admitted that he did not, and it was for the jury to determine whether or not his conduct was consistent with his testimony. Counsel for appellant contend for the extreme proposition that, because he did not testify on his direct examination in regard to his conduct at the time of and subsequent to his arrest, therefore he could not be cross-examined as to that matter. But the rule of cross-examination is not so restricted. Any fact may be called out on cross-examination which a jury might deem inconsistent with the direct testimony of a witness, and a defendant testifying in his own behalf is in this respect put upon the same plane with other witnesses. *People v. Gallagher*, 100 Cal. 475, 35 Pac. 80. The superior court did not err in this matter.

Nor did the court err in admitting the evidence of Logan that there is a fluid by means of which writing may be removed from paper. It was a part of the case of the prosecution to prove that certain writing on the check had been removed and other writing substituted in its place, and certainly it was proper to prove that there is a known means by which this may be accomplished. The point of this objection, however, seems to be that evidence of this character is inadmissible until a foundation for it has first been laid by showing that a solvent fluid has been

used, and that the defendant is conversant with its use. We know of no such rule with respect to such evidence. Each of these facts is independent of the others, and has some tendency to prove the fact in issue. All of them being proved, the case would certainly be stronger than if only one or two of them are proved, but neither is to be excluded because the others are wanting. As to the competency of the witness, his testimony showed that he had made use of the fluid in question, and was in fact an expert, and the matter to be proved was the subject of expert evidence.

The trial court, in submitting the case to the jury, gave the following instruction: "If you believe from the evidence, beyond a reasonable doubt, that the defendant committed the offense charged in the information, or aided, abetted, or assisted any other person or persons to commit the same, then you should find the defendant guilty." This instruction is clearly erroneous. Aside from the person who directly commits a criminal offense, no other is guilty as principal unless he aids and abets. Pen. Code, §§ 31, 971. A person may aid in the commission of an offense by doing innocently some act essential to its accomplishment, and this is especially true in regard to the crime of forgery, for he may pass the forged instrument without knowing that it is forged. The word "aid" does not imply guilty knowledge or felonious intent, whereas the definition of the word "abet" includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime. The error in the instruction is therefore clear, and it cannot be held that it is harmless error to instruct a jury that they must convict upon proof of a fact which does not necessarily imply guilt. It was certainly possible for the jury to have found consistently with the evidence in this case that defendant did not forge or raise the check himself, but that it was forged by some other person, and that his only connection with it was to pass it to the Loan & Trust Company after winning it from the forger, and without any knowledge of its spurious character, in which case he would have been innocent of any crime. But the court, at the request of the defendant, instructed the jury as follows: "If the evidence does not establish beyond reasonable doubt that the defendant made or altered or forged or counterfeited the check in question, or any part thereof, with intent to defraud another, and if the evidence does not establish beyond a reasonable doubt that the defendant uttered or published or passed, or attempted to pass, as true and genuine, the said check, knowing the same to be false or altered or forged or counterfeited, with intent to prejudice or damage or defraud any person, then the mere possession by the defendant of the said check, and his indorsing and negotiating the same, is not sufficient, standing alone, to

convict; for proof of the mere possession and negotiating of a forged check is insufficient to convict a defendant of forgery, in the absence of a guilty intent or guilty knowledge." This specific instruction, on the precise point affected by the error above noted in the charge of the court, we think cured the error; for, construing the two instructions together, the jury could not have failed to understand that merely aiding or assisting in the commission of a crime, without guilty knowledge, is not criminal. In other words, they could not, in view of this instruction, have taken the charge as to aiding or assisting in its narrow and literal sense.

At the request of the prosecution, the court instructed the jury as follows: "Where weaker evidence is produced when in the power of the party to produce higher, it is presumed that the higher evidence would be adverse if it had been produced." The giving of this instruction was error for two reasons: In the first place, because the word "weaker" is substituted for "inferior," a word of different meaning (Code Civ. Proc. § 1963, subd. 6); and, in the second place, because it was wholly inapplicable to the evidence in the case. The defendant did not introduce inferior evidence—i. e. evidence of a lower class—upon any point as to which he could be supposed to have had higher evidence in his power. The use made of the instruction seems to have been to found an argument against the defendant upon the ground that he had not hunted up and called as witnesses the men Adams and King, from one of whom he claimed to have won the check at poker. But the evidence of Adams and King would have been of no higher class than his own evidence, and, besides, they could not have exonerated the defendant without criminating themselves. All the evidence in regard to King and Adams, contained in the record, is to the effect that King was a frequenter of the race track and pool rooms of Los Angeles; that Adams was a "sure-thing" confidence man, and a companion of King; that King proposed the game in which defendant claims to have won the check; that defendant won from them about \$150 less than the face of the check, and paid them the difference when it was transferred to him, after which they disappeared from Los Angeles. All this may have been a fiction, and the jury may have been justified in so considering it; but it was certainly an error, and a highly prejudicial error, in the court to instruct the jury not only that they were to presume that the evidence of King and Adams would have been adverse if they had been called as witnesses, but that it would have been higher and stronger evidence than that of the defendant. The objections to instructions 1 and 2 are removed by an amendment to the record, and instruction 3 is a correct statement of law applicable to the case.

In charging the jury concerning circumstantial evidence, the trial judge used the follow-



ing language: "Where the evidence is entirely circumstantial, yet it is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eyewitnesses would have been." This language is quoted literally from the opinion of Justice Sander-son in *People v. Cronin*, 34 Cal. 202, and since the decision of that case has been repeated in hundreds of criminal trials in this state. It is, nevertheless, not a correct and logical statement of the law, and has been repeatedly criticised in later decisions of this court, though it has never been deemed a sufficient ground of reversal. In cases of circumstan- tial evidence facts should be proved which are not only consistent with the guilt of the defendant, but inconsistent with any reasonable hypothesis of innocence, and every single fact from which the deduction of guilt is to be drawn must be proved by evidence which sat- isfies the minds and consciences of the jury to the same extent that they are required to be satisfied of the fact in issue in cases where the evidence is direct. It is therefore inexact and illogical to say that a conviction may be had on less satisfactory evidence where it is circumstantial than would be required when it is direct. The vice of this instruction, however, is generally corrected, as it was in this case, by special instructions to the effect that every fact essential to sustain the hy- pothesis of guilt and to exclude the hypothesis of innocence must be fully proved.

The court did not err in giving section 470 of the Penal Code as a definition of "forgery." It certainly was law, and, although parts of it were superfluous in this case, we cannot see how the jury can have been misled by it.

Nor did the court err in refusing instructions 6, 9, and 10, asked by defendant. They were substantially given in instructions 19 and 20.

Instruction 5 was properly refused, because it was a request to the judge to instruct the jury, not as to a matter of law, but as to the weight and effect of evidence.

Among other instructions requested by de- fendant and refused by the court was the fol- lowing: "If, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of 'guilty,' nor to be influenced in so voting, for the single reason that a majority of the jury should be in favor of a verdict of 'guilty.'" This is a correct statement of the duty of a juror and should have been given. If any juror needed an in- struction upon this point, it was harmful to refuse it; if no juror needed the instruction, it would have been harmless to give it.

Instruction 7 was properly refused. Against his conscientious convictions, a juror has no more right to vote not guilty than guilty.

Instruction 13 requested by defendant, and

refused by the court, was in the following language: "Gentlemen of the jury, if you entertain a reasonable doubt as to whether or not Exhibit A has been raised from a two dollar and a half check to an eight hundred and fifty dollar check, it will be your duty to acquit." This instruction was correct, and should have been given. There is no theory upon which the defendant could have been convicted under this information, and the evi- dence in the record, if the check was not raised as charged. The refusal of the instruc- tion probably did no actual harm, for the evi- dence as to the raising of the check was all one way, but it was error to refuse it.

Instruction 14 was properly refused, because it does not state a proposition of law, but deals with the effect of evidence.

The court erred in permitting the cross-ex- amination of defendant for the purpose of showing that he got money from the loan and trust company on the forged check. This was a part of the people's case in chief. Counsel for the prosecution seem to have thought their case weak on that point, and sought to prove it more fully by the cross-examination of the defendant. This they had no right to do. He had not testified as to that matter in his direct examination, and they could not compel him to be a witness against himself.

The court did not err in admitting the check in evidence. There was no material variance between it and the paper set out in the in- formation. Nor did the court err in overrul- ing the objections to the questions asked the witnesses Brunjes and Daniels relating to the identification of the defendant.

A teller of the loan and trust company tes- tified that he had examined the books of the bank to ascertain whether the defendant when he passed the check and received an ad- vance on it had any account with the bank, and, over the defendant's objection, was al- lowed to state that he had no account at that time. The ruling of the court upon this point was correct. The fact called for was a gen- eral result, that could only have been arrived at by the examination of numerous books and accounts, which could not have been exam- ined in court without great inconvenience and loss of time, and was therefore properly provable by parol, under subdivision 5 of sec- tion 1835 of the Code of Civil Procedure.

The same witness was allowed to testify, over the objection of the defendant, that the State Loan & Trust Company was a corpo- ration. This ruling was technically errone- ous. It was competent and sufficient to prove that the bank was a de facto corpora- tion, and to prove this by parol, but it was a fact to be proved, like character, by reputa- tion, and not by the direct statement of the witness.

As the result of the foregoing discussion, it is apparent that the judgment and order ap- pealed from must be reversed, and therefore it is unnecessary to decide whether the trial

court exceeded the bounds of legal discretion in refusing a new trial on the ground of newly-discovered evidence. This point cannot arise on a new trial, and all other points presented by the record have been decided. The judgment and order denying a new trial are reversed, and cause remanded.

I concur: VAN FLEET, J.

McFARLAND, J. I concur in reversing the judgment and the order denying a new trial upon the grounds stated in the opinion of the Chief Justice. I do not concur, however, in the views expressed in that opinion respecting the alleged error of the court below in overruling defendant's objections to certain questions asked him on cross-examination. I think that the ruling of the court below in that matter was erroneous, and that such ruling is an additional ground for reversing the judgment and order appealed from. In the first place, I do not think that the questions asked the defendant were cross-examination, under section 1323 of the Penal Code. They were not as to matters "about which he was examined in chief." I do not understand it to have been established by this court that a defendant in a criminal case, who has gone upon the stand as a witness for himself, can be cross-examined to the full extent to which the examination of ordinary witnesses may be carried. My views on that subject are expressed in my opinion in *People v. Meyer*, 75 Cal. 386, 17 Pac. 431. See, also, recent case of *People v. Arrighini* (Cal.) 54 Pac. 591, where this subject is thoroughly discussed. But the matter sought to be proved by the questions was in itself inadmissible. If a case can be imagined where it would be competent to prove what a prisoner under arrest "didn't say" to the officer who holds him in custody, and who is often his hostile prosecutor, the circumstances disclosed by the record here do not make such case. The silence of a person arrested in the presence of the arresting officer, or a refusal to answer a question of the officer, is not a circumstance incriminating the person arrested, and constitutes no evidence against him. Of course, there are some circumstances under which a man's silence may be evidence against him,—circumstances under which it would be natural for men similarly situated to speak; but it would be unwise and foolish, particularly in this state, where arresting officers are frequently prosecuting officers, for a man arrested for a crime to say anything whatever to such officers. And it has been held frequently that the silence of a prisoner in the presence of the officer having his custody cannot be given in evidence. *Greenl. Ev. par. 197*, and cases there cited; *Com. v. McDermott*, 123 Mass. 440; *Com. v. Walker*, 13 Allen, 570; *Com. v. Kenney*, 12 Metc. (Mass.) 235. I think that this rule is also substantially stated by this court in *People v. Elster*, 3 Pac. 884. The appellant was not

called upon at all to explain in any way why he had not told a police officer what he then testified to, and it was not proper to put him in a position where some such explanation would be expected. The question here involved differs materially from a mere general question asked an ordinary witness as to whether or not he had ever stated to any person what he was testifying to until he came upon the stand. My opinion is that the allowance of these questions over the exception of the appellant constitutes error that was prejudicial to the appellant.

We concur: HENSHAW, J.; TEMPLE, J.

GAROUTTE, J. (dissenting). I concur in the views of the Chief Justice as to the scope of the cross-examination of the defendant. When a defendant goes upon the witness stand for the purpose of securing his acquittal, and for the first time tells a Munchausen tale as to his connection with the affair, I think it proper and legitimate cross-examination to ask him: "Did you ever tell this tale to anybody prior to this time? Did you tell it to the arresting officers?" I believe it is the universal practice to ask such questions, and until now I never heard the practice questioned. To ask and compel answers to those questions is certainly no invasion of defendant's constitutional rights. There is no power in the law to compel the defendant to take the witness stand in his own behalf, but when he does it he may be asked any question which will show his past conduct to be inconsistent with his present testimony. The rule of law is so declared in the recent case of *People v. Gallagher*, 100 Cal. 475, 35 Pac. 80. As a general principle, defendant's silence may not be proven against him as a circumstance tending to show guilt. But upon cross-examination, if this silence be inconsistent with his present testimony, inquiry may be had upon it.

This case is reversed upon the error committed by the trial court in giving the following instruction to the jury: "Where weaker evidence is produced when in the power of the party to produce higher, it is presumed that the higher evidence would be adverse if it had been produced." This instruction embodies a very poor attempt to express the principle of law of presumptions declared in subdivision 6, § 1963, Code Civ. Proc. This subdivision of the section, properly quoted, is as follows: "That higher evidence would be adverse from inferior being produced." It will be observed that the adjective "weaker" is not used in the subdivision, and we are not prepared to say that "weaker evidence" and "inferior evidence" cover the same ground. Again, under the evidence in this case, we find no demand for the giving of the presumption of law attempted to be declared by the foregoing instruction, even if it be conceded to be a proper principle to be applied in any criminal case. Yet it is said in *Peo-*



ple v. Bruggy, 93 Cal. 486, 29 Pac. 30: "The practical administration of justice should not be defeated by a too rigid adherence to a close and technical analysis of the instructions of the court. Instructions are for the enlightenment of the jury as to the law of the case, and the jury never enters into such a character of analysis in considering them." The evidence called for no such instruction. By the record it is nowhere disclosed that the defendant offered "weaker" evidence when it was in his power to produce "higher" evidence. There is nothing in the record to indicate that the defendant had in his power any higher evidence to produce. In fact, there is nothing to show that there was any higher evidence anywhere. The instruction, when we consider its effect, is a blank. Neither in law nor in fact does it amount to anything. Defendant insists that it charged him with the responsibility of failing to produce King and Adams as witnesses at the trial. There is nothing in the record to indicate that the instruction was aimed at those persons; for, as suggested, there is nothing to indicate that defendant could have produced them at the trial, even by the exercise of the greatest effort. Again, it was as much in the power of the people to produce these two men as witnesses as it was in the power of the defendant, and the presumption would therefore work against the prosecution exactly as against the defendant. These suggestions only show that the attempted declaration of law was purely an abstract matter, and the jury, as intelligent men, could not have been misled thereby. Defendant's counsel is incorrect in saying that the prosecuting officers in their arguments to the jury invoked this principle against defendant by reason of his failure to produce Adams and King as witnesses at the trial. The record does not bear out such statement. In conclusion, upon this branch of the investigation, it may be said that defendant's counsel in their opening brief concede the instruction was not based upon any "particular facts" in the case. Such concession alone demands that a new trial should not be granted upon this ground. While the defendant has the constitutional right to appeal, he must show some substantial violation of the law in the trial of his case. Some material right must be taken from him, or his conviction must stand. If judgments of conviction in hotly-contested, complicated criminal trials are to be set aside for every technical violation of the law occurring during the progress of those trials, it might almost be said that no conviction would stand the test of appeal. If in the multitude of rulings upon the admission and rejection of evidence, and upon the procedure of the trial in general, a judge does not make some mistake, it would be a wonder indeed. Only a few men possess that amount of legal wisdom. The constitutional right of appeal granted a defendant does not contemplate that this court should find grounds for a new

trial in any and every mistake the trial court may make. For the reasons here given, the contention of defendant discloses a matter too small to demand a retrial of the case. The other matters are of even less importance. I think the judgment and order should be affirmed.

I concur: HARRISON, J.

(122 Cal. 659)

STONESIFER et al. v. KILBURN et al.

(Sac. 382.)<sup>1</sup>

(Supreme Court of California. Dec. 16, 1898.)  
REFORMATION OF DEED—VENDOR AND PURCHASER  
—NOTICE.

1. Two deeds to different grantees, executed in fulfillment of one contract to convey a specific quantity of land, by mistake conveyed less; and, to give the grantees their proper quantity, grantor agreed with them that defendant grantee, whose land adjoined the remainder of the tract, should from his land make up the other grantee's deficiency, and then recoup himself from the balance of the tract, grantor agreeing to execute new deeds conforming to the change. He caused the land to be surveyed, designating the changes to be made; and, relying on his agreement, defendant surrendered to the other grantee the quantity of land designated by the survey, and took possession of a portion of grantor's land, as indicated by the survey. Grantor never executed the correction deeds, but for 12 years acquiesced in defendant's possession. *Held*, that defendant was, in equity, entitled to a reformation of the deed to him so as to include the parcel occupied by him under the agreement with the grantor.

2. A finding that grantees had notice of the possession and equitable title of one in possession of the premises finds that they had actual notice of such person's rights.

3. Evidence that, under an agreement with the owner to convey it to him to make up a deficiency in prior conveyances, defendant took possession of land, and improved the greater portion of it, and, while in possession, the owner conveyed it by deed reciting that the former conveyances conveyed the full amount intended to be conveyed thereby, and with the conveyance delivered a lease of the tract conveyed, which excluded that portion held by defendant, warrants a finding that the owner's grantee, and his grantees, who took while defendant continued in possession, took with notice of his equitable title.

Department 1. Appeal from superior court, Stanislaus county.

Action by A. G. Stonesifer and others against Paris Kilburn and others to quiet title. From a judgment for defendants, and from an order denying a new trial, plaintiffs appeal. Affirmed.

E. J. Pringle and C. A. Stonesifer, for appellants. Wright & Hazen, for respondents.

VAN FLEET, J. Appeal by plaintiffs from the judgment and an order denying a new trial. The action is one to quiet title to a parcel of land which is within the calls of the deed under which plaintiffs claim title, but is held in possession by the Kilburns under a claim of equitable title thereto. As disclosed by the findings, the material facts are these: William S. Chapman, the owner of a tract of

<sup>1</sup> Rehearing denied January 13, 1899.

some 5,000 acres in the Orestimba grant or rancho, in Stanislaus county, in the year 1868, in pursuance of an agreement theretofore made by him with S. and E. Randall and Paris and Guy Kilburn to sell them 2,040 acres of said land at the rate of \$10 per acre, and upon payment of the purchase price of \$20,400 in full, made two deeds, one to the Randall brothers, and the other to the Kilburns, each describing by metes and bounds a tract intended to, and designated as, containing 1,020 acres, the two deeds being designed to cover together the whole amount to be conveyed; the Randall deed calling for land on the north end of the Chapman tract, and that of the Kilburns a tract immediately adjoining the Randalls on the south. Possession was immediately taken by the grantees thereunder. At this time it was supposed and believed by all the parties to the deeds that the instruments carried the full acreage designated in each; but subsequently, in 1872 or 1873, it was discovered that there was a deficiency of land in each deed, amounting in the Randall deed to something over 100 acres, and in the Kilburn deed to over 30 acres. This fact being brought to the attention of Chapman, he agreed with his grantees that the mistakes in quantity should be corrected by the Kilburns surrendering to the Randalls sufficient land on their north line to make up the deficiency to the Randalls, and that the Kilburns should recoup from the land of Chapman on the south by moving their south line over on to the land still owned by Chapman sufficiently to make up to them the amount so surrendered, together with the amount of the deficiency in their deed, and thus give to each their full quantity of 1,020 acres. To accomplish this purpose, Chapman procured an accurate survey of the land to be made; and, immediately upon the running and marking of the lines thereof in the field, directed and requested his grantees to change their respective lines of possession in accordance therewith, which they accordingly did, Chapman promising to thereafter make new deeds to conform to such survey. The findings show that the Kilburns, "at the request and on the faith of the agreement of Chapman, and relying thereon," gave up and surrendered to the Randalls the quantity of land required to make up their deficiency, and placed them in possession thereof, and that they and their successors have since held and possessed said land as their own; that at the same time the Kilburns, in pursuance of the said agreement, and relying upon the promise of Chapman, moved their south line over on to the Chapman land in conformity with the said survey, and took possession of the parcel of land in dispute, and have since held and possessed the same, claiming to be the owners thereof, against the plaintiffs and all other persons, and have continuously since "subjected the said tract of land, and the whole thereof, to their will and control; have cultivated the same, and pastured the same,

used the same for a supply of fuel and fencing material, and for the ordinary use of the occupants, and have built fences thereon and valuable improvements, and have inclosed a large part thereof." This change of possession was effected in November, 1873; but it appears that Chapman has never made a new deed to the Kilburns. In 1885, Chapman sold his land to the south of the Kilburn tract to Montgomery, the deed covering by its terms the parcel of land in dispute; Montgomery conveyed to Page; and the latter, in 1887, sold to the plaintiffs,—each of said parties paying an adequate and valuable consideration, and, as found by the court, "believed that they could rely, and they did rely, upon the description of the land of the Randalls and the Kilburns as the same appeared from their deeds of record in the office of the county recorder of Stanislaus county, as also the description of the land of Chapman as the same then appeared from his title papers as recorded in said recorder's office; but that, at the same time, each of them had notice of the possession and equitable title of the Kilburns." And, in a mixed finding of law and fact, the court found "that, at the commencement of the action, the legal title to the disputed premises was vested in the plaintiffs; but that the equitable title to the land in dispute, which is included within the description in the complaint, was then vested in defendants, the Kilburns, who were then in possession, and entitled to the possession, of said disputed land." As a conclusion of law, the court held that the deed from Chapman to the Kilburns should be reformed so as to include the land in dispute; and that the plaintiffs should execute and deliver a deed sufficient in form and substance to convey to the Kilburns and their grantee, Jeanette Kilburn, the legal title to said land.

Although questioned by appellants in some particulars, we are satisfied that there was sufficient evidence to warrant the findings in all material respects; and upon those findings we think the judgment was clearly right. The facts make out a perfect equity in the Kilburns to the relief granted. Appellants contend that there was no direct promise by Chapman to reform the Kilburn deed which was capable of enforcement; that, whatever the terms of that promise, it was, at best, but executory, and was recalled by the conveyance to Montgomery. But, while the promise was not in express terms to reform either of the deeds in question, such was the necessary effect and implication as to the intent of Chapman from his acts, which were accepted and relied upon by both the Randalls and the Kilburns, and upon the faith of which the latter parted with and surrendered a valuable part of the premises originally conveyed to them. The agreement by Chapman was not wholly executory, but was an executed agreement in all respects except the passing of the deeds necessary to complete it; nor is there anything to necessarily



indicate that Chapman intended to recall his promise by his subsequent conveyance to Montgomery, even could he have been permitted to do so. For more than 10 years prior to that conveyance, he had, with knowledge of the facts, acquiesced in the change of possession effected at his instance and direction; and that he had no intention of revoking such promise is shown by the terms of his conveyance to Montgomery, wherein he excepted "two thousand and forty acres conveyed by said Chapman to Randall and Kilburn." It is not material that no reformatory deed has ever passed from Chapman to the Kilburns. At the time of this transaction, the rights of no one other than the grantor, and his then grantees, were involved, and, as aptly stated in the opinion of the learned judge of the court below: "The agreement to convey two thousand and forty acres of land at the price of ten dollars per acre vested the equitable title to that quantity of land in the purchasers; and as, by mutual mistake, the deeds executed in pursuance of the agreement do not include all the land intended to be conveyed, a court of equity will reform the deeds so as to include the land intended. [Citing cases.] Then, as a court of equity would reform the deeds so as to give effect to the contract according to the intention of the parties by correcting the mistake, there is and can be nothing in the policy of the law to prevent the parties from doing equity between themselves by agreeing to correct the mistake."

But it is urged that the Kilburn deed cannot be reformed as against the appellants, for the reason that the finding that plaintiffs and their predecessors purchased with notice of the equitable rights of the Kilburns is based solely upon the fact that the latter held possession of the disputed premises, which fact is not the equivalent of notice, either actual or constructive, but only a fact tending to prove notice; that there is nothing to show any actual notice, and plaintiffs and their grantors, being bona fide purchasers for value, cannot be affected by anything less than that. But the finding of the court must be construed as a finding that plaintiffs and their predecessors had actual notice of the rights of the Kilburns; and, as we have suggested, there was evidence to sustain that finding. The objection may best be answered in the language of the learned judge of the court below, from which we again quote: "The fact that the Kilburns had been in the actual, exclusive, and notorious possession of the land under the parol agreement from early in 1873 to the time this action was commenced, and had fenced, cultivated, and improved the greater portion of it, with the line between the Kilburn and Chapman possessions distinctly marked; and the fact that the agent of Chapman and the agents of Montgomery, in leasing the lands to the south of the disputed strip or piece, recognized and acquiesced in that line; and when Montgomery

conveyed the land to Timothy Paige, April 11, 1887, he delivered to him a lease which had been made by the agent of Montgomery of the land to the south of the land in dispute, which did not assume to include the land in dispute,—are circumstances sufficient to justify the inference that the plaintiffs and their grantors had notice of the equitable title of the defendants Kilburn. It is said in *Bryan v. Ramirez*, 8 Cal. 467, that, 'where a party has an equity and also actual possession of the property, a purchaser of the legal title is bound to take notice. The law permits an equity to exist, but does not require or permit it to be recorded; and, when the party holding the equity does all the law will permit him to do, his equity will be protected, and all who purchase of a grantor out of possession must take notice.' The principle of equity jurisprudence announced in *Bryan v. Ramirez* has been asserted in many subsequent cases, but differently expressed. In some of them such possession has been held to impart notice *per se*; but in others such possession was treated as evidence of notice only. The result, however, should be the same in either view. [Citing cases.] There are other circumstances tending to show notice to the subsequent purchasers, and the facts bring this case within the authorities cited. The plaintiffs and their grantor, Paige, and his grantor, Montgomery, having purchased with notice of the equitable title of the defendants Kilburn, the parol agreement made by Chapman must be specifically enforced against them. This principle of equity is sustained by all the cases. Civ. Code, § 3395; *Peasley v. Hart* (Cal.) 4 Pac. 537."

These are the only considerations to which we deem it necessary to give particular attention. There are some others urged, but we do not regard them as material. The errors of law assigned are not specially urged. We have examined them, but do not discover that they present any obstacle to sustaining the action of the court below. The judgment and order are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

122 Cal. 636

KUHLMAN v. SUPERIOR COURT OF  
CITY & COUNTY OF SAN FRAN-  
CISCO. (S. F. 1,129.)

(Supreme Court of California. Dec. 13, 1898.)  
STATUTES—REPEAL—CORONERS—WITNESSES—CONTEMPT—PUNISHMENT—JUDICIAL ACTION.

1. Pen. Code, § 1513, authorizing a coroner to punish a witness refusing to testify in like manner as on a subpoena issued by a justice of the peace, repeals St. 1872, p. 406, §§ 17, 18, which provide that coroners in the city and county of San Francisco shall have the same power as judges of courts of record to preserve order and punish witnesses for contempt; the latter being a special act, adopted before the Code went into effect.

2. Under St. 1872, p. 406, § 17, authorizing the coroner to order an arrest for contempt, and have accused brought before the county

judge, to be punished according to law, the action of such court or judge in committing accused is judicial, and not ministerial.

3. Where a witness is adjudged guilty of contempt for refusing to testify, and ordered to prison by the coroner, under Pen. Code, § 1513, authorizing him to punish a recalcitrant witness in like manner as on a subpoena from a justice, the witness cannot be committed under St. 1872, p. 406, § 17, authorizing the coroner to order an arrest for contempt, and have accused brought before the police or county judge to be punished according to law, since this section applies to cases of contempt shown to the coroner directing an investigation, and to cases where the warrant of arrest only is issued by the coroner.

4. Under St. 1872, p. 406, § 17, authorizing a coroner to order an arrest for contempt, and have accused brought before the county judge, to be punished according to law, such judge has no authority to commit accused on an order of commitment made by the coroner, and without a trial.

Department 1. Appeal from superior court, city and county of San Francisco.

Petition by Charles G. Kuhlman for a writ of review to annul an order of the superior court of the city and county of San Francisco committing petitioner for contempt. Order annulled.

J. B. Clarke, for petitioner. Lennon & Hawkins, for respondent.

GAROUTTE, J. This proceeding is inaugurated by a writ of review to annul the action of the superior court of the city and county of San Francisco (W. R. Daingerfield, judge) in a proceeding pending therein. It is based upon the following facts: Petitioner, Kuhlman, was regularly subpoenaed as a witness to give testimony in a case of inquest pending before the coroner of the city and county aforesaid. He appeared, and refused to testify, whereupon the coroner adjudged him guilty of contempt, and ordered that he be imprisoned in the county jail of the city and county of San Francisco until he complied with the order of the court requiring him to so testify. The coroner thereupon ordered the sheriff of said city and county to arrest Kuhlman, and bring him before the nearest judge of the police court or judge of the superior court of the city and county aforesaid, "to be punished according to law, and to have said judgment and sentence of imprisonment enforced." Kuhlman was arrested, and brought before the superior court (Daingerfield, judge); and, upon hearing had in that court, the following order was made: "It appearing to me from said order and warrant of said coroner that the said Charles G. Kuhlman has the ability, and that it is within his power, to be sworn as a witness at the said inquest then and there and now pending before said coroner as aforesaid, and after the hearing of said matter, being now fully advised in the premises, it is hereby ordered, adjudged, and decreed in open court that he, the said Charles G. Kuhlman, for his said contempt of the authority of said William J. Hawkins, coroner of the city and county of

San Francisco, state of California, committed in the immediate presence of said coroner, in refusing to be sworn as a witness at the inquest then and now pending before said William J. Hawkins, coroner of the city and county of San Francisco, to determine the cause of death of \* \* \*, be punished by imprisonment in the county jail of the city and county of San Francisco, of the state of California, until he complies with the order of said William J. Hawkins, coroner of the city and county of San Francisco." It is the aforesaid order that is sought to be reviewed by this proceeding.

It is now contended upon the part of the respondent, and in behalf of the coroner, that the action of the judge of the superior court was not judicial, but ministerial, and that for such reason review is not the proper remedy to right the wrong, as there can be no such thing as an excess of jurisdiction in such a case. We pass this contention of respondent for the moment without decision. Whatever action the judge of the superior court, or the superior court itself, took in the matter, its authority to act rests alone in sections 17 and 18 of the act of the legislature found in the Statutes of 1872 (page 406); and, if that act is not in force and effect, the action here taken, as outlined by the foregoing order, whether it be judicial or ministerial, must fall. Assuming, then, the order to be the result of judicial action, that action only has support under the aforesaid sections; and, if that support be taken away, the order, of necessity, must be null, as going outside of the law.

The act of 1872 is one pertaining solely to the duties of the coroner of the city and county of San Francisco; yet the coroner of the city and county of San Francisco is a county officer (*Kahn v. Sutro*, 114 Cal. 316, 46 Pac. 87), and general laws pertaining to the duties of coroners are as applicable to him as to any other coroner of the state. In the county government act and in the Penal Code, we find the general powers and duties of coroners quite fully set forth; and, clearly, those provisions are binding upon the coroner of the city and county of San Francisco. Whatever may be said as to the force and effect of the provisions of the act of 1872, not covered either by the county government act or the Penal Code, there can be no question but that all those provisions of the act which are covered by that general legislation are repealed. Upon inspection, we find section 1513 of the Penal Code providing as follows: "A witness served with a subpoena may be compelled to attend and testify, or punished by the coroner for disobedience, in like manner as upon a subpoena issued by a justice of the peace." Here is a provision of the general law directly applicable to the facts of the case at hand; and such provision of the Code must be held to repeal any special act in effect at the time the Codes went into effect. This section of the Code deals directly



with witnesses refusing to attend and testify before the coroner, and, by implication, necessarily repeals all parts of the act of 1872 treating upon that subject. *Carpenter v. Jones* (Cal.) 53 Pac. 842. As to what particular parts of the act of 1872 are still in force, if any, it is not necessary to decide. The order of the superior court being based upon purported authority found in sections 17 and 18 of the act of 1872, and the law there found being repealed, the entire proceeding taken and had before the superior court must fall to the ground.

There is another reason why the proceeding taken in the superior court must be annulled. Clearly, section 18 of the act of 1872 has no application to this case, for the punishment there prescribed is limited to fine or imprisonment, and no such penalty has been administered here. It follows that section 17 of the act is the only one which has any application to the subject-matter covered by this proceeding. Yet that section only allows the coroner to issue a warrant of arrest for the recalcitrant witness, and thereupon the guilty party must be "brought before the police judge or county judge of his county, to be punished according to law." The particular proceeding contemplated by this section is not plain. Whether the section is intended to apply to contempts simply, or contemplates cases where a misdemeanor or felony has been committed, and upon the issuance of the warrant of arrest by the coroner a trial in the court having jurisdiction is to follow, is a matter of some doubt; but it is plain that the section gives the coroner no authority, to punish anybody, and whatever may be the nature of the proceeding, whether a simple contempt or a trial of a criminal case, the power rests alone in the court to try it, and adjudge the punishment. This construction of the law necessarily does away with the contention of respondent that whatever was done by the judge of the superior court in this matter was done purely in a ministerial capacity, and in no sense partook of judicial functions. Again, it cannot be successfully contended that this petitioner was punished under the aforesaid section of the Penal Code, and then the proceeding outlined in section 17 of the act of 1872 invoked, in order that a commitment might issue from a regularly constituted court. It is only in those special cases covered by section 17, and where the warrant of arrest alone is issued by the coroner, that the proceedings there laid down may be invoked. The measure of the power is found in the section itself. In conclusion upon this branch of the case, we find the superior court making an order adjudging this petitioner guilty of contempt, and decreeing that he be punished by imprisonment. This judgment and decree of the court in itself declares that it is based upon the warrant of arrest and order of commitment made by the coroner. It is evident, therefore, that the petitioner had no trial before the superior

court, but was adjudged guilty upon the showing made by the face of the warrant and order of the coroner. Even conceding the legislature has the power to vest such unusual authority in the superior court, namely, to adjudge guilt without trial, still there is no attempt by the legislature to do such a thing here; for, as we have seen, the coroner had no right, under the section, to make any order declaring the petitioner guilty, and adjudging the punishment. Hence, the order upon which the superior court based its decree was one made by the coroner without any justification in section 17 of the act of 1872. It is therefore apparent that the court exceeded its authority in making the order of which complaint is here made, and that such order must be annulled.

In conclusion, we suggest that, if the aforesaid section 1513 of the Penal Code declared that a violation of its provisions would render the party so violating them guilty of a misdemeanor, thereby eliminating any question of contempt from the case, such legislation would probably do away with the complex and intricate questions of law involved in the consideration of matters of contempt claimed to have been committed before quasi judicial officers, such as the coroner. The order of the superior court is annulled.

We concur: HARRISON, J.; VAN FLEET, J.

122 Cal. 641

CALIFORNIA NAV. & IMP. CO. v. UNION  
TRANSP. CO. (Sac. 437.)

(Supreme Court of California. Dec. 13, 1898.)

INJUNCTION—IRREPARABLE INJURY—MULTIPLICITY  
OF SUITS—PLEADING.

1. A petition for an injunction to restrain defendant from making landings on certain land bordering on a river averred that such entry caused plaintiff continuous and daily damages, which were irreparable, but no facts were stated showing how or why the injury was irreparable. *Held* insufficient.

2. A general averment, in a petition for injunction, that defendant by his acts causes plaintiff continuous and daily damage, being insufficient to show any irreparable injury, is not aided by a further averment that to recover such damages "will require a multiplicity of judicial proceedings."

Department 1. Appeal from superior court, San Joaquin county.

Action by the California Navigation & Improvement Company, a corporation, against the Union Transportation Company, a corporation, to obtain an injunction restraining the latter from making landings on certain land bordering on the San Joaquin river. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Woods & Levinsky, for appellant. S. M. Sparrier, Fairchild & Carroll, and Reddy, Campbell & Metson, for respondent.

PER CURIAM. The plaintiff and defendant in this case are both corporations organ-

ized under the laws of this state, and engaged in the business of transporting freight and passengers by steamboats between the city and county of San Francisco and the city of Stockton, and intermediate points. The plaintiff brought this action to obtain an injunction restraining the defendant from making landings upon certain land bordering on the San Joaquin river, and receiving therefrom and delivering thereon freight and passengers. A general demurrer to the complaint was interposed and sustained, and, plaintiff declining to amend, judgment was entered that it take nothing by the action. From that judgment the plaintiff appeals.

It is alleged in the complaint that on November 30, 1896, one A. J. Larson was the owner of a tract of land in the county of San Joaquin containing 1,592.50 acres, and bounded in part by Black's slough, by a certain levee canal, and by the San Joaquin river, and that on the day named he contracted with J. D. Peters that he, the said Peters, his heirs, executors, administrators, and assigns, "should have the sole and exclusive right and privilege, for the period and term of forty-three years from and after said date, to erect wharves, landings, piers, chutes, warehouses, and any and all buildings and structures in any way appertaining thereto, and shall have the exclusive right of landing with boats, barges, or other vessels on the said premises for said term, and shall have the exclusive right and privilege of making landings on any part or portion of the said lands, fronting on the 'water front,' so-called (that is, any part or portion of said lands facing upon any water surrounding the same, or any part or portion thereof)"; that on or about December 16, 1896, the said Peters, for a valuable consideration, assigned and transferred the said contract to the plaintiff, and that it is still the owner and holder thereof; "that the said defendant, without the consent and against the will of the said plaintiff, has for many days last past continuously entered upon the said land and premises, and used the same for the purpose of making landings, and receiving therefrom freight and passengers, and of delivering thereon freight and passengers, and that the said defendant, although requested so to do, has refused to cease from said use of the said land and premises, and threatens to, and will, unless restrained by this honorable court, continue to enter upon and use the said land and premises for the aforesaid purposes"; "that the said entry of the said defendant and its said use of the said land and premises as aforesaid has caused and does cause to this plaintiff continuous and daily damage, the amount whereof the plaintiff is not able to determine or calculate"; "that to recover the amount of damages suffered by the said plaintiff by reason of the said acts of the said defendant as aforesaid will require a multiplicity of judicial proceedings"; "that the continuance of the said acts of the

said defendant as aforesaid will enable the said defendant, unless restrained therefrom, to acquire an easement in and upon the said land and premises, and the use thereof, for the said purposes, adverse to this plaintiff."

The only question presented for decision is, does the complaint state facts sufficient to constitute a cause of action? The rule is that pleadings are to be construed most strongly against the pleader, and, when so construed, we think the complaint in this case fails to state a cause of action. It will be observed that it contains only a general averment as to the injury caused or to be caused by the acts of the defendant. No facts are set out showing how or why the supposed injury would be irreparable. But to obtain an injunction, when irreparable injury is relied upon, such a showing is necessary. "It is not sufficient that the affidavit alleges that the injury would be irreparable. It must be shown to the court how and why it would be so; otherwise the extraordinary remedy of injunction will not be allowed." *Waldron v. Marsh*, 5 Cal. 120. "An injunction is never granted, unless the bill shows some vested right in the plaintiff, which is likely to suffer great or irreparable injury from the act complained of. The mere allegation of such injury is insufficient. The facts stated must satisfy the court that such apprehension is well founded." *Branch Turnpike Co. v. Board of Sup'rs Yuba Co.*, 13 Cal. 190. See, also, *Foundry v. Ryall*, 75 Cal. 601, 17 Pac. 703, and *High*, Inj. §§ 34, 722. And the general averment that defendant, by its acts, "has caused and does cause to this plaintiff continuous and daily damage," being insufficient to show any irreparable damage or injury whatever, it cannot be said to be in any way aided or helped out by the further averment that to recover the amount of such damages "will require a multiplicity of judicial proceedings." For the reasons given in the foregoing opinion the judgment is affirmed.

(122 Cal. 651)

HARRISON v. McCORMICK et al. (S. F. 812.)<sup>1</sup>

(Supreme Court of California. Dec. 14, 1898.)

PARTNERS—ACTIONS—LIMITATIONS—DISMISSAL AS TO ONE PARTNER—PLEADING—AMENDMENT—CHANGING CAUSE OF ACTION.

1. An action was commenced against two of three partners, and subsequently an amendment was filed making the third a party, but between the time of the commencement of the action and the filing of the amendment limitations ran in favor of the latter partner, who was discharged. *Held*, that his discharge did not affect the liability of the others.

2. Subsequently to the filing of a suit against two of three partners, an amendment was filed making the third a party, but the action was then barred. The two former partners claimed that, as the suit was on a contract with the three, it was not declared on until the filing of the amendment; hence it was barred also.

<sup>1</sup> Rehearing denied January 9, 1899.



to them. *Held*, that as the effect of the amendment was not to state a new cause of action against the original defendants, but the original cause of action against a new defendant, the latter alone could plead limitations with effect.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by J. W. Harrison against John McCormick and others. There was a judgment for defendants, from which, and from an order denying a new trial, plaintiff appeals. Reversed.

Craig & Meredith and J. H. Meredith, for appellant. Reddy, Campbell & Metson and H. C. Firebaugh, for respondents.

BRITT, C. Action to recover a balance of the price of goods sold. The action was begun against John McCormick and Oscar Lewis, alleged to be partners under the name of McCormick & Lewis. Plaintiff had judgment, which was reversed on appeal for the reason that one T. A. McCormick was shown to be a co-partner with said defendants and a necessary party to the action. *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456. Plaintiff then amended his complaint, joining said T. A. McCormick with the former defendants, and alleging, among other things, that the contract sued upon was made with the three as co-partners under the firm name of McCormick, Lewis & Co. Between the time of the commencement of the action and the amendment aforesaid the statute of limitations applicable to plaintiff's demand had run in favor of T. A. McCormick. He pleaded the same by demurrer to the amended complaint, the court sustained the demurrer, and dismissed the action as to him. On a subsequent trial between plaintiff and the two defendants originally sued, the court nonsuited the plaintiff at the close of his evidence. He moved for a new trial, which was denied; hence this appeal. There was an intermediate appeal of no present interest except as part of the history of the case. *Harrison v. McCormick*, 89 Cal. 327, 26 Pac. 830.

Most, if not all, of the considerations advanced by respondents, in support of the nonsuit ordered by the court, are resolvable into the single proposition that, since the right of action on the contract was barred by the statute as against T. A. McCormick, therefore it was lost also against his co-partners, on the principle that the release of one of two or more partners or other joint debtors is a release of all. Certain qualifications of the rule invoked are as fully established by the common law as the rule itself. "If the discharge do not relate to the merits of the contract, and only concerns the person of one of the promisors, as infancy, bankruptcy, etc., the other promisors are still holden. 'For,' in the language of the *Mirror of Justice* (page 215), 'satisfac-

tion hath respect to the debt, and not to the person.' " *Townsend v. Riddle*, 2 N. H. 449, and cases cited. It is perfectly well settled that the discharge of one partner in bankruptcy, or the infancy of one partner pleaded to an action on a contract voidable by him for that reason, does not affect the liability of his co-partners for the joint debt. *Pars. Partn.* (4th Ed.) §§ 17, 376; *Lindl. Partn. marg.* page 224; *Tooker v. Bennett*, 3 Caines, 4; *Woodward v. Newhall*, 1 Pick. 500; *Slocum v. Hooker*, 13 Barb. 536, 541. The statute of limitations is also a defense peculiar to him who pleads it. As has been said here, it is a personal privilege of the debtor, to be asserted or waived at his option. *Grattan v. Wiggins*, 23 Cal. 16. Its effect is not to satisfy the debt, but to bar the remedy; and we perceive no sufficient reason why this defense which, by operation of law, produces the personal discharge of one of two or more partners or other joint debtors, should be available to his co-defendants, who have not the same advantage.

Suppose John McCormick and Oscar Lewis had been absent from the state until the statute barred the action against their co-partner, and upon their return to the jurisdiction all were then sued; we should have the identical state of facts presented in *Town v. Washburn*, 14 Minn. 268 (Gil. 199), where it was held that a creditor might recover against two partners who had thus been beyond the reach of process, although his action was barred as against a third, who pleaded the statute. The doctrine of that case—if it was correctly decided, and we think it was—should obtain here; for an action actually brought against some, but not all, of the members of a partnership, must be as effective to preserve the liability of the persons sued as their absence from the state, which affords merely an excuse for not suing them.

It is further said that the action stands now upon a contract made with three partners, and that this contract was not declared on until the filing of the amended complaint; and hence that the action is barred as to all the defendants. the same as in the case of *T. A. McCormick*. It is, however, quite apparent from the pleadings that the effect of the amendment to the complaint was not to state a new cause of action against the original defendants, but only the original cause of action against a new defendant. The latter alone, therefore, could plead the statute with effect. *Easton v. O'Reilly*, 63 Cal. 308.

Counsel have made no reference in argument to section 1543, Civ. Code, which declares that "a release of one of two or more joint debtors does not extinguish the obligations of the others, unless they are mere guarantors, nor does it affect their right to contribution from him," and we have therefore not sought to ascertain its bearing in the case. It may be of consequence (Insur-

ance Co. v. Potter, 63 Cal. 157); but, independently of its provisions, we are satisfied that the motion for nonsuit was improperly granted, and the order denying a new trial should be reversed.

I concur: CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the order denying a new trial is reversed.

(122 Cal. 628)

PEOPLE v. McKAY. (Cr. 430.)

(Supreme Court of California. Dec. 9, 1898.  
JURY—HOMICIDE—EVIDENCE—PREMEDITATION—  
PROSECUTING ATTORNEY—ACT OF BAD  
FAITH—INSTRUCTIONS.

1. An objection to the mode of service of the venire is not a ground of challenge to the panel.

2. Defendant, after having been engaged in a fight, went into the house of G., which was near by, and caught up a pistol belonging to G., and rushed away with it, and presented it in a threatening manner towards his adversary, when a third person attempted to take the pistol away from defendant, and in the scuffle was shot. Held, that evidence of G. that he attempted to prevent defendant from taking the pistol, and of the remarks then made by defendant, showing excitement, and that he took the weapon without leave and against the protest of G., was admissible to show defendant's state of mind.

3. Evidence of the previous relations between defendant and his adversary was admissible to show the cause of the immediate quarrel in which defendant killed deceased, though such evidence showed no malice.

4. An offer of the district attorney to prove that defendant had an abandoned and malignant heart, as tending to show that the homicide was the offspring of malice, and not of a sudden heat of passion, though excluded by the court, is not an act of bad faith, since there is good authority sustaining the admissibility of such evidence.

5. In a criminal case, where the jury asked for further instructions, it was immaterial that the court did not confine himself to the points on which information was asked, where the jury could not have been misled thereby.

In bank. Appeal from superior court, San Mateo county.

William Barron McKay was convicted of manslaughter, and he appeals. Affirmed.

Geo. C. Ross, for appellant. Atty. Gen. Fitzgerald, for the People.

TEMPLE, J. The defendant was convicted of the crime of manslaughter, and appeals from the judgment, and from an order refusing a new trial.

1. The first point made on the appeal arises upon the challenge to the panel. The objection goes merely to the mode of service of the venire. It is not shown that the sheriff intentionally omitted to summon any juror drawn. In fact, it does not appear that the jurors drawn were not all in attendance. This objection constitutes no ground of challenge to the panel. The challenge to the panel formed under the special venire is not based upon any statutory ground.

2. It is contended that the court erred in admitting the evidence of the witness Gerke, as to what defendant said and did in procuring the pistol with which it is charged that he committed the homicide. Defendant was charged with killing Robert Curry. There was evidence tending to show that, a few minutes before the homicide, defendant had had an altercation with one Barron, who had beaten him; also, that he went immediately to Gerke's house, which was near by, caught up a pistol belonging to Gerke, and rushed back with it, had presented it in a threatening manner towards Barron, when Curry interfered, and attempted to take the pistol from defendant, and in the scuffle the pistol was discharged, and Curry was killed. The theory of the prosecution was that defendant procured the pistol for the purpose of killing Barron, and, when Curry interfered to protect Barron, defendant killed him to get rid of his interference. The evidence had reference to an attempt on the part of Gerke to prevent defendant from taking the pistol, and remarks of defendant tending to show excitement, and that he took the weapon without leave and against the protest of Gerke. I think the evidence was proper, as tending to show the state of mind of the defendant.

3. I discover nothing in the evidence in regard to the previous relations of defendant and Barron which tended to prove malice, but it was admissible to enable the jury to understand the immediate quarrel in which the homicide occurred.

4. We cannot say that the district attorney was acting in bad faith when he offered to prove that defendant had an abandoned and malignant heart, as tending to prove that the homicide was the offspring of malice, and not of a sudden heat of passion or an accident. I think the ruling of the court rejecting the offered evidence was correct; but, had a different ruling been made, authority sustaining the action of the court would have been found, in the celebrated case of U. S. v. Guiteau, 1 Mackay, 498, where much evidence was admitted which merely tended to show that Guiteau had a malicious and malignant disposition.

5. No injury was done to defendant by the refusal to give the elaborate and abstract definition of "character" offered by the defendant. It could have served no useful purpose.

6. It does not matter whether the court, when the jury asked for further instructions, confined itself to the points upon which information was asked or not. The language in which these instructions were given is not in all respects the best that might have been used, but the jury could not have been misled. The attention of the jury was called to the instructions already given upon the subject. In these, at the request of defendant, the court had elaborately distinguished "murder" from "manslaughter." The jury announced that they were agreed that the killing was not premeditated, and asked for a



definition of manslaughter. The court referred to the former instruction, and added: "Whether such felonious homicide would be murder or manslaughter depends," etc. In the instruction already given, prepared by counsel for defendant, it had said: "Whether the unlawful killing of a human being is murder or manslaughter," etc. Evidently the phrase "such felonious homicide" was general, and did not apply specially to the case in hand. It was the equivalent to the expression already used, to which reference was made in the same sentence, and the jury could not have been misled. It is evident, also, that the jury desired to have restated the difference between murder and manslaughter. The defense was not that the homicide was in necessary self-defense, or that it was excusable, but that it was accidental. The announcement of the jury showed that they were agreed that it was not murder in the first degree, and implied that some of the jury were doubtful whether it was murder or manslaughter. If they had concluded that the killing was accidental, they would not have cared for a definition of manslaughter. All the elements of excusable or justifiable homicide had, however, been fully stated in other instructions.

7. It is discretionary with the court whether it will hear evidence in mitigation of the punishment. Pen. Code, § 1203. The evidence offered was incompetent, and the court properly refused to hear it. The judgment and order are affirmed.

We concur: HENSHAW, J.; McFARLAND, J.; VAN FLEET, J.; GAROUTTE, J.

122 Cal. 626

DUNN v. SCHELL et al. (S. F. 793.)

(Supreme Court of California. Dec. 9, 1898.)

MORTGAGE — INCUMBERING INTEREST AS DEVISEE.

It is no defense to the foreclosure of a mortgage of a debtor's interest as devisee to certain land that the will required the land to be kept "intact" and undivided until the majority of a certain other devisee, since, under Civ. Code, §§ 690, 694, 1341, the interest of the mortgagor became vested at the death of the testator, and under sections 699 and 2947 he could incur it the same as if it were an estate in possession; but under the foreclosure sale the purchaser would take the mortgagor's interest, subject to the directions of the will.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Bill by Sarah R. Dunn against Georgiana L. Schell and others. There was a decree for plaintiff, and defendants appeal. Affirmed.

Fisher Ames, for appellants. Gordon & Young, for respondent.

BRITT, C. In order to secure payment of a promissory note, the defendant Lawrence B. Schell conveyed to plaintiff by way of mortgage all his right, title, and interest "as

an heir at law and as devisee by virtue of the last will of Theodore L. Schell, deceased, in and to" certain parcels of land particularly described. This is an action to foreclose the mortgage so created. By the terms of said will the testator devised to his wife, the defendant Georgiana L. Schell, and several children, of whom said Lawrence is one, all his real property, directing, however, that the same "shall be kept and shall remain intact and undivided and undistributed until my youngest son," one Arthur B. Schell, "shall have attained the age of twenty-one years," the income thereof meanwhile to be controlled and expended by said Georgiana for the support of herself and said children. There was a further provision that, in case of the death of the wife before said Arthur should reach the age mentioned, then the real property devised to the children should be at once distributed. It seems that the will was duly admitted to probate, and the estate of the testator is still in process of administration. Said Arthur was yet below the age of 21 years when this action was tried. Judgment went for plaintiff. The appeal is prosecuted by said Georgiana, the widow, and Lawrence W. Schell and the other surviving children of said testator.

The stress of appellants' argument is on the direction in the will that the real property of the deceased shall be "kept intact" until the majority of his youngest son. It is contended that until that period the power of any of said devisees to hypothecate his interest under the will was restrained, and that the effect of the sale of Lawrence W. Schell's interest under foreclosure will be to defeat the testator's intention in this particular. We discover no substantial ground for this view. On the death of the testator said Lawrence acquired under the will a vested future interest in the lands of the deceased (Civ. Code, §§ 690, 694, 1341; Williams v. Williams, 73 Cal. 99, 14 Pac. 394), which was subject to be transferred or incumbered by him in like manner as if it were an estate in possession (Civ. Code, §§ 699, 2947). It was competent for him to make the mortgage in suit, but upon a sale to satisfy the same the purchaser will take only the share and interest in the property of the decedent, which, but for the mortgage and the foreclosure, the mortgagor himself would have taken. It is impossible, therefore, that the "intact" quality (whatever that may have been) which the testator desired to impress on his real estate for the period mentioned in the will can be affected by the sale of Lawrence's interest therein.

The court made a finding to the effect that the interests of the co-devisees of said Lawrence are subordinate and subject to the claim and lien of the plaintiff created by the mortgage in suit. Appellants complain that this finding is contrary to the evidence. Within itself the finding does not show what interests are declared to be subordinate to the claims of the plaintiff; but, taking it in con-

nection with the other findings and the admissions of the pleadings, we understand it to mean no more than that said co-devisees of Lawrence W. Schell have no right in the share of his father's estate mortgaged by him to the plaintiff which is not subordinate to the lien of the mortgage. This is consonant with the facts in evidence. All the appellants expressly admitted by their answers that they claimed an interest in the mortgaged property, and it was not improper that the findings should negative their asserted rights therein. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

122 Cal. 621

MCNEAR v. BOURN et al. (Sac. 422.)  
(Supreme Court of California. Dec. 9, 1898.)  
WAREHOUSE RECEIPT — NOTICE TO BUYER — EVIDENCE—ERROR.

1. On the question whether the buyer of a warehouse receipt had notice that the warehouseman's employé signing it had theretofore ceased his employment, the latter testified that he told the buyer before the purchase that he was no longer in the warehouseman's employ, and later told him there was no wheat in the warehouse of the person selling the receipt. Another witness testified he was present at the last conversation, and the buyer admitted the employé had told him before of his discharge, but whether the admission referred to a conversation before the buying was not clear. The buyer denied having seen or talked with the employé after his discharge, and before the buying. *Heid*, that the finding of notice by the trial judge would not be disturbed.

2. Where, in an action on a warehouse receipt, the warehouse employé signing it had testified to the circumstances under which he signed it after his discharge, and to having notified the subsequent buyer of it of his discharge, error in permitting him to show there was no such lot of wheat in the warehouse as the receipt called for was harmless.

3. Where, on the issue of notice of an employé's discharge, there was evidence to support the notice, it was not error to permit the employé to testify that he was in fact discharged on the date alleged.

4. On the issue of notice to the buyer of a warehouse receipt of the previous discharge of the employé signing it, testimony of the employé that, after the buying, he told the buyer that the seller of the receipt had no wheat in the warehouse, was not prejudicial, it simply showing the buyer that something was wrong with his receipt.

5. On the issue of notice to the buyer of a warehouse receipt of the previous discharge of the employé signing it, there being evidence to support the notice, it was competent for the employé to show the circumstances under which he signed it, and that the body of it was later filled in by some one else.

Commissioners' decision. Department 2. Appeal from superior court, Yolo county.

Action by G. W. McNear against A. Bourn and D. N. Hershey. There was a judgment for defendants, and, from the judgment and

an order denying a new trial, plaintiff appeals. Affirmed.

Hurst & Hurst and F. W. McNear, for appellant. F. E. Baker and R. Clark, for respondents.

CHIPMAN, C. Defendants owned a warehouse at Ronda, near Woodland, and received grain on storage, issuing warehouse receipts therefor. Plaintiff purchased a receipt calling for 640 sacks of wheat, which defendants claimed was forged, and refused to deliver the wheat described in it upon demand of plaintiff. This action is to recover the sum of \$765.05, paid by plaintiff as the value of this wheat. The trial was by the court, and defendants had judgment, from which, and from an order denying motion for new trial, this appeal is prosecuted.

The court found that defendants were engaged in receiving grain on storage in the year 1895 up to August 6th of that year. Frank Gasteiger was defendants' agent in charge of their warehouse, and was authorized to issue warehouse receipts in the name of defendants for storage of grain. Robert Nethercott was plaintiff's agent, and authorized to buy wheat for plaintiff. Gasteiger ceased to receive grain in storage on August 6th, and defendants settled with and discharged him, after which time he had no authority to act for defendants in any capacity. On August 14th, Gasteiger was working at baling hay, eight miles from Ronda, for other employers. On that day one H. Burk took to Gasteiger a warehouse receipt theretofore made out by Gasteiger to one Emma C. Laugenour, which Burk represented was incorrect, and requested Gasteiger to sign a warehouse receipt in blank in the usual way, and he (Burk) would take the Laugenour receipt and the blank receipt thus signed to one Watkins, the agent of Mrs. Laugenour, and have him fill the blanks in the receipt. Gasteiger complied with Burk's request, and gave him the blank receipt, signed in the name of defendants by Gasteiger. Watkins was not in any way the agent of defendants. Burk presented the receipt to Nethercott, filled out as of date August 13th, and so as to show that he (Burk) had 640 sacks of wheat on storage in defendants' warehouse; and Nethercott purchased the receipt, and paid Burk the sum stated. Subsequently plaintiff presented the receipt to defendants, and demanded the wheat, which was refused. Finding 10 is that Gasteiger was discharged from defendants' employment on August 6th, and thereafter had no authority to act as their agent; and that on August 7th, the day following his discharge, Gasteiger saw and had a conversation with Nethercott in Woodland, "during which conversation he informed said Nethercott that he was no longer in defendants' employ; that he was paid up and discharged the day previous, and was then looking for a job. He also informed the said Nethercott



that defendants had taken in all the wheat intended for storage during said year in said warehouse, and had no further use for an agent or weigher at their warehouse." Finding 11 is to the effect that, on August 19th, Gasteiger again met Nethercott at Woodland, and Nethercott told Gasteiger he had bought Burk's wheat in defendants' warehouse, whereupon Gasteiger told Nethercott there was no such wheat there, and that Burk had left no wheat there. Defendants knew nothing of the existence of this receipt until after Nethercott had bought it.

The plaintiff presents the following as the pivotal question in the case: "Did the defendants, by their want of ordinary care, cause or allow appellant's agent, Nethercott, to believe that Gasteiger was their (defendants') agent on August 13, 1895, the date of the warehouse receipt?" It is contended by plaintiff that it was the duty of defendants to give notice of their agent's discharge and the revocation of his authority. The provisions of the Civil Code and the general doctrine governing agencies, under circumstances such as appear here, are quite fully given by counsel for plaintiff. Section 3543, Civ. Code, is also cited to show that this is a case where one of two innocent persons must suffer by the act of a third, and that the loss must fall on the defendants, because it happened through their negligence. If finding 10 is supported by the evidence, it becomes unnecessary to determine what the rule is as to giving notice where a principal discharges his agent, for it is found that plaintiff had notice. The evidence of Gasteiger tended to show that he met Nethercott in Woodland on August 7th, and said enough to him to leave the plain inference that he was no longer in defendants' employment. He met Nethercott again after the latter had purchased the receipt. Nethercott told Gasteiger of his purchase from Burk, whereupon Gasteiger told him that no such person had any wheat in the warehouse, and showed him a list of all the sacks in the warehouse. A witness was called, who was, it is claimed, present at this meeting, and testified that he and Gasteiger were talking together, when Nethercott came up and spoke to them, and said, "What are you doing here?" And Gasteiger said, "Didn't I tell you before that I was not working at the warehouse any more?" Mr. Nethercott said, "I believe you did." Some discussion is indulged as to whether Nethercott referred to the conversation of August 7th, between him and Gasteiger, or to another conversation he had with Gasteiger after Nethercott bought the receipt. It does not clearly appear to which conversation Nethercott referred. It is not material, however, because the court could accept Gasteiger's evidence without corroboration. Nethercott denies having seen Gasteiger on the 7th, or at any time after the 6th, and before he bought the receipt from Burk. In other respects he flatly contradicted Gasteiger, and

testified that he had no notice that Gasteiger was discharged at the time he bought the receipt.

After a careful examination of the transcript, we are unable to say that there was not sufficient evidence to support the findings. It was the province of the trial judge to pass upon the credibility of the witnesses, and to accept or reject such portions of the evidence as to him seemed worthy or unworthy of credence. An examination of the testimony of the witnesses will show that the court might well have reached an opposite conclusion from the one arrived at; but we cannot say that it was bound to do so, or that the findings are unsupported by the evidence. Plaintiff was grossly imposed upon by the criminal act of Burk, and the more than careless conduct of Gasteiger; but the learned judge who tried the case found that plaintiff's agent had notice of Gasteiger's discharge seven days before the date of the receipt. It may be that when the receipt of a subsequent date was presented to Nethercott for sale, on the 13th or 14th of August, he believed that Gasteiger had resumed work for defendants; but, as defendants in no wise contributed to this belief, they should not suffer because of Nethercott's mistake. It is possible, too, that Nethercott was right, and Gasteiger wrong, as to the date when the latter first informed the former of his discharge by defendants; but the trial court accepted Gasteiger's version of the circumstance, and rejected that of Nethercott. The rule, well established, forbids us from interfering with the prerogative of the court in passing upon the credibility of these witnesses.

2. Plaintiff assigns certain errors of law occurring at the trial.

(a) It is claimed that error was committed in allowing defendants to show by Gasteiger that no lot of 640 sacks of wheat was in the warehouse when he was discharged. As Gasteiger had testified to the circumstances under which he signed the Burk receipt, and had also testified to having given Nethercott notice of his discharge, we think it was not prejudicial error to show by this witness that there was no such lot of wheat in the warehouse on the 6th, when Gasteiger quit work there.

(b) We think it was competent for defendants to show by Gasteiger that his employment ceased on August 6th, as there was evidence tending to show notice of that fact to plaintiff.

(c) We can discover no prejudice to plaintiff in the evidence of Gasteiger as to what was said between him and Nethercott on the 19th of August, conceding it to be immaterial. It amounted simply to his telling Nethercott there was something wrong about the Burk receipt.

(d) We think it was competent for defendants to show the circumstances under which Gasteiger signed the receipt, and that the body of it was filled in by some other per-

son, inasmuch as there was evidence that Nethercott had notice that Gasteiger quit work on August 6th. The judgment and order should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

122 Cal. 648

BROWN v. SAN FRANCISCO SAV. UNION.  
(Sac. 392.)

(Supreme Court of California. Dec. 13, 1898.)

VENUE—DENIAL OF CHANGE—REVIEW.

Under Const. art. 12, § 16, providing that a corporation may be sued in the county where the contract is made, or its principal place of business is, subject to the power of the court to change the place of trial, where the evidence is in direct conflict as to whether the contract in suit arose in the county where suit was brought, or defendant bank had done business there, the denial of a motion to transfer the place of trial will not be disturbed.

Commissioners' decision. Department 2. Appeal from superior court, Glenn county.

Action by Thomas Brown against the San Francisco Savings Union. Appeal from an order denying a motion to transfer the place of trial. Affirmed.

H. C. Campbell and S. Millington, for appellant. Ben. F. Geis, for respondent.

BELCHER, C. This action was commenced in the superior court of Glenn county to recover damages for the alleged breach of an agreement, entered into between the parties, giving the plaintiff an option to purchase certain lands in that county between certain dates at a stated price. It is alleged in the complaint that the defendant is a corporation organized and existing under the laws of this state as a banking corporation, and, at all the times mentioned in the complaint, was, and now is, "doing a general banking business in the said state of California, and in the county of Glenn thereof"; and that, "on or about the 21st day of April, 1896, the above plaintiff and defendant, at and in the said county of Glenn, California, made and entered into" the said agreement. The answer admits that defendant is a corporation organized under the laws of this state, and alleges that it was and is incorporated under the act of the legislature entitled "An act to provide for the formation of corporations for the accumulation and investment of funds and savings," approved April 11, 1862, and the acts amendatory thereof and supplementary thereto, and that, since its organization and incorporation, it has done business as a savings bank corporation, according to the provisions of said acts, and not otherwise; "denies that at the times in the complaint mentioned, or at any time, defendant was, or at any time has been, or is, doing a general banking business in the county of Glenn, or elsewhere, in the state of

California, and denies that it has ever done any business whatever in the said county of Glenn; alleges that, continuously since the date of its organization, its office and principal place of business has been, and is, in the city and county of San Francisco, said state, that all of its business has been, and is, transacted at said office and place of business, and that it has never had any other office or place of business; admits that on or about the 21st day of April, 1896, plaintiff and defendant entered into an agreement of option, etc., but denies that such or any agreement was made or entered into at said county of Glenn, or elsewhere than said city and county of San Francisco." The answer then sets up facts which, if true, would constitute a defense to the action. The complaint and answer were both duly verified. At the time it appeared and answered, defendant filed an affidavit of merits, and a demand in writing that the place of trial be changed to the city and county of San Francisco. The motion was subsequently heard and denied, and from that order the defendant appeals.

Section 16 of article 12 of the constitution provides: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." Under these provisions of the constitution, the question submitted to the court below for decision was, where was the agreement in controversy made or to be performed? And it is clear that, if the averments of the complaint were true, the action was properly brought in the county of Glenn, and, if not, defendant's motion should have been granted. At the hearing, affidavits were read by both sides. Those read on behalf of defendant were made by Albert Miller, president, and Lovell White, cashier and secretary, of the defendant. They stated clearly and positively that defendant was incorporated to do business as a savings bank, and had always had its office and principal place of business in the city and county of San Francisco, as stated in its answer; that it never had any office or place of business in the county of Glenn, or transacted any business in that county; that plaintiff came to defendant's office and place of business in San Francisco, and there personally conducted the negotiations with the officers of defendant that led to the execution of said option agreement, which consisted only of letters written by the cashier of defendant to plaintiff; and that said agreement was to be, and could be, performed by defendant, if at all, only at its said place of business in San Francisco. The affidavits read on behalf of the plaintiff were made by Thomas Brown, plaintiff, and one David Brown. They reaffirm the averments of the complaint, and say "that the facts are that the said plaintiff and de-



fendant, at and in the county of Glenn, state of California, made and entered into the agreement set out in plaintiff's verified complaint," and that all the statements contained in the answer and affidavits of defendant "denying that the contract was made in the county of Glenn, and that defendant never transacted any business in the said Glenn county, and the statements that the contract was made in the city and county of San Francisco, are absolutely false and untrue, the fact being that the contract of option sued upon was made and entered into at and in the said county of Glenn, state of California."

In view of these conflicting affidavits and the decisions of this court in similar cases, we do not think the action of the court below can be disturbed. *Lakeshore Cattle Co. v. Modoc Land & Live-Stock Co.*, 108 Cal. 261, 41 Pac. 472; *Bowers v. Same*, 117 Cal. 50, 48 Pac. 979. We advise that the order appealed from be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

122 Cal. 654

PEOPLE v. ELKINS. (Cr. 482.)

(Supreme Court of California. Dec. 13, 1898.)

MURDER—APPEAL—DISMISSAL—ESCAPE.

Where, pending an appeal from a conviction of murder, accused escapes, the appeal will be dismissed, unless accused returns to custody within a time set by the court.

In bank. Appeal from superior court, Merced county.

W. H. Elkins was convicted of murder, and he appeals. Dismissed.

Jas. F. Peck, Frank H. Farrer, and B. F. Fowler, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. The defendant, Elkins, was convicted of murder of the second degree, and has appealed from the judgment of conviction, and also from the order denying his motion for a new trial. This appeal is now pending before one of the departments of this court. The attorney general, by motion, asks the court to dismiss the appeal, upon the ground that the defendant has escaped from custody, and is now at large. He supports his application by an affidavit of the sheriff in whose custody the defendant was held, to that effect. The interesting question as to the power of the appellate court under the facts here presented, and the proper procedure to be followed in such a case, has been carefully considered upon an identical state of facts arising in the case of *People v. Redinger*, 55 Cal. 290. Upon the authority of that case, it is ordered that the appeal in this case stand dismissed, unless the defendant shall, within 30 days from this

date, return to the custody of the sheriff of the county of Merced, state of California. It is further ordered that a copy of the within order be served upon the attorneys of defendant within 5 days hereof.

We concur: HARRISON, J.; VAN FLEET, J.; McFARLAND, J.; HENSHAW, J.; TEMPLE, J.

123 Cal. 21

VERMONT MARBLE CO. v. BLACK. (S. F. 1,207.)

(Supreme Court of California. Dec. 19, 1898.)

ACTION—PENDENCY—EXECUTORS AND ADMINISTRATORS—NECESSITY OF PRESENTING PENDING CLAIMS IN ACTION.

1. Under Code Civ. Proc. § 1049, providing that an action is deemed pending from its commencement until its final determination on appeal unless the judgment is sooner satisfied, an action is pending which was prosecuted to a default judgment and to an execution sale against the judgment debtor's administratrix as substituted defendant, she having taken an appeal meanwhile.

2. Under Code Civ. Proc. § 1502, requiring plaintiff in an action pending against a decedent at the time of his death to present his claim to the executor or administrator of the estate, and providing that he may not recover in his action unless proof of such presentation be made, an intestate's judgment creditor, who, pending an appeal by the administratrix as substituted defendant, failed to present a claim against the estate for such judgment, cannot recover from the administratrix.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by the Vermont Marble Company against Annie Black, administratrix. There was a judgment for defendant, and plaintiff appeals. Affirmed.

F. W. Reade, for appellant. Geo. C. Sargent, for respondent.

HENSHAW, J. Plaintiff brought its action against William Black to recover on four promissory notes executed by the latter. Upon May 31, 1893, judgment by default was given against defendant, and execution was issued, and a levy made. William Black died on June 5, 1893, and on July 7, 1893, defendant was duly appointed administratrix of his estate, qualifying upon July 10, 1893. On the 14th day of the same month she was substituted as defendant in this action. On July 28, 1893, she moved the court to vacate the default judgment. Upon denial of her motion she appealed, and this court reversed the order of the trial court. *Marble Co. v. Black*, 38 Pac. 512. After the going down of the remittitur, the lower court, on defendant's motion, vacated the default, and permitted her to answer upon terms. Meanwhile, upon November 1, 1893, the sheriff had sold certain property of the estate under his execution levy. The moneys received from the sale were paid into court to await the final determination of the action. At the trial, after plaintiff had introduced its evi-

dence, defendant moved for a nonsuit upon the ground that plaintiff had not proved the presentation of a claim for its demand against the estate of deceased. It was admitted that no claim had been presented. The court granted the motion, and from the judgment which followed plaintiff appeals.

By section 1502 of the Code of Civil Procedure, plaintiff in an action pending against a decedent at the time of his death must duly present his claim to the executor or administrator of the estate of the deceased, and he may not recover in his action unless proof of such presentation be made. "An action is deemed to be pending from the time of its commencement until its final determination upon appeal \* \* \* unless the judgment is sooner satisfied." Code Civ. Proc. § 1049. Appellant first contends that the judgment was "satisfied," within the meaning of section 1049, Code Civ. Proc., by the execution sale, but this position is not tenable. The judgment was not, in fact, satisfied, and a forced payment by execution sale against a nonconsenting judgment debtor cannot be held to abridge any of his rights upon or under appeal. *Kenny v. Parks*, 120 Cal. 22, 52 Pac. 40. The action, then, was certainly pending. In *re Blythe's Estate*, 99 Cal. 472, 34 Pac. 108. But appellant argues that, even if this be the fact, nevertheless it was not necessary for it to present its claim. Herein reliance is had upon *In re Page*, 50 Cal. 40, and *Brennan v. Brennan*, 65 Cal. 517, 4 Pac. 561; but in both of these cases an attempt was made to resist in the probate court the payment of a final judgment of a court of general jurisdiction. In neither of them had the objection of nonpresentation of the claim been advanced in the trial court. Both cases, then, resolved themselves into a question of collateral attack in the probate court upon final judgments rendered by courts of general and competent jurisdiction. In the case at bar the fact of nonpresentation was first raised in the trial court. It is in all essentials like the case of *Falkner v. Hendy*, 107 Cal. 49, 40 Pac. 21, 386, which is decisive of this question. Here, as there, while deploring the hardship, we find ourselves unable to save plaintiff from the consequences of its neglect. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

6 Cal. Unrep. 192

McDONALD v. MAYOR, ETC., OF CITY OF PLACERVILLE. (S. F. 938.)

(Supreme Court of California. Dec. 16, 1898.)

#### JUDGMENT—DEFAULT.

Where plaintiff sues on a judgment, joining as defendants persons claiming adverse rights therein, demanding, in addition to the recovery on the judgment, a determination that the adverse claimants have no interest therein, and judgment is rendered against him on the latter contention, he is not entitled to judg-

ment against the judgment debtor who is in default, under Code Civ. Proc. § 585, allowing judgment by default in actions arising on contract for the recovery of money only.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Marion J. McDonald against the mayor and common council of the city of Placerville. Judgment for defendant, and plaintiff appeals. Affirmed.

Edward Lynch and W. G. Bonta, for appellant. C. W. Cross, for respondent.

PER CURIAM. The plaintiff sued on a certain judgment against the city of Placerville, averring himself to be the owner of an undivided one-half thereof, and joining as defendants several persons alleged to claim rights in the same adverse to him. The court below held that he had no interest in the judgment, and its decision was affirmed on a former appeal in this case, entitled *McDonald v. Cutter*, 120 Cal. 44, 52 Pac. 120. The only point made here is that plaintiff should have recovered against the city of Placerville, which suffered default. Plaintiff, however, demanded relief in addition to a recovery of money due on the judgment, viz. a determination that the defendant Cutter has no interest in the same; and this on grounds such that a failure to sustain his case in that particular necessarily defeated it as to all the defendants. He was therefore beyond the provision of the statute allowing judgment by default in actions arising on contract for the recovery of money or damages only. Code Civ. Proc. § 585. This appeal seems to us frivolous. The judgment is affirmed.

6 Cal. Unrep. 193

SMITH v. WILLIAMS et al. (Sac. 147.)

(Supreme Court of California. Dec. 16, 1898.)

WATER RIGHTS—DEED—CONSTRUCTION—EVIDENCE—REPETITION.

1. A deed by a prior appropriator of water conveyed "all of his right to the use of all the waters of D. creek. Said waters to be taken out at a point \* \* \* about one mile above the head of S.'s old ditch, and tapping said creek where the B. Co. taps said D. creek. \* \* \* To have and to hold \* \* \* the first right to the use of all the waters" thereof. The grantor at that time owned five ditches tapping the stream below the named point of inflow, through which ditches he thereafter continued to divert water, with the grantee's acquiescence. Considerable water still flowed in the stream below the point named; it being from seepage, springs, and other sources. *Held*, that the intention was to convey a first right only to the point mentioned, and, hence, that the waters below did not become subject to appropriation.

2. It is not error to exclude a question calling for a mere repetition of testimony.

Beatty, C. J., and Temple and Henshaw, JJ., dissenting.

In bank. Appeal from superior court, Siskiyou county.

Action by William H. Smith against William Williams and Jacob Temple. From a



judgment for plaintiff, and an order denying a new trial, defendant Templey appeals. Affirmed.

Warren & Taylor and T. M. Osmont, for appellant. James F. Farraher, for respondent.

VAN FLEET, J. Appeal by defendant Templey from the judgment, and an order denying a new trial. The action was to enjoin defendants from diverting water from a small stream in Siskiyou county, known as "Ditch Creek," and for damages for such diversion. Plaintiff's claim was the exclusive right by prior appropriation to the waters of the stream, to the extent of 600 inches, measured under a 4-inch pressure, "when there is that quantity therein; and, when there is not such quantity, then all of the waters" of the stream "which rise or flow therein or thereinto between the point where the present ditch of the Blue Gravel Mining Company taps said creek, and a point about two miles below, on the line of said creek, where the present lower ditch of plaintiff taps said creek." He averred a wrongful diversion by defendants of 50 inches of the water at a time when there was less water in the stream than the maximum quantity to which he was entitled, to his damage in the sum of \$350. Defendant Templey set up the right in himself by appropriation to "about twenty inches" of the water of the stream, and denied the diversion of any water belonging to plaintiff, or any damage. The court found that plaintiff was entitled to the exclusive use of the waters of the stream, to the extent of 500 inches; that defendant Templey in June, 1893, forcibly took possession of one of plaintiff's ditches and diverted through the same about 50 inches of water, and continued such diversion up to October, and again in like manner diverting it from May to October, 1894; that during the periods of such diversion there was less than 500 inches of water in the stream; that plaintiff was damaged in the sum of \$250. Judgment was entered enjoining the diversion, and for the damages found.

The main point urged is that the findings are not sustained by the evidence. There is evidence tending substantially to establish the facts as found by the court. The finding that plaintiff "is now, and for upwards of twenty years last past has been, the owner and entitled to the exclusive use to the extent of five hundred inches, measured under a four-inch pressure, when there is that quantity, and, when there is not such quantity, then to all of the waters flowing in Ditch creek, in Cottonwood mining district, county of Siskiyou, state of California, which rise or flow therein between the point where the present ditch of the Blue Gravel Mining Company taps said Ditch creek, and a point about two miles below, on the line of said creek, where the present lower ditch of plaintiff taps said creek," presents the principal point of at-

tack. It is contended that the finding is wholly negatived by the fact, as claimed by appellant, that prior to the bringing of the action plaintiff had conveyed away all his rights and interest in the waters of Ditch creek. This claim is based upon the fact that in December, 1888, plaintiff made a deed to one McFarland, whereby he conveyed to the latter "all of his right to the use of all the waters of Ditch creek. Said waters to be taken out at a point in said creek about one mile above the head of William H. Smith's old ditch, and tapping said creek where the Blue Gravel Mining Company's ditch taps said Ditch creek." "To have and to hold, all and singular, the first right to the use of all the waters of said creek." We think this deed was correctly construed by the court below as conveying only plaintiff's rights to the quantity of water mentioned, taken out at the designated point, and as leaving unaffected in plaintiff his rights in the stream below that point. This intention is evident, not only from the language of the instrument, but by the practical construction put upon it by the parties to the deed. Plaintiff at the date of the conveyance owned some five ditches tapping the stream at points below the point of diversion specified in the deed to McFarland, through which he has since continued to divert waters from said creek without interference or adverse claim from his grantee, but with his knowledge and acquiescence. Plaintiff's grantee has taken the water from the stream by means of the same dam which existed in the stream at the point of his diversion when the deed was made; and there has since continued to flow below said dam a considerable quantity of water, part of which escapes past said dam, and part by seepage from the Blue Gravel Company's ditch, and part of which comes into the stream from springs and other sources below said dam; and plaintiff's right to the use of this water has never been questioned by his grantee, nor by any one else other than appellant. The claim of the latter was based upon the theory that plaintiff had parted with all his rights in the stream; that all the water that flowed below the point of diversion made by plaintiff's grantee was seepage water, which was unappropriated, and which appellant was therefore entitled to take. The court properly found against this claim.

The other points call for no particular notice. There was no material error in sustaining plaintiff's objection to the question asked him as to the damage done him. It had been clearly answered once, and could not be made stronger by repetition. Judgment and order affirmed.

We concur: HARRISON, J.; McFARLAND, J.; GAROUTTE, J.

I dissent: BEATTY, C. J.

TEMPLE, J. I dissent. Plaintiff claims exclusive right by appropriation to 600 inches

of water, or, when there is not that quantity, then to all the water in the creek, between two designated points on the creek. He avers that he now is, and for 20 years last past has been, the owner of, and entitled to the exclusive use of, said water. He charges that defendants forcibly took possession of one of his ditches June 15, 1893, and diverted, and continue to divert, 50 inches of water, to his damage in the sum of \$300, and that they threaten to continue such diversion. Templey denied all the material allegations of the complaint, and set up a right in himself, by appropriation, to 20 inches of water, "being seepage water from a ditch taking all the waters of Ditch creek, in Cottonwood mining district, and extending from Ditch Creek to the 'Blue Gravel Mining Claim,' so called." Plaintiff testified at the trial that he owned five ditches by which water was taken from Ditch creek, and in 1878 he put upon record a notice describing his several claims to water. He also testified to the use of water from these various ditches down to the year 1892. In the notice, posted and recorded in 1878, he says: "Take notice that I own three ditches now taking waters of Ditch creek, a tributary of Cottonwood creek, and upon which this notice is posted,—one of them called the 'Crawford Ditch,' one the 'Haserick Ditch,' and the other constructed by me in 1870 to turn waters from this creek to the Steve Oysler ditch; and I claim the first right to the waters of this creek for said ditches to the full capacity, which ordinarily is all of the waters of this creek. I now claim surplus waters in high waters, after said ditches are supplied, and the waters below said ditches, to the extent of five hundred inches, under a four-inch pressure," etc. There was no evidence tending to prove any later appropriation by plaintiff. The court found "that plaintiff above named is now, and for twenty years last past has been, the owner, and entitled to the exclusive use, to the extent of five hundred inches, measured under a four-inch pressure, when there is that quantity, and, when there is not such quantity, then to all the water flowing in Ditch creek," etc. In 1888 the plaintiff made a conveyance to one McFarland, in which it is recited that in consideration of the sum of \$6,000, and other considerations, the party of the first part "does by these presents bargain, sell, convey, and confirm unto said party of the second part, and to his heirs and assigns, forever, all of his right to the use of all of the waters of Ditch creek. Said waters to be taken out at a point on said creek about one mile above the head of the Wm. H. Smith's old ditch, and tapping said creek where the Blue Gravel Mining Company's ditch taps said Ditch creek, in the Cottonwood mining district, county of Siskiyou, state of California. To have and to hold, all and singular, the first right to the use of all of the waters of said creek, together with all rights appurtenant thereto," etc. The appellant contends that

by this deed plaintiff parted with all his right to the waters of Ditch creek, and as there was no evidence tending to show that plaintiff had, by appropriation or otherwise, subsequently acquired any water rights in the stream, and, furthermore, as the court expressly based its finding in favor of plaintiff upon rights which had belonged to plaintiff for 20 years, the finding is wholly without support from the evidence. It seems that there was already a dam at the point indicated, and that the Blue Gravel miners were taking water for these mines. The deed was for the owners of that mine, or some of them; and it is argued that the deed was merely intended to settle and assure their right to take all the water at that point, and for their mine. A contrary intent is indicated in the deed, which provides that the grantee shall not sell water for one particular purpose. Whether this attempted limitation be valid or not, it shows that the use of the water was not to be confined to working the mine. That the deed conveys all the rights of the grantor is so plainly expressed that construction is neither called for nor proper. It is twice expressed without qualification: "All of his right to the use of all the waters of Ditch creek," and "the first right to the use of all the waters of said creek, with all rights appurtenant thereto." There being a clear grant of the water and water rights, a condition which would prevent the grantee from the full enjoyment of the estate granted would be void as repugnant; also, under section 1070 of the Civil Code. *Wilcoxson v. Sprague*, 51 Cal. 640; *McLennan v. McDonnell*, 78 Cal. 273, 20 Pac. 566; *Dodge v. Walley*, 22 Cal. 225. The case of *Maker v. Lazell*, 83 Me. 562, 22 Atl. 474, is a very instructive case on this subject. The cases are collated and reviewed, and the objection that the rule will sometimes defeat the intention plainly manifested is answered.

I think, however, that this language in the deed cannot be regarded as a limitation or as a condition. As to limitations and conditions, the language of a deed must be construed strictly against the grantor. It is otherwise as to a reservation. Civ. Code, § 1069. By a reservation the grantor reserves to himself some right or property which did not before exist, such as rents and easements. An exception withdraws from the operation of the deed some part of the subject-matter of the conveyance. However construed or understood, the statement that water is to be taken out at a certain point cannot be a reservation. And it is equally plain that it is not an exception. It is claimed that it must be construed as a grant only of such water as could be diverted at the point mentioned. Such conclusion is against the obvious and unambiguous language of the deed. All of plaintiffs' appropriation of water was from points below the Jillson's or Blue Gravel dam. He testified, and, indeed, the very reason of the contention is, that a great deal of water per-



colated into the stream below the dam. This water, so far as included in his appropriations, certainly passed by his deed. But he cannot sell the right to take water from the stream at a point above his appropriation, and still maintain, as against other appropriators, his water rights below. If he had not authorized the diversion, there might have been water enough for all. And, if the water diverted does not come out of his water right, how could he sell it? Again, Smith did not own the stream, or its bed or banks. It does not appear that he was a riparian proprietor on the stream. He had no power to fix the point of diversion, nor any apparent interest in the question. The grantee acquired title to the water from him, but could not also acquire a right to build a dam at any point. I think the finding in favor of the plaintiff's right to the water unsupported by the evidence.

The plaintiff, in his complaint, charged that the defendants forcibly and against his consent took possession of a ditch belonging to plaintiff, and through it diverted from Ditch creek 50 inches of water which belonged to the plaintiff. Appellant denied plaintiff's right to any water, and also his ownership to the ditch, and that he at any time diverted any water whatever from the creek, except what seeped through the dam and from the Jillson ditch, and averred that he claimed by appropriation 20 inches of water, all of which was seepage water from the Jillson ditch, but was not taken by him from Ditch creek. Jillson, as well as Templey and Williams, testified upon this point favorably to defendant. The court, however, found this issue, also, for the plaintiff. I can find no direct evidence in the record to the effect that appellant ever took any water from Ditch creek except as above stated.

Templey and his witnesses testified that he had dug a ditch below the Jillson ditch, and that all the water he took came by percolation from that ditch. Upon this it is contended that, upon the construction of the deed claimed by plaintiff, this was water which had been taken out of the stream at the point mentioned, and, therefore, water which he had sold. This would present the question whether an appropriator can prevent other parties from taking from the stream water which, left undisturbed, would percolate into the stream, and help to furnish the quantity to which he had acquired a right by appropriation. As this case now stands, it is not necessary to determine what the respective rights of the parties would be under such circumstances. It may possibly not be material upon a new trial, and, as it is an important question, which is involved in several other cases, I think it better that it should be passed for the present. I think the judgment and order should be reversed.

I concur: HENSHAW, J.

6 Cal. Unrep. 200  
**GRAY et al. v. RICHARDSON.** (S. F. 941.)  
 (Supreme Court of California. Dec. 16, 1898.)

**MUNICIPAL IMPROVEMENTS—REASSESSMENT.**

Street Improvement Act, § 9, authorizing a second assessment where a suit to foreclose a lien for street work has been defeated by some defect in the prior assessment, does not apply when such a suit is defeated by any defects other than in making the assessment.

Department 1. Appeal from superior court, Marin county.

Application for mandamus by George T. Gray and others against George L. Richardson, as superintendent of streets. From an order denying the application and a motion for new trial, plaintiffs appeal. Affirmed.

Fisher Ames, for appellants. E. H. Bogen and E. B. Mahon, for respondent.

**HARRISON, J.** The plaintiffs seek by this proceeding a writ of mandate compelling the defendant, as superintendent of streets in the city of San Rafael, to issue to them an assessment for certain street work done by them in that city. A contract for doing the work was awarded to the assignor of the plaintiffs, and, after the work had been completed to the satisfaction of the superintendent, an assessment therefor, with warrant and diagram attached, was made and issued to said assignor in February, 1894. After its issuance, the assessment and warrant were assigned to the plaintiffs, and they brought actions thereon to foreclose the lien of said assessment against certain parcels of the land that had been assessed. In these actions they were nonsuited, and judgment rendered in favor of the defendants therein. The present proceeding is instituted to obtain another assessment for the work, under the provisions of section 9 of the street improvement act. The superior court denied the application, and the plaintiffs have appealed therefrom.

Section 9 of the street improvement act provides: "Whenever it shall appear by any final judgment of any court in this state that any suit brought to foreclose the lien of any sum of money assessed to cover the expense of any street work done under the provisions of this act has been defeated by reason of any defect, error, informality, omission, irregularity or illegality in any assessment hereafter to be made and issued, or in the recording thereof, or in the return thereof made to or recorded by said superintendent of streets," the superintendent of streets may issue a second assessment therefor. In *Gray v. Lucas*, 115 Cal. 430, 47 Pac. 354, we had occasion to consider this provision of section 9, and we there said: "Under this provision of the statute, the right to a second assessment does not exist, unless it appear by the final judgment in a suit upon the prior assessment that the suit was defeated by reason of some infirmity in the 'assessment,' or in the recording thereof, or in some matter connected with the

return of the warrant. If the suit is defeated by reason of a defect or infirmity in any other step taken in the proceedings, or by reason of a lack of evidence, or failure to prove any other fact essential to a recovery, the statute does not apply." In the present case the court finds "that it does not appear by said judgments, or any of them, or by any final judgment entered in any of said actions, that said suits, or any of them, brought to foreclose the lien of or for any sum of money assessed to cover the expenses of said street work, was or has been defeated by reason of any defect, error, informality, omission, irregularity, or illegality in any assessment made or issued, or in the recording thereof, or in the return thereof made or recorded by the superintendent of streets." No exception is taken to the correctness of this finding, or the sufficiency of the evidence to sustain it, and it follows that the superintendent was not authorized to issue a second assessment. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(122 Cal. 676)

YANCEY v. NATIONAL BENEV. ASS'N.  
(S. F. 824.)<sup>1</sup>

(Supreme Court of California. Dec. 17, 1898.)

JUDGMENT BY DEFAULT—VACATION—APPEAL—  
DISCRETION.

The day after a case was set for trial on a later date according to the rules of court, defendant's attorney, who lived in another county, wrote to plaintiff's attorney, showing that he did not know that the case was set for trial, and the latter replied without giving any information on the subject. On the day the case was set for trial the former unsuccessfully tried to find the latter or to learn of his whereabouts, and a judgment was rendered against defendant in his absence, as his attorney discovered next day, when he promptly moved to vacate the judgment. *Held*, that it was not a plain abuse of discretion to deny the motion.

Department 2. Appeal from superior court, Fresno county.

Action by Margaret F. Yancey against the National Benevolent Association. From an order refusing to vacate a judgment, defendant appeals. Affirmed.

Geo. F. Getty, Haven & Haven, and F. E. Cook, for appellant. W. P. Thompson, for respondent.

HENSHAW, J. This is an appeal from the order of the superior court refusing to vacate a judgment rendered against defendant. The grounds of the motion are that the judgment was given through the mistake and inadvertence and surprise of the defendant. The uncontradicted facts shown at the hearing were the following: The defendant is a foreign insurance company. The action was instituted by plaintiff against the defendant to recover upon one of its policies. It was com-

menced in the city and county of San Francisco. Defendant employed to represent it attorneys who were residents of the city and county of San Francisco. Thereafter plaintiff by her motion procured a change in the place of the trial of the action from the city and county of San Francisco to the county of Fresno. The cause was at issue, and upon October 2d it was, under the rules of the court, set for trial upon October 27th following. The rule under which the cause was set has heretofore been considered by this court. It is as follows: "The trial calendar of either department will be called at such time as the judge of such department may appoint, and the cases thereon set for trial. The trial calendar shall consist of those cases in which an issue of fact has been joined before the day set for the calling of the same." Defendant's attorneys were at the time of the setting of the cause for trial in San Francisco, and had no actual notice of the fact. Upon October 3d defendant's attorneys by mail served upon plaintiff's attorney in Fresno notice of its motion for leave to amend its answer, and for the issuance of a commission to take testimony. Their motions were noticed for the 28th of October, the day following the date set for the trial of the action. At the same time they communicated with plaintiff's attorney by mail, writing to him that they had noticed their motions for the 28th of October, and concluding: "We should also be pleased at that time to agree with you upon a date for the trial of the case, provided the date can be set far enough off to allow us to have the depositions taken, and to arrange with Mr. Getty for his presence." To this plaintiff's attorney made reply upon October 10th, acknowledging the receipt of the letter, refusing his consent "at this time" to the filing of the amendments, or to the taking of the proposed deposition, and concluding: "As the case has been ready for trial several months, I must refuse to consent to continue the trial thereof until you can take or attempt to take any depositions." Upon the 27th of October, 1896, the day set for trial, one of defendant's attorneys was in the city of Fresno. He called at the office of plaintiff's attorney five times upon that day, and looked for him in other places, but was unable either to find him or to learn his whereabouts. The following day, upon going to attend the court at the hearing of his motions, he learned for the first time that the cause had been set for trial upon the day preceding, had been actually tried in his absence, and a judgment in favor of plaintiff rendered. His motion to vacate the judgment followed promptly, but was denied.

The sole question here presented is whether or not the court abused its discretion in refusing to vacate the judgment upon this showing. That the case is one of much hardship to the defendant there can be no doubt. There can be as little doubt but that, if plain

<sup>1</sup> Rehearing denied January 13, 1899.



tiff's attorney had held in any regard the amenities of the profession, he would not have permitted defendant's attorneys to remain in ignorance, when knowledge of that ignorance was so plainly brought home to him by their letter. But at the same time it cannot be said that there was any legal duty imposed upon plaintiff's attorney to notify defendant's attorneys of the fact that the case had been set for trial, and, this being so, he is in no way legally responsible for defendant's counsel's ignorance of the fact. Indeed, there was no legal duty cast upon anybody to notify defendant's attorneys of the fact. It was their duty to inform themselves of it, and it was their neglect that they did not do so. *Eltzroth v. Ryan*, 91 Cal. 584, 27 Pac. 932; *Dusy v. Prudom*, 95 Cal. 646, 30 Pac. 798. In the latter case the appeal was also from a decision of the superior court of Fresno county, and the case had been set under the identical rule above quoted. In the present instance the defendant's attorneys took no means to inform themselves whether or not the case had been set for trial, but assumed, either that it had not been set, or that it would not be tried until after the date fixed for the hearing of their motions. But neither of these assumptions affords such an excuse for the neglect that we can say that the trial court abused its discretion in refusing to vacate the judgment. The case is one of admitted hardship, but where, as here, discretionary power is vested in the trial court, the exercise of that power may not be reversed, except for plain abuse. The judgment appealed from is therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

122 Cal. 655

POULSON v. STANLEY. (S. F. 1,382.)  
(Supreme Court of California. Dec. 16, 1898.)

WITNESS — ACTIONS AGAINST ADMINISTRATORS—  
COMMUNICATIONS BETWEEN HUSBAND AND WIFE  
—APPEAL—QUESTIONS OF FACT—REVIEW.

1. Code Civ. Proc. § 1880, making incompetent as witnesses (subdivision 3) parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, upon a claim against the estate of a decedent, as to any matter occurring before his death, does not disqualify a wife suing the administrator of her husband's estate to establish a conveyance of certain land from her husband to her and to quiet the title; since she does not seek to enforce a "claim," but merely to declare that the estate has no interest in the property.

2. Code Civ. Proc. § 1881, subd. 1, disqualifying as witnesses a husband or wife as to any communication made by one to the other during marriage, does not make a wife, suing her husband's administrator to establish a conveyance of land by her husband to her, incompetent to testify that he delivered the deed to her; that not being a "communication," within the statute.

3. Whether a wife's conduct after the time she claimed a deed was delivered to her by her husband to certain land raised the inference

that it had not been delivered is a question of fact for the trial court, and is not reviewable.

4. A finding that a deed to the grantor's wife was not made to hinder creditors is one of fact, and not reviewable, the transaction having been made while Civ. Code, § 3442, provided that the question of fraudulent intent is one of fact, and that a transfer cannot be adjudged fraudulent solely because not made for a valuable consideration.

Department 1. Appeal from superior court, Alameda county.

Action by Alice S. Poulson against James Stanley, administrator. There was a judgment for plaintiff, and defendant appeals. Affirmed.

F. W. Sawyer and A. Morgenthal, for appellant. E. M. Gibson and Welles Whitmore, for respondent.

HARRISON, J. Appeal from a judgment in favor of the plaintiff quieting her title to certain real estate. The plaintiff was the wife of Peter Wilhelm Poulson, who died April 23, 1894, and the defendant, Stanley, is the administrator of his estate. The plaintiff claims title to the land in question by virtue of a conveyance alleged to have been made to her by her husband. The instrument was never recorded, and she was unable to produce it at the trial, claiming that it had been abstracted from her desk and destroyed. Testimony was given that a conveyance to the plaintiff of the property in question had been signed and acknowledged by her husband, and that such a conveyance had been in her possession subsequent to the time it purported to have been made. For the purpose of proving its delivery to her, the plaintiff was asked whether she had ever received a deed of the property from her husband. The defendant objected to this question upon the ground that under section 1880, Code Civ. Proc., the plaintiff is incompetent to testify as to any fact occurring before the death of her husband, this being an action by her against his administrator upon a claim against his estate. The court overruled the objection, and the defendant excepted thereto.

The provision of section 1880 relied on by the appellant is as follows: "The following persons cannot be witnesses: \* \* \* (3) Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of a deceased person as to any matter of fact occurring before the death of such deceased person." Whether a person shall be competent as a witness upon the trial of a question of fact, either by virtue of the relation he bears to the opposite party, or his interest in the cause of action, and the degree of interest in the cause which will disqualify him as a witness, are questions of legislative policy, and the function of courts in reference thereto is to apply the rules prescribed by the legislature. For-

merly a party to an action was not permitted to be a witness as to any fact in issue therein, and such was the law in this state under the procedure act first enacted. The strictness of this rule was gradually modified until the adoption of the Codes in 1872. The history of these changes prior to 1864, is given in *Davis v. Davis*, 26 Cal. 36. In 1870 (St. 1869-70, p. 662) the legislature repealed section 393 of the practice act, under which this decision was made, and thereafter a witness was not incompetent by reason of the relation which he bore to the cause of action, or to the adverse party, except in the case of certain confidential relations. In the Codes, as originally enacted, section 1880, Code Civ. Proc., preserved the same rule, but in 1874 this section was amended by adding thereto subdivision 3, including as persons who were incompetent as witnesses as follows: "Parties to an action or proceeding, or in whose behalf an action or proceeding is prosecuted, against an executor or an administrator, upon a claim or demand against the estate of the deceased;" and in 1880 this subdivision was still further amended by including the assignors of parties, and limiting the incompetency to matters of fact occurring before the death of the deceased person. Under section 1879, Code Civ. Proc., all persons are competent as witnesses except those enumerated in sections 1880 and 1881; and, before a person can be held incompetent or his testimony excluded, it must appear that he, or the matter upon which he is to be examined, is within the provisions of the exceptions. The exception in subdivision 3 of section 1880 requires, not only that the witness be a party to the action, and that the action be against the administrator of a decedent, but it must also appear that the action is upon a claim or demand against the estate of the decedent, and that the testimony sought from the witness is as to a matter of fact occurring before the death of the decedent. Unless all of the conditions exist, the witness cannot be held incompetent. In *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200, and 25 Pac. 1101, it was held that the exception did not apply in an action for the foreclosure of a mechanic's lien; that, as no personal judgment could be recovered in the action against the estate payable in due course of administration, it was not a "claim," within the meaning of subdivision 3 of the section. There is no difference in principle between an action to establish a lien upon property belonging to the estate and an action to declare that the estate has no interest in the property. In *Myers v. Reinstein*, 67 Cal. 89, 7 Pac. 192, it was held that this provision of the statute did not render the plaintiff incompetent in an action to establish a resulting trust in certain property held by the estate. The court, therefore, did not err in permitting the witness to give the testimony.

The provision of subdivision 1 of section 1881 is not applicable. The delivery of a deed is not a "communication," within the meaning of that section.

Whether the conduct and acts of the plaintiff after the time when she claimed to have received the deed were such as to authorize the inference that it had not been delivered to her was a question to be determined by the trial court upon the evidence before it, and is not open here for review. Neither can we review the finding of the court that the deed was not made with intent to hinder, delay, or defraud any creditor of the grantor. Such fraudulent intent is by the statute made a question of fact; and under section 3442, Civ. Code, as the section stood at the time of the transaction, the transfer could not be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. See, also, *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 303. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

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(123 Cal. 140)

**TOLAND v. TOLAND et al. (Sac. 449.)**  
 (Supreme Court of California. Dec. 23, 1898.)  
**WILLS — PERPETUITIES — ALIENATION — TRUSTS —**  
**PLEADING—ERROR.**

1. A will provided: "Should my death occur before the expiration of the leases of my landed estate, I desire [M.] to receive all rents. So soon as the leases of rented lands are canceled, I desire the land to be sold." Held not to suspend the power of alienation, in violation of Civ. Code, § 715, forbidding such suspension longer than during lives of persons in being; a prior alienation not being forbidden, and there being persons by whom an absolute interest in possession could be conveyed.

2. An express trust was not created by the provision, in contravention of Civ. Code, § 857, which requires the distribution of the proceeds of sale or lease of the trust estate to be provided for in the instrument; and this though, in a subsequent clause, the testatrix "commended all minor details" to M.

3. Where defendants in an action to quiet title claimed under a will which was held on appeal to be valid, it was error to strike as sham their answer denying plaintiff's interest in the land.

Department 1. Appeal from superior court, Solano county.

Action by William Gridley Toland against Hugo H. Toland and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

E. B. & G. H. Mastick, Wilson & Wilson, J. B. Mhoon, and Jno. M. Gregory, for appellants. Delmas & Shortridge, for respondent.

**HARRISON, J.** The plaintiff brings this action against the defendants to quiet his title to the undivided half of certain land in the county of Solano; claiming the same by succession from Mary B. Toland, who died seised of said land November 14, 1895. In answer to the plaintiff's claim, the defendants allege that Mrs. Toland made a testamentary disposition of the land, and that they are the beneficiaries under her said will; setting forth in their answer a copy of the will. The plaintiff demurred to this answer, and, his demurrer having been sustained, judgment was entered in his favor, from which the defendants have appealed.

The will of Mrs. Toland is olographic, and is as follows: "Being in perfect health, and of sound mind, I, Mary Bertha Toland, make, publish, and declare this to be my last will and testament. Should my death occur before the expiration of the leases of my landed estate, I desire the firm of E. B. Mastick, Esq., and his partners, to receive all rents. So soon as the leases of rented lands are canceled, I desire the land to be sold, highlands and tules, with all improvements, to the best advantage." She then gives directions for the disposition of her personal property, and of the proceeds of said sale, in which are the following provisions: "The Toland vault, at Laurel Hill Cemetery, I wish to be provided with a sum for its care through future years. I will five hundred dollars to Grace Church, for pew number twenty, to be kept for my son and

members of my family." No one is named by her as executor of the will, but at its close she says: "To the firm of E. B. Mastick I commend all minor details."

It is contended by the plaintiff in support of his demurrer that by the terms of the will a trust for the management and disposition of the land is created for a definite period of time, and that thereby the power of alienation is suspended, in contravention of the provisions of section 715, Civ. Code, which provides that the absolute power of alienation cannot be suspended by any limitation or condition whatever for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, with a single exception, which is not presented here. It will be observed that this section only forbids a suspension of the power of alienation, and that a provision for the exercise of that power at a future time is not within its provisions, unless such exercise is itself suspended beyond the period therein limited. The provision of section 749, that the delivery of the grant, when the limitation, condition, or future interest is created by grant, and the death of the decedent, when it is created by will, is to be deemed the time of the creation of the limitation, condition, or interest, shows that the suspension must be by virtue of some provision in the instrument by which the limitation, condition, or estate is created, and that the power is not suspended by a mere direction in the instrument to make a sale or other alienation of the land after a designated period of time, unless under the provision of the instrument an alienation prior to that date is also forbidden. The statute does not prohibit all limitations of estates by which the power of alienation is suspended, but permits a suspension of such power, with the restriction that the suspension shall not continue beyond the period of lives in being at the creation of the limitation, and in section 716 defines this restriction as follows: "Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed." Consequently, whenever there are persons in being by whom an absolute interest in possession in the land can be conveyed, the power of alienation is not suspended. In the will of Mrs. Toland there are no terms which forbid a sale or place the land beyond the power of those having interests therein to unite and convey an absolute interest in possession. The testatrix does not give any such direction, and the language used by her is susceptible of a different construction; and it is one of the cardinal rules of interpreting an instrument to give it such construction as will make it effective, rather than void. Civ. Code, §§ 1645, 3541. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained (section 1324); and, of two modes of interpreting a

will, that is to be preferred which will prevent intestacy. Section 1326; *Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552. Her direction to sell the land "so soon as" the leases are canceled designates a point of time after which the beneficiaries might enforce a sale, but does not postpone the right to make the sale until the expiration of the terms created by those leases. It is equivalent to a direction to sell the land "whenever" the leases are "canceled." The word "canceled" is to be taken in its ordinary sense, and the use by her of that word instead of "expired" or "determined" justifies an inference that she had in her mind the possibility that the tenants might surrender the leases prior to the expiration of the term for which they were given. There was, therefore, no time after the death of the testatrix that an absolute interest in possession could not have been conveyed. The tenants could at any time, by agreement with the executor, cancel their leases, or unite with him in a conveyance, and give to the grantee the fee and possession of the land.

Neither can the plaintiff's contention that the will creates an express trust in contravention of section 857, Civ. Code, be maintained. It does not in terms create a trust for any purpose; nor does it give any estate in the land to be held in trust by any person until a sale should be made, or name any person who is to make such sale. That the testatrix had great confidence and trust in the firm of Mr. Mastick is evident from the terms of the will, but by "commending all minor details" to him she did not make him a trustee, or create an express trust in relation to the land; nor does her declaration that he should "receive" all rents have any greater effect than to make him a trustee of these rents. A trust in personal property may be created for any purpose for which a contract may lawfully be made (Id. § 2220), and the creation of a trust does not of itself suspend the power of alienation, unless a trust term in the property is created, within which a sale or other alienation by the trustee would be in contravention of the trust. The will does not purport to create an express trust in the land for the purpose of enabling him to receive these rents, but merely directs that he shall receive them. There is no direction to pay or apply to the use of any person the rents which he shall receive, or to accumulate them for any purpose. Whether this provision be construed as a legacy to him of these rents, or as a direction that he shall merely "receive" and account for them to the estate of the testatrix, is immaterial. If he be regarded as a trustee of the rents thus to be received by him, it cannot affect the validity of the will.

The validity of the bequests for the Toland vault and for the pew in Grace church is not involved in this litigation. Their validity or invalidity does not affect the will, if it is otherwise valid.

In addition to the above answer, the defendants, by a separate answer, denied that

the plaintiff had any interest in the land, and upon motion of the plaintiff this answer was struck out on the ground that it was sham. Under the foregoing considerations of the character of the will, the court erred in this ruling. The judgment is reversed.

We concur: VAN FLEET, J.; GAROUTTE, J.

6 Cal. Unrep. 190

GRANGERS' BANK OF CALIFORNIA et al.  
v. SHUEY et al. (S. F. 910.)

(Supreme Court of California. Dec. 15, 1898.)

BANKS—OVERDRAFTS—NOTES—WAIVER OF MORTGAGE LIEN.

1. A bank took a mortgage as security for an overdraft, and later a note for the amount due on the draft, as a matter of bookkeeping, but with the agreement that it was not a payment of the account. The mortgage recited that it was to stand as security for whatever indebtedness to the bank might result from the account at any particular period. Held to justify a finding that the note was not given in final payment, and that the lien still subsisted.

2. Where evidence is conflicting on a vital question of fact, the appellate court cannot pass on the question of preponderance of the evidence.

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county.

Action by the Grangers' Bank of California and others against J. A. Shuey and others. There was a judgment for plaintiffs, and defendant the Union Savings Bank appeals. Affirmed.

A. A. Moore and Thos. D. Corneal, for appellant. E. S. Pillsbury and F. D. Madison, for respondents.

CHIPMAN, C. Foreclosure. Defendants J. A. Shuey and his wife, Lelia, on January 20, 1893, executed to plaintiff bank (hereinafter referred to as respondent) a deed of trust, intended as a mortgage, duly recorded January 25, 1893, to secure the overdraft of defendant J. A. Shuey. At that time this overdraft amounted to \$6,387.30. On February 27, 1895, Shuey executed to defendant bank (hereinafter referred to as appellant) a mortgage on the premises included in the deed of trust given respondent, which was duly recorded March 29, 1895, actual notice of which came to respondent April 19, 1895. On June 10, 1895, this action was brought to foreclose respondent's mortgage, the amount secured thereby then being \$6,136.19. Appellant, by its cross complaint, put in issue the amount due respondent on the overdraft, and claimed that the lien of the respondent had been fully paid and satisfied. One of the items of respondent's account was a promissory note for \$5,500, given to respondent August 5, 1893, on which date its overdraft account was credited by this amount. The running account in respondent's ledger "showed the following credit: '1893, August 5th, by note se-



cured by deed of trust, \$5,500,' and the following debit item: '1895, May 2d, note and int. of August 5, 1893, \$5,883.80.'" The contention of appellant now is that this \$5,500 note (amounting May 2, 1895, to \$5,883.80) was given in final payment, and to that extent respondent's lien was discharged; and the only question presented is whether such was the effect of the note.

It appears in evidence that respondent took this note in compliance with certain previous resolves of the Clearing House of San Francisco to abandon and discontinue the practice of allowing current overdraft accounts. Respondent was a member of the clearing house, and agreed with its other members to carry out the new policy. This agreement, with some other facts and circumstances, is relied upon by appellant as showing that the note was taken in payment of the overdraft, thus discharging respondent's lien, and that the court erred in finding that the amount was secured by respondent's mortgage. Counsel on both sides agree to the well-settled proposition of law that the taking of a note for a pre-existing debt is not payment unless it be expressly agreed that it shall be so considered. *Society v. Burnett*, 106 Cal. 514, 39 Pac. 922; *Dellapiazza v. Foley*, 112 Cal. 380, 44 Pac. 727. The real question in the case, therefore, resolves itself into one of fact.

Mr. Montpellier, president of the respondent bank, testified that "at the time the note was taken it was expressly understood and agreed that it should not be considered as payment, in whole or in part, of the current account; that the note was a matter of accommodation for the books of the bank, and was secured by deed of trust." He was asked on cross-examination if he stated these things to Mr. Shuey in words, and he answered: "Yes, sir. Q. Did you state all those things to Shuey? A. Yes, sir, certainly; distinctly and clearly." It also appeared from the evidence that when Shuey gave the mortgage to appellant he informed the president of the appellant bank, and he also told its vice-president and cashier, that the respondent had a deed of trust to secure this note. Respondent's deed of trust contained the provision that "this conveyance shall stand as security for whatever indebtedness to the bank may be the result of said account at any particular period."

There was evidence to justify the court in finding that the note was not given in final payment, and in treating the overdraft account as unchanged. Having so concluded, the court very properly held that the lien still subsisted and was prior to appellant's lien. The principle is correctly stated in *Jones, Mortg.*, at page 924: "No change in the form of indebtedness or in the mode of payment will discharge the lien. A mortgage secures the debt, and not the note or bond or other evidence of it. Nothing short of the actual payment of the debt, or an express re-

lease, will operate to discharge the mortgage. The mortgage remains a lien until the debt it was given to secure is satisfied, and is not affected by a change of the note or by giving a different instrument as evidence of the debt." The most that can be claimed by appellant is that the evidence is conflicting upon the vital question of fact here involved. In such case we are not at liberty to pass upon the question of preponderance of the evidence. The judgment and order should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

122 Cal. 665

TUOHY v. WOODS et al. (Sac. 361.)

(Supreme Court of California. Dec. 16, 1898.)

PRINCIPAL AND SURETY — EXTENSION TO PRINCIPAL'S ASSIGNEE—ACTIONS—PLEADING—ISSUES—EVIDENCE—APPEAL—HARMLESS ERROR.

1. An extension of time granted by a mortgagee to the mortgagor's grantee, is an alteration of the contract which will discharge a surety thereon.

2. Under Civ. Code, § 2819, exempting a guarantor from liability where the creditor alters or impairs his rights or remedies against the debtor, without the surety's consent, a surety's allegation that the contract was changed "without his consent" is merely formal, and need not be proved, in the absence of proof that he consented.

3. An erroneous finding that a surety guaranteed payment of interest on a mortgage note only is immaterial where judgment was rendered discharging the surety, because of an extension granted to the debtor without his consent.

4. Where a surety was discharged by an extension of time granted to the debtor without his consent, the extent of his injury by such extension is immaterial.

Department 2. Appeal from superior court, Tulare county.

Action by John Tuohy against J. N. Woods and another. From a judgment in favor of defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

W. B. Wallace and Kile & Plummer, for appellant. Dudley & Buck and Woods & Levinsky, for respondents.

McFARLAND, J. This is an appeal by plaintiff from a judgment in favor of defendants and from an order denying a motion for a new trial. The action was brought upon a promissory note, in the usual form, for \$5,000 and interest, dated September 26, 1890, payable one year after date to plaintiff or order, and signed by defendants. In their answer, defendants, after some denials and averments not necessary to be here considered, allege that the note sued on was given solely as security for the payment of the principal and interest of a certain other note for \$82,500 and interest, to be made by one John Herd,

Jr., to the plaintiff, and which note was so made by Herd to plaintiff, dated October 21, 1890, and payable on or before October 1, 1894, which note was secured by mortgage given by Herd to plaintiff upon certain lands; and that the plaintiff afterwards extended the time for the payment of said note for a period of more than two years, and that by such extension defendants were released and exonerated from the payment of the note here sued on,—they, by signing said note, becoming merely sureties for the payment of said note of \$82,500. The court found that the note sued on was signed by defendants merely as sureties, that the plaintiff did extend the time for the payment of the principal note and mortgage, and that thereby the defendants were exonerated, and their obligation as such sureties satisfied and extinguished.

The evidence was sufficient to justify the said findings of the court. At the time the note sued on was signed by defendants there was also a written agreement made by the plaintiff and the defendants to the effect that the note should be placed in escrow with the Bank of Visalia for so long as the annual interest on the \$82,500 note should be paid, and that, if the said interest should not be paid, "or if at the maturity of said last-named note full payment of principal and interest due thereon be not paid, then said Bank of Visalia shall in either event deliver said first-named note to John Tuohy, or order, or otherwise to be returned to said Woods Bros." This written agreement, together with other testimony, warranted the court in finding that defendants, by signing said note, became merely sureties as aforesaid. There was also sufficient evidence to warrant the finding that plaintiff extended the payment of said note. Herd conveyed the mortgaged premises to one Linder, who expressly assumed payment of the note and mortgage which Herd had given to plaintiff; and afterwards the plaintiff, knowing that fact, entered into a written agreement with Linder not to foreclose the mortgage before the 6th day of September, 1898, if Linder would make him certain yearly payments, and would execute to him a crop mortgage on all the crops to be annually planted and raised on the land. It does not appear that any action has yet been brought upon the said note and mortgage for \$82,500. Appellant contends that this extension cannot be taken advantage of by respondents, because it was not made directly with Herd, the maker of the note and mortgage. But Linder was not a mere stranger to the principal obligation. By becoming the grantee of the mortgaged premises and assuming the mortgage indebtedness he became a principal and controlling party to the obligation upon which the respondents had become sureties. He became the principal debtor, and Herd, the grantor, the surety. *Bank v. Madden*, 109 Cal. 313, 41 Pac. 1092; 3 Pom. Eq. Jur. (2d Ed.) p. 1845. And as to the plaintiff, Herd, and Linder, "the doctrines concerning suretyship

must control the dealings between these three parties." 3 Pom. Eq. Jur., supra.

Appellant contends that, as respondents aver in their answer that the extension was made without their consent, and, as there was no evidence introduced touching their consent, therefore they cannot take advantage of the extension, because the burden was on them to show that it was made without their consent. Appellant contends that every "necessary" averment in the pleadings must be proven. This is not universally true, because there are some necessary formal averments which need not be proven; but the averment in the answer that the extension was made without respondents' consent was an entirely unnecessary averment. When a surety has shown that the contract as to which he became surety has been changed, he has then shown that there has been an attempt to make him liable on a new and different contract; and the burden is then upon the other party to show that the surety has consented to the new contract. This principle is aptly stated in *Stowell v. Goodenow*, 31 Me. 540. In that case the jury was instructed: "That if the defendant [the surety] had proved that the plaintiff [the creditor] had made such an agreement to wait further time for a good consideration with Goodenow [the debtor], then the burden of proof was on the plaintiff to show that the surety had knowledge of or consented to such agreement; and, if he failed to do so, the surety would be discharged;" and the appellate court held that the instruction was correct. The court said: "The wrong and injury to the surety consists in the change of the contract and of the relations between the creditor and the principal debtor. It is this which discharges the surety. And, when proof of it has been made, the creditor can be relieved from the effect of it upon his rights only by showing that the surety has assented or waived all objection to it. \* \* \* The proof should come from the party who would be relieved from the consequences of his own wrongful acts." See, also, *Miller v. Stewart*, 9 Wheat. 701; *Calvo v. Davies*, 73 N. Y. 211; *Riggins v. Brown*, 12 Ga. 276; *Taylor v. Johnson*, 17 Ga. 531; *Edwards v. Coleman*, 6 T. B. Mon. 567; *Baylies*, Sur. p. 290; *Gross v. Parrott*, 16 Cal. 143. Section 2819 of the Civil Code does not state a rule of evidence.

The finding of the court that the respondents signed the note sued on as sureties "for the payment during the said term of five years of the interest on said note of \$82,500," if construed as meaning that they were sureties for the interest only, and not for the principal, is inconsistent with the averment in the answer that the note sued on was intended to be a security for the interest and principal of the note of \$82,500; but that finding, and the other finding that said interest had been fully paid, are immaterial, and in no way affect the correctness of the judgment. To what extent the respondents were injured by the extension



is not a legitimate subject of inquiry in this action. *Driscoll v. Winters* (Cal.) 54 Pac. 387. The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

122 Cal. 679

PEOPLE v. TURNER. (Cr. 493.)

(Supreme Court of California. Dec. 17, 1898.)

PERJURY—INDICTMENT.

1. An indictment for perjury which fails to state that the false swearing was willful is insufficient, under Pen. Code, § 118, defining perjury as the willful stating as true of any material matter which the person stating it knows to be false, after having taken an oath to depose truly.

2. In an indictment for perjury, a recital, after the charging part, that thereby accused willfully swore falsely, and did commit willful perjury, is a mere conclusion of law, and does not cure an omission to charge in the charging part of the indictment that the perjury was willful.

Department 2. Appeal from superior court, city and county of San Francisco.

J. F. Turner was convicted of perjury, and from the judgment of conviction, and from an order denying a new trial, he appeals. Reversed.

Geo. D. Collins, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. Defendant, convicted of perjury, appeals from the judgment, and from the order denying him a new trial. Of the propositions which he advances in support of his appeal, but one need be considered, since it is determinative of the question.

The indictment is fatally defective. It charged that the defendant did "falsely, feloniously, contrary to his said oath, and knowing the same to be false, swear, take oath, say, and give in evidence, among other things, in substance as follows." By our Penal Code, "every person who, having taken an oath that he will testify, declare, depose or certify truly before any competent tribunal, officer or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury." Pen. Code, § 118. This indictment fails to charge that the false swearing was willful. At common law, where willfulness was an essential element of the crime, and in all the states of this country which by statute have adopted a definition of the crime making willfulness an element thereof, it is held uniformly and without exception that the defendant must be charged with willful false swearing, and the willfulness of the act must be proved. "It seemeth that no one ought to be found guilty of this offense without clear proof that the false oath alleged against him was taken with some degree of deliberation." 1 Hawk. P. C. (Curw. Ed.) p. 429, § 2. "It

is a general rule that, unless the statute be recited, neither the words 'contra formam statuti,' nor any periphrasis, intendment, or conclusion, will make good an indictment which does not bring the offense within all the material words of the statute; as if \* \* \* an indictment of perjury on 5 Eliz. c. 9, omit the words 'voluntarie et corrupte.'" 5 Bac. Abr. p. 90. In *Rex v. Stephens*, 5 Barn. & C. 246, it was charged against the defendant that he "then and there falsely and maliciously gave false testimony against J. H., by falsely deposing," etc. It was held in arrest of judgment that the indictment was bad for not alleging that the defendant willfully and corruptly swore falsely. By section 5392 of the Revised Statutes of the United States, one is guilty of perjury "who willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true." In *U. S. v. Edwards*, 43 Fed. 67, it is said upon this statute, "Perjury cannot be committed, unless the person taking the oath not only swears to what is false, or what he does not believe to be true, but does so willfully." It was further held that to charge that the statement was falsely and corruptly made was not sufficient in an indictment. As to the rule in state courts under statutes similar to our own, there may be cited *State v. Perry*, 42 Tex. 238; *Com. v. Taylor*, 96 Ky. 394, 29 S. W. 138; *State v. Day*, 100 Mo. 242, 12 S. W. 365; *State v. Carland*, 14 N. C. 114; *Green v. State*, 41 Ala. 418; *State v. Morse*, 1 G. Greene, 503; *State v. Delue*, 1 Chand. 166. And, in further evidence of the universal recognition of the rule, reference may be had to the following learned writers: 2 Chit. Cr. Law, 315; 3 Russ. Crimes, 36; Whart. Cr. Law, 1245; 2 Bish. New Cr. Law, §§ 1045, 1046.

The indictment concluded in the following language: "Whereby he, the said J. F. Turner, did then and there, as aforesaid, willfully, corruptly, contrary to his oath, and knowing his testimony to be false, swear falsely and feloniously, commit willful perjury." This language is but a mere conclusion of law, and does not avail to cure the defect in the charging part of the indictment. *State v. Carland*, 14 N. C. 114; *State v. Day*, 100 Mo. 242, 12 S. W. 365; *Com. v. Taylor*, 96 Ky. 394, 29 S. W. 138; 2 Bish. New Cr. Proc. § 903. The judgment and order are, therefore, reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

123 Cal. 53

PEOPLE v. NATIONAL BANK OF D. O. MILLS & CO. (Sac. 467.)

(Supreme Court of California. Dec. 19, 1898.)

NATIONAL BANKS—TAXATION—EXEMPTION—ASSESSMENT—REVIEW BY BOARD OF EQUALIZATION—HARMLESS ERROR.

1. Where an assessment is proper, a refusal of the board of equalization to consider objec-

tions that it was arbitrarily made, and that the board had no power to review it, is harmless.

2. Pol. Code, § 3632, authorizing an assessor to issue a subpoena to a taxpayer, and hold an examination, if dissatisfied with the verified list furnished by the taxpayer, does not prevent him from adding to such list, without such subpoena and examination, property of the taxpayer not included in the list.

3. Under Rev. St. U. S. § 5219, providing that the legislature of each state may direct the manner and place of taxing all shares of national banking associations, and that nothing in the act shall exempt the real property of the association from state taxes, the personal assets of a national bank are exempt from taxation by the states.

4. The stock of a bank represents the value of all its assets.

Department 2. Appeal from superior court, Sacramento county.

Action by the people against the National Bank of D. O. Mills & Co. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Atty. Gen. Fitzgerald, for the People. Lloyd & Wood, for respondent.

TEMPLE, J. The action was brought to recover taxes assessed to respondent, a national banking association organized under the acts of congress. On the first Monday in March, 1895, it had real property in Sacramento, and also personal property, consisting of safes and fixtures, and money on hand and money on special deposit. The blank form for a statement, with demand for a list, was served on it by the assessor; and it was returned, with a description of certain real estate, and safes and fixtures, valued at \$5,000. The assessor was dissatisfied with this, and returned it to the president of the bank, insisting that the personal assets of the bank were liable to taxation. After considerable conversation and discussion, during which the amount of the deposits as they were afterwards assessed was stated by the president and cashier, the list was changed by erasing the item as to the safes and fixtures, and in that condition was verified and returned to the assessor by the cashier. The assessor then proceeded, without issuing any subpoena to any officer or employé of the bank, or to any other person, to assess to and against the defendant the safes and fixtures, valued at \$5,000, and deposits to the amount of \$800,000. In due time the defendant tendered the amount of the tax upon the real estate, but it declines to pay the tax upon the personal property; claiming that it is exempt under the act of congress creating national banks, as an instrumentality of the federal government. All the findings, save one, were agreed upon by the parties. It is not found, and does not appear, that the assessor considered that defendant had, after demand, refused to make a statement as to its property, or that he made an entry to that effect on the assessment book, as authorized by section 3633 of the Political Code; but it does appear that the board of equalization

refused to consider the objections made by the bank to the assessment on the ground that the "assessment had been arbitrarily made, and that the board of equalization had no power to review the same." It is admitted that the bank did have the property which was assessed to it, and also that, if it is not exempt from taxation, it ought to have been given in by the bank and assessed to it. The refusal of the board to consider defendant's objections has not injured it, if the assessment was proper and would have been maintained. Judgment was for the defendant, and the people appeal from the judgment, and from an order denying a new trial.

It is contended that the assessment was illegal, for two reasons:

1. After the taxpayer has returned to the assessor his verified list, although the assessor knows of other property belonging to the taxpayer; although, in fact, the taxpayer has had his attention called to the matter, and admits the possession and ownership of other property, as was the fact in this case,—still the assessor cannot include such property in the assessment without first issuing a subpoena and holding an examination, as he is authorized to do under section 3632 of the Political Code. The proposition is that an addition to the list furnished by the taxpayer, without the examination, renders the assessment void,—at least, as to the property thus added to the list. Unless the statute has given such effect to the list, this position cannot be maintained. The general duty of the assessor is to list all taxable property in his county or district. The law compelling the taxpayer to furnish the list is undoubtedly designed to assist the assessor in the performance of his duties. The assessment is not judicial, and must necessarily be summary. All property should be assessed, or the burden of taxation is not imposed alike upon all. The assessor must not knowingly permit any to escape. Must he, then, when he not only is fully informed as to the property, but the taxpayer admits and states to him all the facts in regard to it, but simply contends that it is by law exempt, resort to this—in that case—useless proceeding before he can lawfully assess such property? In many states the law does give the verified list some effect, but I think it has generally been held that, unless the statute provides otherwise, it does not in any way limit the powers of the assessor. Welty, Assessm. § 4; Cooley, Tax'n, 357; 1 Desty, Tax'n, p. 545. In Massachusetts it is made conclusive upon the assessor, although it has been held there that the commissioners who revise and equalize may add other property. In New York the taxpayer may make an affidavit which may have the effect to reduce his assessment, and the different states, as was to have been expected, have various schemes upon the subject. In Nevada a similar law was construed, and it was held that the statement was merely in



aid of the assessor, and had no binding effect upon him. *State v. Kruttschnitt*, 4 Nev. 178. See, also, *Railway Co. v. Johnson*, 108 Ill. 1; *Felsenthal v. Johnson*, 104 Ill. 21; *Morris v. Jones*, 150 Ill. 542, 37 N. E. 928; *Thompson v. Tinkcom*, 15 Minn. 295 (Gil. 226). The last-named case is particularly interesting upon this point. The statute there considered was quite similar to ours, and it was held that the assessor was not only at liberty to add omitted property of which he had knowledge, but was bound by his oath so to do; and it was said that, when the statute "does not directly or by implication make the oath of the party conclusive, it is merely a step in the proceedings to enable the assessor to make a complete return of all the property in his district." I believe this to be a correct statement of the general current of decisions upon the subject.

The question, then, is, is there anything in our statute which will preclude the assessor from listing any property to the taxpayer, except such as he returns in his verified list, or shall admit on examination under oath after service of a subpoena upon him? The subpoena cannot be issued until after he has made his statement, and the statute does not expressly authorize the assessor to add to the list after the issuance of the subpoena, and the examination of the taxpayer under oath, even if further property should be discovered upon such examination. Under the statute, and upon the stricti juris theory of construction, so much insisted upon by respondent, the assessor has no more power to add to the list after the issuance of the subpoena and after the examination than he had before, and although the existence of other taxable property may have been admitted by the taxpayer. It must be observed, also, that this construction makes the taxpayer the judge of what property is exempt from taxation, quoad the assessor. Counsel for respondent say it must be intended that upon the discovery of other property upon such examination the assessor should list it. To this I agree, but I know of no reason why property so discovered should be listed, and property discovered through the unsworn admissions of the taxpayer should not be. The provision as to the examination is but an aid to the assessor to enable him to perform the duty enjoined upon him, and which, upon making his return, he is compelled to state under oath that he has done. Pol. Code, § 3652. In respect to this, reliance is placed upon *Weyse v. Crawford*, 85 Cal. 196, 24 Pac. 735, which, it is contended, holds that the assessor cannot add to a list returned by a taxpayer, unless he has been so subpoenaed and examined. I do not so understand that opinion. It holds that the assessor cannot make an assessment which shall not be revisable by the board of equalization, unless the taxpayer has refused to make out his list under oath, or has refused to comply with some other requirement of the law. Properly un-

derstood, I have no quarrel with that decision. Unless there has been some dereliction on the part of the taxpayer, unless he has failed to render the assistance to the assessor which the law requires him to render, he cannot be subjected to the penalty of a nonrevisable assessment. This, I think, is all that was decided upon this matter in *Weyse v. Crawford*. It denominates such an assessment "an arbitrary assessment." The term is not found in the statute. As used in the opinion, it evidently has reference only to an assessment which cannot be revised by the board of equalization. This is not a ruling that the assessor cannot assess property not found in the verified lists made by a property owner.

2. As a second reason for claiming that the assessment is illegal, it is contended that the personal assets of the bank are exempt from taxation by the terms of the national banking act. It is provided in section 5219 of the Revised Statutes of the United States that nothing in that act shall prevent all shares in any association from being included in the individual assessment of the owner, in assessments made for the purpose of state taxation, "but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," etc. It was also provided that shares owned by nonresidents should be taxed in the city or town where the bank is located, and not otherwise. The original act required a list of shareholders to be kept open at the bank during business hours for the inspection of state officers, and no other visitatorial power was allowed. The attorney general does not deny that a national bank is a fiscal agent of the United States, created by it as a means of exercising its powers. Nor does he apparently question the power of congress to limit or deny the right of the state to tax its property; but he contends that, although the state cannot tax an agency of the United States, it may tax the property of its agents,—at least, where there is no express inhibition by congress,—and that taxation of the personal property of a bank, as other like property in the state is taxed, is not prohibited, either expressly or impliedly, by the act of congress. Upon all these questions the decisions of the supreme court of the United States are final, and accordingly counsel have most elaborately considered numerous cases decided by that tribunal. I think counsel really disagree, however, only on one point, viz. whether taxation of such property is prohibited by the act of congress. Appellant states his contention as follows: "An important question raised here is whether the inherent right rests in a state to tax the property of a federal corporation, unless

prohibited by congress, or whether its right to tax the property of such corporation is derived from the federal government?" The respondent submits two propositions: (1) Congress has the power; and (2) has limited the power of the state to tax the property of national banks, and, of course, that it has denied to the states the right to tax any property of national banks, except their real estate, although permitting the taxation of the shares to the shareholders. Since, therefore, respondent bases its claim to exemption upon the proposition that congress has prohibited the tax, it is only important as a matter of argument to determine whether the state may tax such property, unless forbidden by congress, or whether it derives its power to tax from the permission given by congress. It is an important consideration in regard to this question that congress has expressly provided for the taxation of the shares of the bank to the shareholders, and has directed the mode in which this shall be done. It has been repeatedly declared by the supreme court of the United States that by this provision congress has not deprived the states of a resource from which it could properly derive a revenue. The shares of stock may be taxed, and it is hornbook law that the stock represents the value of all the assets of the bank. It has been so expressly adjudicated in this state. *People v. Badlam*, 57 Cal. 594; *Waterworks v. Schottler*, 62 Cal. 69; *City of San Francisco v. Fry*, 63 Cal. 470. It is assumed in *Van Allen v. Assessors*, 3 Wall. 573; also in *People v. Weaver*, 100 U. S. 539, where it is asserted that the limitation was intended only "to protect the bank from anything beyond their general share of the public burdens." In many other cases the proposition is taken for granted, and it is, I think, quite obvious. Under our decisions, we cannot deny that when the capital stock is assessed the assets of the corporation are subjected to the tax. In the case of national banks the value of the shares was in part made up of United States bonds, in which a portion of the capital must be invested. The bonds are not subject to state taxation, yet no deduction is required from the assessment for the investment in the bonds. So the real estate may be assessed, as well as the stock, but the value of the shares is made up in part by the real estate. The trouble is that we do not tax to the individual shareholders the stock; but, on the other hand, we assess to the corporation all its assets, which, we have held, gives the value to the stock. Under our methods of classification, made for the purpose of equalizing the burdens of taxation, it has been held that we cannot assess the shares of stock in a national bank as other money capital is assessed. But, conceding that congress could direct the extent and mode of taxing the property of the bank, if the mode provided would, if pursued, subject the property of the bank to taxation to the same ex-

tent that other like property is taxed, the conclusion is irresistible that it was intended that the tax expressly permitted should be the only tax to which the property is to be subjected. But it seems to me that the precise question was determined in *Rosenblatt v. Johnston*, 104 U. S. 462. A state attempted to tax the personal assets of an insolvent national bank. It was quite naturally thought that it had then ceased to be a governmental instrumentality. In a short opinion by the chief justice it was held that, as the assets still belonged to the corporation, they were exempt, under section 5234 of the Revised Statutes of the United States. In *Covington City Nat. Bank v. City of Covington*, 21 Fed. 489, Mr. Justice Matthews refers to the case. After asserting the power of congress in the premises, he says: "It has in fact withdrawn them and their property from the domain of state taxation, except so far as it has expressly consented that they may be taxed. That consent, so far as it has been given, is contained in section 5219 of the Revised Statutes. It does not permit taxation of any property belonging to the bank, except only its real estate, as clearly appears from *Rosenblatt v. Johnston*, 104 U. S. 462." General and special deposits are assessable to the depositors. *Yuba Co. v. Adams*, 7 Cal. 35. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

122 Cal. 681

O'CONNOR v. SOUTHERN PAC. R. CO.  
(L. A. 278.)

(Supreme Court of California. Dec. 17, 1898.)

APPEAL—PRESUMPTIONS—RAILROADS—RIGHT OF WAY IN STREETS—DAMAGES—INJUNCTION.

1. A finding that appellee's property was damaged by construction of a railroad in the street will be sustained, in the absence of the evidence, where, under any state of facts, the acts of appellant, as shown by the statement of facts, would result in damage.

2. A statement of facts showing the construction of a steam railroad so that an abutting owner has the use of only 31 feet of street between his property and the track, in the absence of which he would have the use of 72 feet, sustains a finding that such owner was damaged.

3. Injunction will lie to restrain the construction of a track of a steam railroad in a street to the damage of an abutter to whom no compensation has been offered.

In bank. Appeal from superior court, Los Angeles county.

Injunction by William O'Connor against the Southern Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Bicknell & Trask, for appellant. Towner & Fleming and A. W. Hutton, for respondent.

GAROUTTE, J. This is an action instituted by O'Connor in the superior court of Los



Angeles county to restrain the defendant from constructing its railroad on White avenue, a public street of the city of Pomona. The plaintiff, O'Connor, is the owner of real property abutting on White avenue, and is the owner of the fee to the center line of the street. It is alleged that the threatened use and occupation of the street by the defendant for the purpose of a steam railroad will irreparably damage plaintiff, and it is further alleged that defendant has not tendered or made any compensation therefor. The defendant, by answer, denies the allegations of the complaint as to the damage, and as an affirmative defense alleges that it has entered upon the street under a franchise granted by the municipality of Pomona, etc. This case is here upon appeal from the judgment without the evidence, and the only question presented is, does the judgment find support in the findings of fact? The material findings of fact to be considered are: (1) "That heretofore, to wit, on or about the 11th day of November, 1895, the trustees of the said city of Pomona regularly passed and adopted the Ordinance No. 153, a copy of which ordinance is annexed to the defendant's answer herein. That the said ordinance has been duly and regularly assigned by J. A. Muir to the defendant. That, claiming to act under and in pursuance of said ordinance, and under the terms thereof, the defendant entered upon said White avenue as aforesaid for the purpose of constructing its railroad, and was proceeding to lay a single-track railroad along the center line of said avenue at the time of the filing of the complaint in this action. That said White avenue is one hundred feet wide. That the center line of said track, as being constructed, is upon the center line of said avenue. That the construction of said railroad was being carried on in the usual and ordinary manner. That the ties and tracks, when laid and completed, would occupy four feet on each side of said center line, but in the laying of said track the said defendant was excavating, and would have continued to excavate, a trench in and along a large portion of the said street in front of plaintiff's property to a depth of from eighteen inches to two feet, and of a width of about ten feet. Fourteen feet on each side of said White avenue was and is devoted to and used for the purpose of a sidewalk, leaving about thirty-one feet on each side of the center line of said railroad track for the use of the public as a roadway; the rails of said railroad when constructed would be flush with the established grade of said street." (2) "The occupation and use of said street as threatened by the defendant in the manner mentioned will irreparably injure and damage plaintiff, and will greatly endanger and obstruct the use of plaintiff's premises, and greatly lessen its value for a residence, or for any purpose, and, if not restrained, the defendant will so occupy and use the said street as hereinbefore found, and will, to the extent as heretofore found, prevent the neces-

sary use of a portion of said street in front of plaintiff's premises."

As matter of law, this court cannot say that the facts set out in finding 1, under the conditions there pictured, may not have caused damage to defendant's property, as declared by finding 2. The court has declared that damage did result from the acts done under the conditions described in finding 1, and without the evidence before us it is impossible for this court to gainsay that declaration. The test would seem to be that if, under any conceivable state of facts, these acts might result in damage to plaintiff's property, then, in the absence of the evidence, such a state of facts must be assumed to have been shown at the trial of the case. By finding 1 plaintiff has the use of 31 feet of the street between the railroad track and his lot. Less the sidewalk, and in the absence of the railroad track, he would have the use of 72 feet. As matter of law, the court cannot say that 31 feet of this street will answer all the legitimate uses to which it might be put by plaintiff, an abutting owner, any more than it can say that 10 feet would be amply sufficient for all his legitimate uses. In the face of the findings of fact quoted, it becomes unnecessary to review the soundness of the doctrine laid down in the case of *Montgomery v. Railway Co.*, 104 Cal. 189, 37 Pac. 786. Again, we are clear that the facts here disclosed clearly give plaintiff the right of invoking the remedy of injunction. For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, J.; McFARLAND, J.; HENSHAW, J.

122 Cal. 689

MYERS et al. v. SIERRA VAL. STOCK & AGRICULTURAL ASS'N et al.

(Sac. 400.)

(Supreme Court of California. Dec. 17, 1898.)

CORPORATIONS—NOTES—PAYMENT BY SURETIES—ACTION AGAINST STOCKHOLDERS—CONTRIBUTION—SUBROGATION—EQUITY—PLEADING—HARMLESS ERROR.

1. Where several stockholders paid a company note, on which they were liable as sureties, each contributing the same amount, any liability of one of them to the others for a greater proportion, by reason of his owning more stock, is one arising entirely out of his relation as stockholder, and not as co-surety, and, therefore, must be determined in accordance with Civ. Code, § 322, which provides a legal remedy against stockholders.

2. Where the holder of a corporate note holds no security, and the action thereon against the stockholders is not barred, it is not necessary for stockholders who pay the note as sureties to bring an action in equity to enforce contribution from the other stockholders; but their remedy must be by an action at law, under Civ. Code, § 322, which gives a joint and several action against stockholders for their proportionate share of the corporate debt.

3. Where Civ. Code, § 322, gives a joint and several action at law against stockholders for their proportionate share of the corporate debt, but provides that the judgment must be sever-

al, a suit to enforce contribution by stockholders on a company's note cannot be maintained in equity under the guise of avoiding a multiplicity of suits.

4. Where subrogation in equity is sought, the burden is on the person claiming it to show that it is necessary for his protection.

5. Where sureties on a company's note are obliged to pay it, they have an action at law directly against the stockholders, and, therefore, cannot maintain a suit in equity to enforce subrogation to the rights of the payee of the note.

6. Where Code Civ. Proc. § 462, gives plaintiff in an action on a note the right to controvert by evidence any new matter set up in the answer, except as to the genuineness and due execution of the note, it is harmless error to allow plaintiff to file an affidavit denying the genuineness and due execution of a corporate note set up in the answer, after the time allowed by statute, where the note on its face does not purport to have been made by the corporation, as an admission of its due execution would not be an admission that it was the company's note.

Commissioners' decision. Department 2. Appeal from superior court, Sierra county.

Action by J. D. Myers and others against the Sierra Valley Stock & Agricultural Association and others. From a judgment for plaintiffs, defendants M. Pritchard and the Sierra Valley Literary Society appeal. Reversed as to appellants, and affirmed as to other defendants.

Frank R. Wehe, for appellants. F. D. Soward, for respondents.

CHIPMAN, C. The complaint sets forth the following facts: Defendant corporation made its note to Charles and Margaret Perry for \$1,500 December 24, 1892, payable two years after date. It was signed by plaintiffs and by defendants Pritchard, Dolley, Darling, and Newman, as sureties. The payees assigned the note to Mrs. King. She demanded payment at its maturity, and, the corporation being unable to pay, plaintiffs and Pritchard and Dolley, sureties, under a legitimate and fair effort to protect their interest in the corporation property, on May 27, 1895, paid the amount then due (\$1,790), each paying \$223.75 thereof; the other two sureties, Newman and Darling being unable to pay anything. The corporation had issued but 353½ of its 500 shares of capital stock, and all the parties plaintiff and defendant held shares, except defendant Darling, who held none. Appellant Pritchard held 75 shares, and appellant the Literary Society 12½ shares. No other person held more than 24 shares. The complaint alleges other unpaid indebtedness of the corporation, the amount of which, and the holders thereof, being unknown to plaintiffs; and plaintiffs allege that "they seek in equity to be subrogated to the rights and remedies of said Mrs. King, \* \* \* and thus ask to enforce contribution against M. Pritchard, who owned seventy-five shares of the subscribed capital stock of said corporation, while plaintiffs owned but a small number (as aforesaid) of the shares thereof when said indebtedness of the said fifteen hundred

dollar loan was so incurred by said corporation, \* \* \* and pray that he pay to them his proportionate share of such indebtedness. These plaintiffs, also, for the same reasons, and after their subrogation to the rights and remedies of said Mrs. King, demand contribution in equity, that each of the defendants who owned stock in said corporation when said fifteen hundred dollar indebtedness was incurred pay them his proportionate share thereof." An accounting of the affairs of the corporation and a receiver are asked, and that the property of the corporation be sold, and the affairs of the corporation wound up, and that plaintiff be subrogated to the rights of Mrs. King, and "that they thus be enabled to enforce, by way of contribution, recovery from M. Pritchard, and the other owners of stock of said corporation, their proportionate share of said fifteen hundred dollar note and indebtedness of said corporation so paid by the sureties thereon as aforesaid." Defendants demurred on several grounds: "(1) For insufficiency of facts; \* \* \* (4) want of jurisdiction, in that it does not appear that the demand of plaintiffs, or any of them, against each stockholder, amounts to three hundred dollars or over." The demurrer was overruled, and defendants answered. The answer sets up, among other things, certain unpaid indebtedness of the corporation to defendants Pritchard and Dolley (in addition to the said note of fifteen hundred dollars) for work and labor and for money advanced to the corporation, which they allege should be paid, but does not deny any of the material allegations of the complaint. The facts found are substantially as alleged in the complaint, and the court finds certain sums to be due defendants Pritchard and Dolley on account of matters alleged in the answer. The decree adjudges that plaintiffs recover from the corporation \$1,483.44; that defendant Dolley recover from the corporation \$623.24, and that Pritchard recover from the corporation \$330.89; that plaintiffs and Pritchard and Dolley be subrogated to the rights and remedies of Mrs. King, to enable them to enforce by contribution from the stockholders of the corporation their proportionate share of its indebtedness. And, to effect such recovery, a joint judgment was given plaintiffs against the defendants, "severally, the respective amounts and the proportionate share of plaintiffs' costs set opposite their respective names, with legal interest thereon as follows: From M. Pritchard, the sum of \$121.98, with eleven per cent., plaintiff's costs amounting to \$3.87; from Sierra Valley Literary Association, the sum of \$56.62, with \* \* \* costs amounting to \$1.23." (Here follows a statement that judgment was entered against each of the other defendants in favor of plaintiffs.) Judgment was also given for Dolley against Pritchard for \$64.89, and 3 cents costs, and against the Literary Society for \$29.60, and 46 cents costs, and also a judgment in favor of Dolley against each of the other defendants for the



proportionate share of the indebtedness. Pritchard and the literary society each appeals from the several judgments against them, and from the order denying motion for new trial. No receiver was appointed, and no sale of the corporation property ordered. The court, however, seems to have inquired into the entire indebtedness of the corporation, and it found the amount due on the Perry-King note to be \$1,977.94, of which \$247.24 was due to each of the eight sureties who paid Mrs. King; also, \$330.89 due Pritchard on his separate claims; and \$628.64 due Dolley on his claims, or \$2,442.99 in all; and that the liability per share was \$6.92. The court found, also, that the stockholders whose payments have not satisfied the same "are, as to his co-stockholders, yet holden for the amount of said indebtedness, in the proportion that the amount of stock held by him as hereinbefore set out bears to the 353½ shares so issued"; and judgments against the stockholders seem to have followed accordingly.

1. The point upon which appellants chiefly rely is that the court had no jurisdiction, because the demand against each defendant, exclusive of interest, was less than \$300. There was a right of action at law in Mrs. King, under section 322, Civ. Code, either joint or several, against all the stockholders for their proportionate share of the indebtedness, as prescribed by that section. But, whether she had brought the action against all, or each separately, the superior court had no jurisdiction as to those defendants against whom judgment was sought for a less sum than \$300. *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 820. She also had a right of action against the sureties, or any one of them, as they were jointly and severally liable. When the sureties paid the note, each paying \$223.75, each of them then had an action against the stockholders jointly or severally, under section 322, supra, and this right of action was good against the co-sureties as stockholders, the same as against any other stockholders. But it was not an action arising out of the relation of surety. It was statutory, purely. Section 322, supra. In this action appellant Pritchard was liable for such proportion of the whole amount (\$1,790) as his 75 shares bore to 353½ shares, or \$5.06+ per share, making \$379.50 due from Pritchard as a stockholder. But the complaint shows that Pritchard paid \$223.75 on account of this indebtedness, and plaintiffs claim from him only his proportionate share after this credit is allowed, which left him debtor only for \$155.75 of the alleged corporate indebtedness, under the allegations of the complaint. The literary society held 12½ shares, and its liability was only \$63.25. Many of the defendants had but one share, and their liability was but \$5.06 each. We need concern ourselves, however, only as to the appellants last above named. As to the rights of the co-sureties between themselves as such, we do not see that any question arises as to appel-

lant Pritchard, for it is alleged that he paid equally with plaintiffs, and, if he was liable for a greater amount than either of plaintiffs, because he held more stock than they did, it was because he was a stockholder, and not because he was a surety; and, as a stockholder, the remedy against him was by an action under the statute, in which full relief was attainable. The literary society was liable only as a stockholder. The question as to whether all the plaintiffs could unite to bring the action is not raised, and need not be decided.

The theory of the complaint seems to be that it became necessary to bring the action on the equity side of the court in order to subrogate the plaintiffs to the rights and remedies of Mrs. King, and to secure contribution from the stockholders; and, having thus been compelled to go into the equity court, it then had jurisdiction to enter judgment against each stockholder, although the amount was less than \$300. Mrs. King held no securities for the debt. The action against the stockholders was not barred by statute when this action was brought. There was no right or remedy in Mrs. King which required the interposition of an equity court in order to invest plaintiffs therewith, or entitle them to be subrogated. It was not necessary to go into equity for contribution from the stockholders, because the statute gave a clear and adequate legal remedy against them. The stockholders were liable as principals for the debt evidenced by the note. The sureties who paid it could look to them as principals. Civ. Code, § 322; *Derby v. Stevens*, supra; *Hyman v. Coleman*, 82 Cal. 650, 23 Pac. 62. And as principals they were liable to the sureties, under sections 2847, 2848, Civ. Code. Even among the sureties themselves the action for contribution is an action cognizable at law. *Taylor v. Reynolds*, 53 Cal. 686. We are unable to perceive any sufficient grounds for seeking equitable relief, and the decree shows that the whole purpose of the action was to obtain several judgments against the stockholders for their proportionate share of the indebtedness, under section 322, supra, which, in our opinion, could have been accomplished by a simple action at law against each. We do not think, under the guise of avoiding a multiplicity of suits, or to obviate an action by each plaintiff, that the present action should be sustained. In giving a joint and several action against the stockholders, multiplicity of suits is avoided by the statute. Civ. Code, § 322. Where subrogation in equity is sought, the burden is on the person claiming it to show that it is necessary for his protection. *Sheld. Subr.* §§ 11, 19. Here there was no such necessity, because the stockholders became principals; and plaintiffs, upon payment of the note, had their action in assumpsit, as sureties, directly against the stockholders, as principals. *Brandt, Sur.* § 205; *Taylor v. Reynolds*, supra. Respondents content that, although they had a remedy at

law, still there was concurrent jurisdiction in equity,—and Mr. Pomeroy's Equity Jurisprudence (section 139) is cited. But the author there says: "The fact that the legal remedy is not full, adequate, and complete is, therefore, the real foundation of this concurrent branch of the equity jurisdiction." Where the remedy is a mere recovery of money, the case does not come under the concurrent jurisdiction, but comes within the sole cognizance of the law, unless the right of action is dependent upon, or is in some way connected with, some equitable feature or incident, such as fraud, mistake, accident, trust, accounting, or contribution, and the like. *Id.* § 178. It was said in *De Witt v. Hays*, 2 Cal. 463, that, "to entitle the plaintiff to the equitable interposition of the court, he must show a proper case for the interference of a court of equity, and one in which he has no adequate or complete relief at law." And Mr. Pomeroy says at section 354: "If, therefore, the facts stated in the pleadings show that the primary rights, the cause of action, and the remedy to be obtained are legal, then the action is one at law, and falls within the jurisdiction at law." The action here was avowedly to obtain contribution from the stockholders, but this contribution, as we have seen, was a statutory right, which was enforceable by a simple action in assumpsit, in which full and adequate relief was obtainable. The complaint must be treated as stating an action at law, and the court, therefore, was without jurisdiction, the amount claimed against appellants being for less than \$300 in each instance. The judgments obtained by Dolley against appellants, for like reasons, were erroneous.

2. In support of defendants' motion for a new trial, error is assigned in allowing plaintiffs to file an affidavit at the trial denying the genuineness and due execution of the promissory note of the corporation set forth in defendant Pritchard's answer; the objection being that section 448, Code Civ. Proc., requires the affidavit to be made "within ten days after receiving a copy of the answer," and that the court had no power to allow this to be done at the trial. Conceding, but not deciding, that the affidavit came too late, and that the court could not allow it to be filed, plaintiffs had the right, under section 462, *Id.*, to controvert by evidence this new matter set up in the answer, except as to the genuineness and due execution of the note. With this exception, they could show any matters in confession or avoidance. In *re Garcelon's Estate*, 104 Cal. 570, 38 Pac. 414. The Pritchard note does not on its face purport to have been made by the corporation. Admitting its genuineness and due execution was not, therefore, an admission that it was the corporation note. We think the evidence tending to show that it had not been authorized by the directors, and that it was without consideration, was competent, as was other evidence tending to show the nonexistence of any indebtedness of the corporation to

Pritchard on account of the note. This being so, if it was error to allow the affidavit it was without injury, for there was no evidence offered by plaintiffs controverting the genuineness or due execution of the note in the form it appears. The evidence was conflicting, but there was evidence tending to support the findings, and they cannot now be questioned. No reason is presented for disturbing any of the judgments not appealed from, and we see no error entitling appellants to a new trial. Our conclusion is that the judgments against Pritchard and the Sierra Literary Society, from which they appeal, should be reversed, and otherwise the judgments and the order should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgments against Pritchard and the Sierra Literary Society, from which they appeal, are reversed, and otherwise the judgments and the order are affirmed.

(123 Cal. 47)

PEOPLE v. HILL. (Cr. 417.)

(Supreme Court of California. Dec. 19, 1898.)

HOMICIDE—EVIDENCE—INTENT—INTOXICATION.

On a trial for murder there was evidence that, shortly before the homicide, accused drank some liquor, and the inference was justified that he had drunk a great deal. Several witnesses testified that he was drunk within an hour of the homicide, and it was shown that between that time and the homicide he drank at least twice. *Held* to be sufficient proof of intoxication to require giving a requested charge thereon, under Pen. Code, § 22, providing that, where intent is a necessary element of the crime charged, the jury may consider the fact that accused was intoxicated.

Department 2. Appeal from superior court, Fresno county.

Leon Hill was convicted of murder, and from the judgment and an order denying a new trial he appeals. Reversed.

Frank H. Short, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The defendant was convicted of murder in the first degree, and was sentenced to a life imprisonment in the state prison. He appeals from the judgment, and from an order denying a new trial. The appellant is a youth, and at the time of the homicide upon which the charge of murder was based he was only 18 years and some months old. The homicide occurred on a road about a mile and a half from a resort known as the "Fresno Hot Springs," at which place there was an hotel, saloon, croquet ground, etc. About 9 o'clock in the evening of June 27, 1897, the appellant left said springs in a buggy with a young companion, named Tony Loveall, to go to his home, which was about five or six miles distant. At the same time the deceased, Lloyd Duke, also left the springs



in a buggy, in which were also two other persons, named Smoot and Taylor. All these persons had been together in the saloon at the springs, where something had been said about a bet on a wrestle between the defendant and the deceased, in which the deceased said that he would either wrestle or fight the defendant. Some months before that time the deceased had whipped the appellant at another place. After the parties had started, the buggies were brought close together several times, and each had passed the other, and there was considerable rough and angry talk between the parties. Smoot was left at his house, which was a short distance from the springs. At that time the buggy in which the appellant rode was ahead, and, some of the harness being disarranged or broken, the appellant had stopped his buggy, and had gone to the side of one of his horses to repair the harness. At this point, which was about one and a half miles from the springs, the deceased and Taylor overtook the appellant; and there is testimony that the deceased, in an angry manner, asked the appellant and his companion what they were doing, and said, "Stop, you sons of bitches, I will fix you." The deceased then jumped out of his buggy on the ground, when the appellant, who had returned to his buggy, also jumped to the ground, taking with him a gun which had been in the buggy, and hollered to the deceased, "Stop." The parties were then very close together, but it was dark and dusty, so that the movements of the deceased and the appellant could not be very distinctly seen. Immediately afterwards the appellant fired a shot, which caused the death of the deceased. The appellant testified that he thought the deceased, who was an older and larger man, was about to attack him, and that he shot in self-defense. The parties were all boisterous and noisy, and seemed to act with a good deal of recklessness. There was testimony to the effect that the defendant sought to prevent the deceased from passing him in his buggy, and there are many other circumstances not necessary to be detailed under the views we take of the case.

The defendant asked the court, in writing, to give the following instruction: "If you should believe from the evidence that at the time of the killing the defendant in this case was intoxicated, or under the influence of intoxicating liquors, you may and should take into consideration such fact, in determining the degree of the crime of which the defendant is guilty, if you believe him guilty of any crime." The court refused to give this instruction, and did not give any instruction at all on the subject of intoxication; and the refusal to give this instruction, or any other of a similar character, is one of the main errors relied on for a reversal. There is no doubt that this instruction was correct, and that appellant was entitled to have it given, unless some special reason appears, warranting its refusal. Section 22 of the Penal Code provides that

"whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act"; and it has been repeatedly held that, in a trial for murder, the jury, in determining whether there was that "willful, deliberate, and premeditated killing" which constitutes murder in the first degree, may consider the fact that the accused at the time of the homicide was intoxicated. A few of the cases to this point are the following: *People v. Belencia*, 21 Cal. 544; *People v. King*, 27 Cal. 507; *People v. Ferris*, 55 Cal. 588; *People v. Jones*, 63 Cal. 168; *People v. Bruggs*, 93 Cal. 476, 29 Pac. 26; *People v. Vincent*, 95 Cal. 425, 30 Pac. 581; *People v. Lane*, 100 Cal. 379, 34 Pac. 856.

The attorney general admits that the instruction is, upon its face, correct, and that it should be given in cases where the facts warrant it; but he claims that in the case at bar there was no sufficient evidence of the intoxication of the appellant at the time of the homicide to make the instruction applicable. But this contention cannot be maintained. There certainly was evidence strongly tending to show that appellant was intoxicated, and sufficient to put the question of his intoxication within the province of the jury. The defendant and Loveall had gone to the said hot springs for the first time, on the day of the homicide, about 2 o'clock in the afternoon, and had remained there until about 4 o'clock. During that time they were in the saloon a part of the time, although it does not appear affirmatively that the defendant drank at the bar; but when they left they purchased a bottle of whisky, and took it with them into the buggy in which they were riding. They then drove to appellant's home, and to other places, and returned to the springs somewhere between 7 and 8 o'clock in the evening. Shortly before the homicide occurred, and while they were in the buggy, appellant drank the last whisky that was left in the bottle. These facts are not, perhaps, very conclusive evidence that the appellant and Loveall actually drank the whole contents of the bottle; but it was expressly testified to by witnesses that, a short time after they returned to the springs, appellant was intoxicated. Soon after they had returned to the springs the appellant and Loveall were walking along the road from the croquet ground to the hotel, and two boys named Crump were walking in front of them. A short distance ahead of them on the road were three ladies,—Mrs. Motley, Mrs. Gregory, and Mrs. Forsyth; and, as the appellant and his companion approached closely to the ladies, the latter stepped off the road a few feet, into the shadow of a cabin that stood there.

to let them pass. Mrs. Motley testified as follows: "We thought the gentlemen were intoxicated,—their manner was boisterous and loud; and we stepped in behind the cabin, to let them pass." And again: "We thought they were intoxicated, and we stepped behind a cabin." And again: "The parties who seemed to be intoxicated were behind, in the rear of the others. They were close enough before we stepped out that we could notice that they were intoxicated." And again: "As they were coming, Mr. Hill was staggering; but I did not notice Tony,—whether he was staggering or not." Mrs. Forsyth, having testified that the ladies stepped out to the cabin, said: "The occasion of our stepping beside that cottage was, we wanted to let them pass ahead of us. I thought they were all drunk." This occurred, according to the testimony of Mrs. Motley, about 8 o'clock, or between 8 and 9. She was not certain how long it was before the appellant and the deceased drove away from the springs in buggies, but she places it from a few minutes to a half hour, although in one part of the testimony she says that it might have been "nearly an hour." After this the appellant and his companions went immediately to the saloon, and there drank more. It does not appear how many drinks they took then at the saloon, although it clearly appears that the defendant took one drink, and there is some evidence that he took two. The parties then all started on the road in their buggies, and, before the homicide, appellant took the last drink out of the bottle, as before stated. Therefore it certainly cannot be truly said either that there was no evidence, or that there was only slight evidence, of appellant's intoxication at the time of the homicide. There was evidence that shortly before the homicide he actually drank some liquor; there was evidence from which it could be properly inferred that he had drank a great deal of liquor; and there was express testimony of witnesses that within an hour of the homicide he was drunk, which testimony was competent to prove the fact (*People v. Monteith*, 73 Cal. 7, 14 Pac. 373; *Town Co. v. Neale*, 78 Cal. 77, 20 Pac. 372); and it was shown that between that time and the time of the homicide he drank at least twice, and perhaps oftener. The facts here are very different from those in *People v. Kloss*, 115 Cal. 567, 47 Pac. 459. In that case the homicide was committed on April 18th, and the only evidence as to the intoxication of the defendant in that case at the time of the homicide was that he was addicted to heavy drinking, and that "he had been drinking on April 17th"; and in the opinion of the court it is stated that the evidence "does not show how much or how often he had been drinking on the 17th, or at what hour, or that he had at any time reached the stage of intoxication." Of course, if a person kills another under such circumstances that the

killing is neither manslaughter nor excusable or justifiable homicide, he is guilty of murder, although he may have been intoxicated at the time of the homicide; but murder is not necessarily murder in the first degree. In order to be of the first degree, the killing must have been "willful, deliberate, and premeditated." In determining whether or not the killing was so willful, deliberate, and premeditated as to constitute murder in the first degree, it is proper for the jury to consider how much his mental condition at the time was affected by intoxication; and, there being an express statutory declaration upon the subject of intoxication, a defendant in a murder case is entitled to have an instruction embracing such statutory declaration given by the court to the jury, where there is evidence which makes it applicable; and for the refusal of the court to give the instruction under discussion the judgment must be reversed, and a new trial ordered.

There is not much else necessary to be said for the instruction of the court upon another trial. The appellant asked the court to give a great many instructions which were refused. Many of them were correct, but an examination of the record shows, we think, that they were all substantially embraced in other instructions which were given; and, therefore, we do not see, at present, any prejudicial error committed by refusing said instructions. The court did not err in overruling appellant's objections to testimony given by the witnesses Seacord, Motley, and Forsyth with respect to certain declarations made by the appellant. It is not necessary to discuss the point made by appellant as to the alleged misconduct of the assistant counsel for the prosecution in his closing argument. Such point will probably not arise upon another trial. And, as a new trial is to be ordered, it is, of course, not necessary to examine that ground of the motion which consists of newly-discovered evidence. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: HENSHAW, J.; TEMPLE, J.

6 Cal. Unrep. 210  
 SCANLAN v. SAN FRANCISCO & S. J. V.  
 RY. CO. (Sac. 393.)  
 (Supreme Court of California. Dec. 23, 1898.)

JUDICIAL NOTICE — MATHEMATICS — CONTRACTS —  
 CONSTRUCTION — ENGINEER'S ESTI-  
 MATE — ACCEPTANCE.

1. Under Code Civ. Proc. § 1875, subd. 8, authorizing courts to take judicial notice of the laws of nature, the court judicially knows the rules of mensuration by which the cubic contents of an irregular prismoidal body are ascertained.

2. Where a contract for constructing a railroad embankment provided that additional dirt, not exceeding a certain quantity, should be added for shrinkage, the exact percentage to be



specified by the company's engineer, and that payment for such embankment should be made by measurement of the material in the embankment, excluding that added for shrinkage, the amount designated by the engineer to be added for such shrinkage up to the limit specified is conclusive, even though the shrinkage be less.

3. Where the construction of a railroad embankment was to be paid for by an actual measurement of the cubic contents of the embankment, and the contractor completed it without making a survey, or objecting to the one made by the company's engineer, his neglect to make such survey before the surface of the ground, which was one of the necessary data for the measurement, was covered, was an admission that the company's survey was correct.

Department 1. Appeal from superior court, San Joaquin county.

Action by A. V. Scanlan against the San Francisco & San Joaquin Valley Railway Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

E. F. Preston, for appellant. Gould & Bogue and Woods & Levinsky, for respondent.

VAN FLEET, J. This is an action, brought by a contractor for the construction of a railway embankment to recover the contract price for the alleged cubic contents of the embankment. The defendant had paid to the plaintiff what it claimed to be the whole amount earned, except about \$20, which it brought into court. The plaintiff had judgment for the balance claimed by him, and the defendant appeals.

The contract, among other things, contained the following provisions: "On embankments a percentage for shrinkage must be added to the fill, and said percentage will be as specified and marked out by the engineer [of the company], but will in no case exceed ten per cent. of height of bank." "Material will be measured in embankment, but no measurement will be made of the material added for shrinkage, nor payment made for same." Under this contract it was incumbent upon the plaintiff to prove the cubic contents of the material placed by him in the embankment, measured in the embankment, excluding the material added for shrinkage. The plaintiff produced as a witness an engineer, who testified that he had measured the embankment after its completion, and had found it to contain a certain number of cubic yards, which he stated; but he did not give the data upon which his computations (for he testified to two) were based. In his measurements and computations he made no allowance for any material added for shrinkage; nor did plaintiff in any way prove how much had been so added, though it was admitted that such additions had been made. The witness testified that his computations were made by measuring a certain number of cross sections, finding the average area of these cross sections, and multiplying this average area by the length of the embankment. One of the computations submitted by him was based entirely

upon his own measurements, and the other, which was much less, upon the measurements of the defendant's engineer, except as to the heights, as to which the witness used his own measurements. The court, in its findings, adopted neither of these computations, but fixed the amount at an intermediate figure, for which we are unable to find any basis in the evidence. We think that there was no evidence before the court by which the contents of the embankment could be ascertained. The finding depends entirely upon the accuracy of the computations made by plaintiff's engineer, since the measurements themselves were not before the court, and it is evident that these computations were inaccurate.

1. The court takes judicial notice of the laws of nature (Code Civ. Proc. § 1875, subd. 8), among which are the principles of mathematics. The science of mensuration, which must control in this case, is a branch of pure mathematics, with which the court is presumed to be acquainted. By the rules of mensuration, the contents of an irregular prismoidal body, such as a railway embankment, is ascertained by dividing it by vertical planes at every change of contour of the underlying ground into a series of prismoids, and computing the contents of each of these prismoids by adding together its two end areas and four times its middle area, dividing this sum by six, and multiplying the quotient by the length of the prismoid. The product will be the actual contents of the prismoid. See ENC. Brit. (9th Ed.) art. "Mensuration." This method was not employed by the witness. His method was an approximation, which assumes that the middle area of a prismoid is equal to half the sum of its end areas. This is true only in the case of a prism, or in a prismoid consisting of the frustum of a regular pyramid. This approximation, it is true, will give results correct enough for practical purposes in very uniform embankments, where there is but little difference in height. But in other cases its results are always too large, and it would be easy to suppose cases in which the excess would be greater than the difference between the estimates of the respective parties in this case.

2. The plaintiff's computations made no allowance for the additional earth put on for shrinkage. It is true that there was some testimony tending to show that at the time of the measurement the embankment, to use the words of respondent's brief, "had settled or shrunk nearly, if not quite, all it would." This testimony was entirely too indefinite to take the place of actual measurement, to which defendant was entitled under the contract. Moreover, it did not reach the point; for the amount to be added for shrinkage, under the contract, was to be determined, within certain limits, by the defendant's engineer, and within those limits his judgment was conclusive, even if the shrinkage should turn out to be less than he had allowed for.

3. The plaintiff's engineer, working as he did after the embankment had been constructed, did not know the original condition of the ground; and, in order to supply that essential factor, he made certain assumptions, which may or may not have been justified by the facts, but which the evidence does not show to have been so justified. We do not think, however, that any such assumptions are allowable under this contract. Since the work is to be paid for by actual measurement, and the original surface of the ground is one of the necessary data for such measurement, the builder, if not satisfied with the survey made by the company's engineer, should, before commencing work, have that survey corrected, or make an accurate one for himself. A neglect to do this is equivalent to an admission of the correctness of the company's survey. The plaintiff should, therefore, have proved that survey; but he did not do this, and objected to the proof of it offered by defendant, and it was not in evidence in the case.

We would suggest that upon another trial of the case each side should put in evidence the measurements upon which any computation offered by it is founded, unless such proof is waived by the other side. If the measurements are before the court, errors in computation can be corrected.

Our conclusion upon this point renders it unnecessary to notice the other points made. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; GAROUTTE, J.

123 Cal. 77

HAWLEY v. KOCHER. (Sac. 470.)

(Supreme Court of California. Dec. 19, 1898.)

APPEAL—REVIEW—BILL OF EXCEPTIONS.

1. On appeal on the judgment roll alone, without a bill of exceptions, an order striking out a portion of the complaint cannot be reviewed; it being no part of the judgment roll, under Code Civ. Proc. § 670.

2. Code Civ. Proc. § 647, providing that an order striking a part or the whole of a pleading shall be deemed excepted to, does not make such order reviewable without being brought up by bill of exceptions.

3. On review of an order striking part of a complaint on a recital of the judgment that, at the time of demurring to the complaint, defendant moved to strike certain portions of the complaint, which was granted, the ruling on such motion must be held to be correct, since, conceding that such recital, not being essential to the validity of the judgment, can be considered in reviewing such order, it must affirmatively show that such order was erroneous.

4. In a replevin complaint, a description of the property by giving a list of items, each item containing several different articles, with the aggregate value of the items, and not of the specific articles, and without an allegation as to where the property is situate, is insufficient.

Department 2. Appeal from superior court, Mariposa county.

Action by George T. Hawley, as assignee

of Jacob Kocher, against Catharina Kocher. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Jos. Kirk, J. W. Knox, and J. J. Trabucco, for appellant. F. H. Farrar and G. G. Goucher, for respondent.

McFARLAND, J. This action is brought by the plaintiff, as assignee in insolvency of Jacob Kocher, against the defendant, to recover personal property, or "three thousand five hundred and ninety-seven and  $\frac{19}{100}$  dollars," the value thereof, in case delivery cannot be had, together with \$500 damages for the detention thereof, and for costs of suit. The action is what is usually called, under our system, "claim and delivery of personal property." Judgment was rendered for the defendant, and the plaintiff appeals upon the judgment roll alone, without any bill of exceptions. The transcript commences with an "amended complaint." The respondent filed a demurrer to the amended complaint. The demurrer was general, and also special. The special grounds were that the complaint was uncertain, also that it was ambiguous, and also that it was unintelligible. The real ground of the demurrer was that the complaint did not contain any sufficient description of the property sought to be recovered. The court sustained the demurrer; and, the appellant not having filed another amended complaint within the time allowed, judgment was rendered against him, and from this judgment he appeals.

Appellant contends that the court below erred in striking out a portion of the amended complaint, but that contention cannot be considered on this appeal. It could be reviewed only upon a bill of exceptions. An order striking out part of the pleadings is not part of the judgment roll. Code Civ. Proc. § 670. This has frequently been determined by this court. In Feely v. Shirley, 43 Cal. 369, the court said: "The ruling of the court in striking out a portion of the answer cannot be reviewed upon this appeal, since it forms no part of the judgment roll,"—citing cases. In Morris v. Angle, 42 Cal. 240, the court say: "The notices of motions to strike out and to dismiss, and the orders of the courts upon such motions, \* \* \* do not legitimately constitute a portion of the record in this case on appeal. They are not embodied in any statements or bill of exceptions, and constitute no part of the judgment roll in this case; hence cannot be regarded on this appeal." In Gancart v. Henry, 98 Cal. 281, 33 Pac. 92, the appellant sought to have reviewed an order of the court below refusing to strike out an amended answer, and the court said: "No bill of exceptions was prepared embodying the action of the court in the premises, without which the notice, motion to strike out, and order of the court refusing such motion, did not become a part of the judgment roll,



under section 670 of the Code of Civil Procedure." It is true that there was the further objection in that case that there was no exception to the refusal of the court to strike out, and an order refusing to strike out is not one of the orders which are deemed to have been excepted to by section 647, Code Civ. Proc.; but it was held that, in any event, the point could be raised only upon a bill of exceptions. In *Barber v. Mulford*, 117 Cal. 356, 49 Pac. 206, the court say: "There is printed in the transcript a notice of motion to strike out part of the complaint, also an order of the court refusing the same, and error is assigned thereon. These proceedings are not part of the judgment roll, and are not embodied in any bill of exceptions. This court cannot, therefore, take any notice of them." In *Canal Co. v. Kidd*, 43 Cal. 180, the court say: "Upon motion of the defendants an order was entered striking out a portion of the complaint. The appeal is taken from the judgment, and from an order sustaining a demurrer to the complaint. That an order striking out a portion of a pleading may be reviewed here upon appeal from the judgment is true; but it is no less true that such an order, being in itself no part of the judgment roll (section 203), cannot be so reviewed, except it be supported by a statement on appeal, and here there is none." See, also, *Wilson v. Wilson*, 64 Cal. 92, 27 Pac. 861; 1 *Freem. Judgm.* par. 79. Counsel for appellant seems to attach some importance to the fact that section 647, Code Civ. Proc., provides that an order "striking out a pleading or a portion thereof" is deemed to have been excepted to; but an order which is not made a part of the judgment roll, no matter how an exception to it may be taken, must be presented by a bill of exceptions. In *Nash v. Harris*, 57 Cal. 242, the court say: "A party who has excepted to a decision of a court, whether he except in person at the time the decision was made, or is deemed in law to have excepted, must in statutory or reasonable time after his exception avail himself of the right to reduce the same to writing, and take the steps required by law to have the bill of exceptions settled and signed by the judge." In the transcript there is printed what is called an "Order Sustaining Demurrer," in which it is said as follows: "Motion to strike out the amended complaint lines from 10 to 28 on page 4, and lines from 1 to 8 on page 5, allowed, and said lines are hereby stricken from the amended complaint." But this matter printed in the transcript is of no consequence, because the ruling of the court upon the motion to strike out is no part of the record, unless made so by bill of exceptions.

Appellant contends that a bill of exceptions was not necessary, because the judgment contains a recital that a motion to strike out parts of the complaint was made and granted. The recital is merely of the bare facts that

at the time of the filing of the demurrer to the amended complaint the defendant "filed and served her motion to strike out certain portions of said amended complaint," and that after hearing argument, etc., "an order was duly given and made granting said defendant's motion to strike out certain portions of plaintiff's complaint." No other facts are stated. The grounds of the motion are not given, nor is there even any designation of the parts of the complaint which were stricken out. Appellant relies in support of this contention upon two cases: *Abbott v. Douglass*, 28 Cal. 296, and *Derby v. Jackman*, 89 Cal. 1, 26 Pac. 610. In the former case the facts were very peculiar, and the decision was made by a bare majority of the court; two of the justices strongly dissenting. There the judgment recited that after witnesses were sworn and examined, and the case was being tried upon its merits, the court struck out the answer; and the majority of the court proceeded upon the theory that it was impossible to imagine any just theory upon which the order could be sustained. The court say: "Now, upon what ground, if any, could the order have properly been made during the progress of the trial? If there be any, lying within the scope of legal conjecture, the order must be considered as having been properly made." In the dissenting opinion of Sawyer, J., concurred in by Sanderson, C. J., it was held that there should have been a bill of exceptions or statement showing the facts upon which the order was made, and it is said: "There is nothing in the record which shows the grounds upon which the order was based, and we cannot tell whether it was properly made or not," and suggestions are made of facts which may have existed which would have warranted the order made. But, assuming that case to have been correctly decided, still the decision went upon the theory that the recitals in the judgment affirmatively showed error, and that it was not "within the scope of legal conjecture" to imagine that the ruling was not erroneous. That cannot certainly be said of the ruling in question in the case at bar. In *Derby v. Jackman* the order sought to be reviewed was an order granting plaintiff's motion for judgment on the pleadings, and it was contended that it could not be reviewed, because there was no bill of exceptions. The court held that the ruling of the court could be reviewed without the bill of exceptions, because the recitals of the judgment set forth everything which a bill of exceptions could have shown. The court say: "As a matter of fact, the judgment includes all that the bill of exceptions could show,—all that is necessary for a review of this action of the court. The motion, and the grounds of it, are specifically recited, and the ruling upon it, and the entry of judgment as a consequence." The facts in that case, therefore, were materially different from those in the case at bar. Here nothing appears except the naked fact that a rul-

ing striking out some portions of the complaint, not named, was made. There is nothing to show that the ruling of the court was erroneous, and in the absence of such showing it must be presumed to have been correct. It appears, also, from the recitals in the judgment, that a demurrer to the original complaint was sustained, and leave given to amend; but it does not appear upon what ground the demurrer to the original complaint was sustained, or upon what conditions leave to amend was granted. In *Dimick v. Campbell*, 31 Cal. 239, the court say: "Looking to the judgment roll alone, it cannot be determined upon what ground the district court struck out the defendant's answer. We cannot presume error, and the record does not show that the court erred in striking out the answer. The judgment, therefore, cannot be reversed on this ground." Assuming, therefore, for the purposes of this case, that recitals in a judgment not necessary to the validity of the judgment itself can be considered as statements of matters necessary to the review of intermediate orders, which, as a general rule, should be in a bill of exceptions, still such recitals must certainly show affirmatively that the order sought to be reviewed was erroneous; and, such not being the case here, the ruling of the court striking out portions of the complaint must be held to have been correct.

2. The demurrer to the complaint was properly sustained upon the ground that there was not a sufficient description of the property sought to be recovered. In any kind of a suit involving personal property, it should be described with a reasonable degree of certainty; and this rule is especially applicable to an action of claim and delivery because the property is to be specifically returned to the plaintiff on the execution, if return can be made, and the defendant in such action has the right to make such return in the event of a judgment against him. The complaint avers that on or about the 29th day of August, 1896, the insolvent transferred "a large portion" of his property to the defendant; that he was then the owner and in the possession of the following described personal property, to wit, "a stock of merchandise, consisting principally of hardware, situated and being in the store premises of said Jacob Kocher, at said Merced, Merced county, Cal."; "and that he then and there transferred and conveyed to the defendant" the greater part or portion of the aforesaid merchandise, to wit, "the following articles, of the following value." Then follows a list of articles, nearly each item of which contains items of property of different kinds, with an aggregate value attached,—as, for instance: "Paints, oils, brushes, and glass, \$625.38;" "Pumps, pipe, and plow implements, \$322.55;" "Tools, shelf ware, bucksaws, etc., \$105.21;" "Milk pans, saws, and belting, \$122.80;" "Belting, steel bits, etc., \$108.95." One of the items is "Sundries," and the balance of the list is of a similar char-

acter. There is no quality, quantity, value, or price given to any particular kind of property named. The action was commenced, apparently, long after the time of the alleged transfer from the insolvent to the defendant, and there is no averment as to where the property was at the time of the commencement of the suit; so that it cannot even be claimed that a lump description of personal property situated in a certain building, or at a certain place, if such a description could be held to be good, applies here. The description here is certainly not as good as that held bad in the following cases: *Welch v. Smith*, 45 Cal. 230; *Kelly v. Murphy*, 70 Cal. 560, 12 Pac. 467; *Cooke v. Aguirre*, 86 Cal. 479, 25 Pac. 5. See, also, *Pierce v. Langdon* (Idaho) 28 Pac. 401; *Smith v. McCoolle* (Kan. App.) 46 Pac. 988; *Stevens v. Osman*, 1 Mich. 92; *Lockhart v. Little* (S. C.) 9 S. E. 511. The judgment appealed from is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(123 Cal. 65)

#### PEOPLE v. JONES. (Cr. 388.)

(Supreme Court of California. Dec. 19, 1898.)

CORPUS DELICTI—EVIDENCE—CONFESSIONS—DISCRETION—ARSON—HARMLESS ERROR—CHARGE.

1. Where the court notified the prosecuting attorney, about to prove confessions of accused, that, if he did not afterwards prove the corpus delicti, the confessions would be stricken, it was not an abuse of discretion to admit proof of confessions before that of the corpus.

2. On a trial for arson, to prove the corpus delicti, and to corroborate confessions of accused that on a certain night he and another drove a buggy to the front fence, and his companion got out and burned the house, barn, granary, and chicken house, there was evidence that the fire occurred about that night, and that the buildings were 60 to 150 feet apart. There was no definite description of the buildings, and no estimate of their value; nor could their relative locations be gathered from the evidence. One witness testified that he saw where a buggy had been hitched near the roadside, and saw the tracks of two men leading from there to the house, and back. Held to be sufficient to justify admission of confessions.

3. Under an information charging accused with burning a dwelling house, evidence that other buildings were also burned was admissible in proof of the corpus delicti, and also to corroborate accused's confession that the other buildings were burned.

4. Evidence is not insufficient to sustain a verdict of arson because it tends to show that the burning was done at the instance of the owner, and therefore was lawful, in the absence of an intent to defraud, where the owner denied that he had anything to do with it.

5. There was evidence that accused confessed that his accomplice told him one H. procured the burning, and was to pay them \$100. Accused offered to prove by H. that this was not so, which was refused. Held, that since H.'s denial would not show that the accomplice had not so told accused, and his admitting it would tend to prove accused guilty, the latter was not injured by the ruling.

6. Where the examination in chief of a witness was confined to what occurred when one accused of a crime was arraigned, a question on cross-examination as to what accused said at his preliminary examination several days later was properly excluded.



7. Where one accused of arson testified positively that he had nothing to do with the burning, and knew nothing about it, he was not prejudiced by a refusal to permit him to testify that on his preliminary examination he had so stated.

8. A charge was not erroneous, as leaving out the element that the burning must have been done by accused, where his connection therewith was properly and fully presented in other charges.

9. A charge was not erroneous as leaving out the element that the burning might have been authorized by the owner, there being no evidence that the owner did authorize it.

10. Where one accused of arson was told by his accomplice of their object in going to the premises, and held the horse while the other set fire to the buildings, he was guilty.

11. In a trial for arson, the court charged that if the jury should find that accused was informed by his accomplice of the object in going to the premises, and held the horse while he set fire to the house, they should find them guilty. Held not to be a charge on the facts, but on the conclusion to be drawn from them.

12. In a trial for arson, a charge was properly refused which contained matter which might have misled the jury into the belief that accused did the burning himself; thus eliminating the proposition that if he were present, aiding another, he would be guilty.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county.

Walter Jones was convicted of arson, and from the judgment of conviction, and an order denying a new trial, he appeals. Affirmed.

M. K. Harris and S. L. Carter, for appellant. Atty. Gen. Fitzgerald, for the People.

HAYNES, C. The defendant was convicted of the crime of arson in the second degree and sentenced to imprisonment in the state's prison for the term of five years, and appeals from the judgment and an order denying his motion for a new trial.

The information charged that Walter Jones and L. B. Spivey on March 6, 1897, did willfully, unlawfully, etc., set fire to and burn a certain dwelling house, the property of one W. A. Cosby. The first witness called for the prosecution was S. S. Crutcher, the deputy constable who arrested the defendant, and who, it appears, had acted as a detective in working up the case; and it was proposed to prove by him certain statements in the nature of confessions made by defendant Jones, who was then being tried, the defendants having severed. It was objected that the corpus delicti had not been proved. Ordinarily the corpus delicti should be the first point to which the evidence should be directed; but the order of proof is usually in the discretion of the court, and, unless it clearly appears that the defendant has been prejudiced by the manner in which that discretion has been exercised, it will not justify a reversal of the judgment. We see no such prejudice; the court having then notified the district attorney that, if he did not afterwards introduce evidence upon that point, the evidence of confessions would be stricken out.

The evidence of the corpus delicti was, in substance, that four detached buildings were burned, consisting of a dwelling house, barn, granary, and chicken coop. These buildings were upon a 40-acre lot belonging to Mr. Cosby, and situated in the country, some 12 miles from Fresno. Luther Spivey, who was jointly charged with defendant Jones, had taken a lease of the premises about a month before the fire, but for what term does not appear; the only statement in that regard being that it had not expired. Spivey testified he had slept there perhaps 8 or 10 or 12 times; that he came from the ranch to his father's house, in or near Fresno, on Friday evening, and did not go back until Monday, at which time he found the buildings burned. A farmer living two or three miles away testified that he saw a fire in the direction of the Cosby place about 9 or 10 o'clock on Saturday night, March 6th, but could not tell what it was, owing to intervening trees. Another witness testified: That he drove by the Cosby place on Monday morning, and there was a little steam or smoke from the moisture and heat, and thought the fire had occurred about two days before. That he saw where a horse and buggy had been hitched near the roadside. That he drove on, and when he returned he drove in and shot some pigeons, and saw the tracks of two men leading from where the buggy stood towards the house and back to the roadside. He estimated the distance from the house to the barn at 150 feet; from the house to the granary "about sixty or eighty feet,—forty or sixty feet." That another building was about 100 feet from the house, but not 100 feet from the granary, which was between it and the house, and about 40 or 60 feet from the house and the other buildings. J. M. Schier, also called for the prosecution, testified that the barn was about 15 or 20 paces from the house; that the granary was the nearest building to the house, and about 10 or 15 paces from it, and the chicken coop a few paces more. No description was given of any of these buildings, except that the house had five rooms; nor was any estimate given of their value, or whether there was or was not inflammable material about them which might be ignited from sparks; nor can the relative location of the several buildings be ascertained from the evidence, though the direction and distance of each from the house was capable of exact ascertainment and proof. The only additional facts appearing are that it rained either Friday night or Saturday night, and that Cosby had an insurance of \$300 on the house, and \$100 on the barn. On behalf of the prosecution it is urged that each of these buildings must have been separately fired, and that, therefore, the incendiary character of the fire is sufficiently shown to admit evidence of the confessions. "The corpus delicti is made up of two things: First, certain facts forming

its basis; and, secondly, the existence of criminal agency as the cause of them." Best, Ev. (Am. Ed. 1883) § 442. See, also, *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440; 7 Am. & Eng. Enc. Law, p. 861 et seq., under title "Corpus Delicti," and 6 Am. & Eng. Enc. Law, p. 582, "Confessions," and numerous cases cited in the notes. As to the degree of evidence required to show criminal agency, a distinction must be taken between the evidence which upon the whole case would justify a conviction, and that degree of proof of criminal agency in the burning of the buildings for the purpose of letting in evidence of the confessions or admissions of the defendant. To justify a conviction, the jury must be satisfied beyond a reasonable doubt of the existence of every fact necessary to constitute the offense, and to identify the defendant as the perpetrator; but it is not necessary that the evidence of the criminal act should be of that conclusive character in order to justify the admission of the defendant's confessions. The rule is well established that a conviction cannot be had on the extrajudicial confessions of the defendant, unless corroborated by proof aliunde of the corpus delicti. *People v. Jones*, 31 Cal. 566; *People v. Thrall*, 50 Cal. 415; *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440. But it is not necessary that the evidence of the corpus delicti should itself connect the defendant with its perpetration, in order to make the confession admissible. Mr. Justice Clifford, commenting upon the language used in *Greenleaf on Evidence*, said: "Considering the language employed by that author, it is somewhat doubtful how far he would carry the doctrine; and, if it is to the extent that the corpus delicti must be fully proved independently of the confession, we are not prepared to adopt it, as in that view the admission of the confession would be useless, except to prove the agency of the accused, and would operate as an exclusion of the confession for any other purpose, whereas, if freely and voluntarily made, it is clearly admissible as evidence in support of any element in the charge to which it applies. Full proof of the body of the crime, the corpus delicti, independently of the confession, is not required, says Nelson, C. J., in *People v. Badgley*, 16 Wend. 59, by any of the cases; and in many of them slight corroborating facts were held sufficient." *U. S. v. Williams*, 1 Cliff. 5, 24, Fed. Cas. No. 16,707. So in *People v. Simonsen*, 107 Cal. 347, 40 Pac. 440, it was said, in illustration of the case there under consideration: "A building may be burned under such suspicious circumstances as to indicate the act of an incendiary, and thus a corpus delicti established, and the doors opened for the defendant's admissions and confessions; but there must be some evidence of some kind tending to show the incendiary character of the fire, aside from these admissions and confessions." In the

case before us, I think the evidence, though weak and unsatisfactory in particulars capable of more explicit statement, is sufficient to justify the admission of the confessions. The buildings were in fact burned, and the circumstances tended in some degree to indicate that the fire was of incendiary origin, and, therefore, the confessions were in some degree corroborated.

The defendant objected to the admission of evidence that any building was burned other than the one specified in the information. The evidence was admissible in proof of the corpus delicti, and also in corroboration of the confession of the defendant that Spivey, after setting fire to the house, set fire to the barn.

The substance of the alleged confession of the defendant, as testified by Crutcher, was that on Saturday night, about 9 o'clock, he met Spivey, who was in a buggy on the street; that Spivey asked him to take a ride with him into the country; that he got a bottle of whisky, and went with him; that after they had gone some distance he asked Spivey where he was going, and Spivey said he was going out to burn Mr. Cosby's house; that he asked Spivey if he was not afraid of getting into trouble; that Spivey replied, "No; that is all right; Owen Holmes keeps me straight;" that he held the horse while Spivey got out and started to burn the buildings, and set fire to one, and then he got out and tied the horse, and went to where Spivey was; that on the way, either going or returning (the witness did not remember which), Spivey told defendant "that he was to get one hundred dollars from Holmes; that Mr. Cosby was to give Mr. Holmes one hundred dollars, and Holmes was to hire Spivey to do the work." On cross-examination the witness admitted that he expected to get a reward of \$300 in case of conviction. L. P. Timmins, a deputy sheriff and keeper of the jail, testified to a statement made to him by the defendant, and which was substantially the same as that testified to by Crutcher, with the addition that, after he got out of the buggy, Spivey set fire to the barn. It is contended that the verdict is not justified by the evidence. Conceding that confessions made to officers after arrest, even when made without solicitation, are evidence of a weak and unsatisfactory character, and conceding further, as to Crutcher, that he not only had the inducement of a reward as a stimulus towards a successful prosecution, but an unfortunate memory as to details, yet defendant's confessions were to some extent corroborated; and there was evidence which, if believed by the jury, justified the verdict.

It is contended, however, that these confessions contained the statement that Spivey was employed by Owen Holmes, Holmes having been employed by Cosby, the owner of the buildings, and that Cosby, the owner, and Spivey, the tenant, had a right to burn



the buildings, unless they were burned to defraud some one, and, the intention to defraud not appearing, the alleged confession shows a lawful burning, and that, therefore, the evidence is insufficient to justify the verdict. It is true, the evidence does not show the value of the buildings, nor whether the insurance had been paid, or the insurance company released. Mr. Cosby was called as a witness on behalf of the prosecution, and testified to his ownership of the property, that Spivey was his tenant, and that the house and barn were insured, but was not asked whether he authorized the buildings to be burned; but on cross-examination he denied that he employed Holmes to procure any one to burn the buildings, or that he suggested the burning, or had anything to do with it. If the jury believed Cosby, they were authorized to conclude that, as he had nothing to do with the fire, it was necessarily unlawful and malicious, unless it was accidental or spontaneous. Holmes was not called by the prosecution, but was called by the defendant, and asked whether he ever offered Spivey or Jones, or procured either of them, or any person, to burn said buildings, or that he would give them \$100, or any other sum, to do it. The district attorney objected that it was irrelevant, incompetent, and immaterial. The court sustained the objection. The defendant then offered "to prove affirmatively the matters stated in the form of a question to the witness," and the court sustained an objection thereto. And to each of these rulings defendant excepted. If the witness had answered the question in the negative, it would not have shown that Spivey did not tell the defendant that Holmes had promised him \$100 to burn the building; and, if answered in the affirmative, it would have tended to prove both Spivey and defendant to be guilty; and in that case the defendant was not injured by the ruling. What counsel meant by his offer to "prove affirmatively the matters stated in the question" is not quite clear. If it was to prove that Holmes did agree to pay Spivey for burning the buildings, the evidence would have tended strongly against the defendant, as above suggested, unless the defendant could go further, and prove that Cosby had in fact employed Holmes for that purpose; but defendant had already closed that door by making Cosby his own witness, and proving that he had not authorized Holmes to do any such thing. If it be conceded that the court erred in these rulings, the defendant was not prejudiced.

The testimony of S. C. St. John, the justice of the peace, upon his examination in chief by the district attorney, was confined to what occurred when defendant was arraigned. The question put to the witness as to what the defendant said at the time of his preliminary examination, some days afterwards, was not proper cross-examination, and was properly excluded.

The question put to the defendant upon his

examination in chief, whether upon his preliminary examination he did not state that he had nothing to do with the burning of the buildings, and had never told anybody that he had, was admissible, in view of the testimony of Crutcher. But he had already testified positively that he had nothing to do with the burning, and had never told anybody that he had, and knew nothing about it. This covered the ground embraced in the question, and he was not prejudiced by not being permitted to repeat it.

We think the court did not abuse its discretion in directing defendant Jones to be first tried, nor in refusing to permit more than one counsel to argue the case for the defendant. Section 1093 of the Penal Code expressly authorizes the court to restrict the argument to one counsel on each side, except in cases where the offense charged is punishable with death.

Appellant excepts to instructions numbered 22 and 23; to the first, that it leaves out the element that the burning must have been done by the defendant, and that it may have been authorized by the owner without any intention to defraud. Everything which is proper to be said to the jury by the court cannot be well embodied in a single sentence. The question of defendant's agency in the burning was properly and fully presented in other parts of the instruction, which must be taken as a whole, and read together; nor was there any evidence tending to show that Cosby authorized the buildings, or any of them, to be burned, and hence there was no occasion for an instruction of the character suggested.

To the second of said instructions (No. 23) it is objected that "it is error to charge upon the facts of the case," and that the jury are instructed that remaining in the buggy while another applied the match was aiding in the commission of the offense. The court properly instructed the jury that if they found from the evidence, beyond a reasonable doubt, that defendant was informed of the object of Spivey in going to the premises, and did hold the horse while he or another set fire to the house, they should find him guilty. This was not an instruction as to how the jury should find the facts to be, but an instruction as to the conclusion that should be drawn if they found the facts stated to be true. It is said that "there is evidence showing that the burning was against defendant's will." We find no evidence of that character.

It is also contended that the court erred in refusing to give certain instructions requested by the defendant. All of these, except one, are covered by instructions given, so far as they contain matter that should be given, and were properly refused. One (No. 26) referred to the circumstance, which appeared incidentally, that defendant was under arrest upon some charge, the nature of which was not stated, at the time he was arrested upon the present charge. This specific matter was not embraced expressly in any instruction given,

though instructions given so fully and carefully guarded the defendant that it would seem impossible that he should have been injured by the omission. Besides, the instruction requested contained matter which might have misled the jury into the belief that in order to convict they must find that the "defendant burned the dwelling house," thus eliminating the proposition that if he were present, aiding another, he would be guilty.

Other exceptions appear in the record, but, after careful examination, we find none that would justify a reversal of the judgment, or which requires special notice. The judgment and order appealed from should be affirmed.

We concur: BRITT, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

123 Cal. 62

HIBERNIA SAVINGS & LOAN SOC. v.  
THORNTON. (S. F. 1375.)

(Supreme Court of California. Dec. 19, 1898.)

BILLS AND NOTES—PLEADING—MORTGAGES—FORECLOSURE.

Where a complaint alleged a cause of action on a note only, a judgment foreclosing a mortgage given to secure the note is not supported by averments in the answer that the note was given in renewal of former notes given by a married woman in her separate business, and secured by mortgage on her separate estate, and is, therefore, erroneous.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by the Hibernia Savings & Loan Society against R. S. Thornton, executor. From a judgment for plaintiff, defendant appeals. Reversed.

B. B. Newman, for appellant. Tobin & Tobin and Francis Pope, for respondent.

HARRISON, J. Upon a former appeal in this case (109 Cal. 427, 42 Pac. 447) a judgment in favor of the plaintiff for the amount of the promissory note sued on was reversed. After this reversal the cause was again tried, upon the issues presented by the original pleadings and a supplemental answer setting forth the death of the former defendant and the appointment of the appellant as his executor; and the court rendered judgment in favor of the plaintiff for the foreclosure of a mortgage, and directing a sale of the property therein described, from which the defendant has appealed.

By the complaint herein the plaintiff seeks merely to recover the amount of the promissory note set forth therein, and the appellant contends that a judgment of foreclosure was not authorized. The rule is firmly established in this state that an action cannot be maintained upon a promissory note secured by a mortgage, independent of an action to fore-

close the mortgage. The respondent does not dispute this proposition, but seeks to uphold the judgment by reason of certain averments in the answer. It is alleged in the answer that the note sued upon was given in renewal of former notes executed by Elizabeth O'Neill to the plaintiff in transactions relating to the purchases of real estate by her for her own account, and "that, for the purpose of securing the payment of said several promissory notes, the said Elizabeth O'Neill made, executed, and acknowledged, and delivered to the plaintiff, its officers, agents, attorneys, and servants, her several and respective indentures of mortgage upon her said separate real estate so acquired and owned by her." It is contended by the respondent that by this averment the defendant has supplied the defect in the complaint which was requisite to entitle the plaintiff to recover, and has thereby authorized a judgment in foreclosure as fully as though such judgment had been originally sought by the plaintiff; citing in support thereof *Cohen v. Knox*, 90 Cal. 266, 27 Pac. 215, *Shively v. Water Co.*, 99 Cal. 259, 33 Pac. 848, and other cases. The rule invoked by the respondent does not, however, have any application to the present case. The allegation in the answer is not of a fact which supplies the omission of the plaintiff to aver such fact in the complaint, or which helps out a defective allegation in the complaint, but is of a fact which negatives the plaintiff's right to maintain the action set forth in its complaint. The plaintiff seeks by the complaint herein to recover a general money judgment upon a promissory note, and not to subject any particular property to sale therefor. No particular property is described in either the complaint or the answer; nor does the answer aver that any particular mortgage was executed as security for the note set forth in the complaint, and it does aver that the mortgages which it alleges were executed by Elizabeth O'Neill were upon "her separate real estate." The finding of the court that she "left" no separate estate at her death is not inconsistent with the fact that she executed mortgages upon her separate estate. The answer, moreover, avers that the mortgages therein referred to were made by Elizabeth, while the court finds that the mortgage which it orders to be foreclosed was made by Charles and Elizabeth. Mr. Pomeroy says (Code Rem. § 579), "This rule should properly be confined to the case where the answer affirmatively alleges the very fact that is missing from the complaint." The allegation in the answer can have no greater effect than if the same allegation were placed in the complaint; and it is very evident that, if the complaint had alleged the fact as it is averred in the answer herein, a judgment thereon foreclosing a mortgage upon the property described in the decree could not be sustained. The court, therefore, erred in receiving in evidence the mortgage when it was offered by the plaintiff, and in rendering judgment for its foreclosure. The



case of *Harden v. Ware*, 5 Pac. Coast Law J. 317, cited by the respondent, cannot be regarded as an authority for the proposition contended for by the respondent, since, after the opinion there given was filed, a rehearing in the cause was granted, and subsequently, without any further action by this court, the appeal was dismissed upon the stipulation of the parties. The judgment is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

123 Cal. 26

HOLLIDAY v. HOLLIDAY et al. (L. A. 328.)

(Supreme Court of California. Dec. 19, 1898.)

MALICIOUS PROSECUTION—PLEADING—FAVORABLE TERMINATION—PROBABLE CAUSE—DISMISSAL OF PROSECUTION—JUDGMENT—CONCLUSIVENESS—ADVICE OF COUNSEL—DISCLOSURE OF FACTS—INSTRUCTIONS.

1. An allegation in malicious prosecution that plaintiff was discharged on a writ of habeas corpus duly issued and returned, and that the prosecution was wholly ended, sufficiently pleads a final termination of the prosecution favorable to plaintiff, without showing the jurisdiction of the judge to issue the habeas corpus.

2. Under Pen. Code, §§ 701-714, giving a justice of the peace final jurisdiction to bind persons to keep the peace on complaint filed, his finding that there was just reason to fear the commission of the offense threatened, and binding the defendant to keep the peace, is conclusive, in the absence of evidence that the judgment was fraudulently procured, that there was probable cause for the prosecution.

3. Where the court in malicious prosecution stated facts by plaintiff's request which would constitute want of probable cause, and also, by defendant's request, those which constituted probable cause, and instructed the jury that, if they found the former to be true, the plaintiff should recover, and, if the latter were true, then defendant should recover, the insufficiency of the facts stated to constitute lack of probable cause was not misleading, because the jury must have understood that, if the other statement of facts was not proved, then there was a want of probable cause.

4. A dismissal of a prosecution to keep the peace at the suggestion of the district attorney, on being assured by the defendant that she would not molest complainant, and by her attorney that he anticipated no purpose on defendant's part to harm complainants, is not such a dismissal by defendant's procurement as not to be a final termination in her favor.

5. In order that an advice of counsel shall be a defense to malicious prosecution, it is unnecessary that all facts which the prosecutor "could have ascertained by reasonable diligence" should have been disclosed to counsel.

Temple, J., dissenting.

In bank. Reversed.

For opinion in department, see 53 Pac. 43.

PER CURIAM. This is an action to recover damages for malicious prosecution and false imprisonment, based on a proceeding instituted by defendants against plaintiff before a justice of the peace, under the provisions of sections 701-714 of the Penal Code. The complaint contains four counts. The first count alleges that on the 19th day of August, 1895, in the city of Los Angeles, the defendants

falsely and maliciously, and without reasonable or probable cause, charged plaintiff before William Young, a justice of the peace within and for the township of Los Angeles, with having threatened to burn the personal property of defendants, and to shoot, stab, and kill defendants; and that said defendants had just cause to fear the said threats would be carried into execution by said plaintiff if she was not restrained by the court; and procured said justice to issue a warrant for the arrest of plaintiff on said charge; and thereupon plaintiff was arrested under said warrant, and imprisoned in the county jail of Los Angeles county for the space of eight days. It is then alleged "that on the 27th day of August, 1895, upon petition of plaintiff for discharge upon a writ of habeas corpus, which was duly issued and returned, the said plaintiff was discharged from custody, and the said prosecution is wholly ended and determined." The second count alleges that on the 27th day of August, and immediately after plaintiff's discharge, as alleged in the first count, the defendants again procured the said justice to issue a warrant for the arrest of plaintiff upon the same charge set out in the first cause of action, and thereupon she was arrested under said warrant, and imprisoned for three hours until released upon her own recognizance to thereafter appear and answer said charge; and "that on the 31st day of August, at the request of counsel for defendants, and on motion of the district attorney, the plaintiff was discharged from custody without examination, and said prosecution is wholly ended and determined." The third and fourth counts, by the instruction of the court, were withdrawn from the consideration of the jury, and they need not, therefore, be considered. Defendants demurred to each of the counts contained in the complaint, and their demurrer was overruled. They then answered, denying the allegations of the first and second counts relating to malice, want of probable cause, and damage; and, as a further defense to the first count, alleged that after an examination of the charge before the justice of the peace the proceeding was finally determined on August 20th, and, as showing such final determination, set up the following order made by the justice: "It appears to me that there is just reason to fear the commission of the offense within mentioned. I order that you, the said defendant, enter into an undertaking in the sum of one thousand dollars, with two sufficient sureties, to keep the peace towards the people of the state of California, and particularly towards the affiants. Done in open court, this 20th day of August, 1895. Wm. Young, Justice of the Peace." And, in addition to the denials of the allegations of the second count, defendants alleged that they consented to the dismissal of the second proceeding solely for the reason that they and their counsel were assured by the counsel for the plaintiff in this action (the defendant in said proceeding) that

she would not carry the threats, for the making of which she was charged, into execution, or otherwise harm or molest the persons or property of defendants. The case was tried before a jury, and a verdict was rendered in favor of the plaintiff for the sum of \$500, on which judgment was entered. From that judgment, and an order denying their motion for a new trial, defendants have appealed.

The law is well settled that to maintain an action of this kind the plaintiff must allege and affirmatively prove malice and want of probable cause on the part of the defendant in instituting the proceeding which is made the basis of the action, and that the same has been finally determined in favor of the plaintiff. Appellants contend that the allegations in the first count of the complaint—that upon a writ of habeas corpus, which was duly issued and returned, plaintiff was discharged from custody, and the prosecution was wholly ended and determined—were not sufficient to show that the proceeding had been finally determined in favor of the plaintiff, and therefore their demurrer to that count should have been sustained. The argument is that it does not appear that the petition for the writ was presented to any court or judge having jurisdiction to issue the writ, or that an order was made by any court or judge directing the discharge of plaintiff. But it was only necessary to allege that the prosecution had been finally determined, and not the means by which that end was accomplished. The statement that plaintiff was discharged upon a writ of habeas corpus which was duly issued and returned, and the prosecution was wholly ended, should, therefore, we think, be held sufficient. *Newell, Mal. Pros. p. 353.*

It is further contended that the order of the justice of the peace made August 20th, requiring the plaintiff to enter into an undertaking to keep the peace, was a conclusive determination that there was probable cause for the institution of the proceeding which resulted in the making of such order, and was not subject to collateral attack. And, in accordance with this contention, defendants requested the court to instruct the jury that the order referred to, made by the justice upon the information before him, was "conclusive evidence that there was probable cause for lodging said information and prosecuting said proceeding." The court refused to give the instruction asked, and, at the request of the plaintiff, instructed the jury that "the fact that Justice Young rendered judgment requiring the plaintiff in this action to give bail in the sum of one thousand dollars to keep the peace is no bar to this action by the plaintiff," and that "the defendants cannot shield themselves on the first and second causes of action behind the action of Justice Young in issuing the warrants of arrest and committing plaintiff, if the facts stated in the information were false, and not believed by the defendants to be true." It is insisted by appellants that

the court erred in refusing to give the instruction requested by them, and in giving the instruction requested by respondent, and many cases are cited on both sides as to the effect, as conclusive evidence, of judgments and orders of courts. Without reviewing the cases cited, we deem it enough to say that, while there is some apparent conflict in the decisions, the prevailing rule is that when a person is charged before a competent court having jurisdiction of the matter, and is tried and found guilty, the judgment rendered, unless it is shown to have been obtained by means of fraud, is conclusive evidence of probable cause for making the charge, even though it is afterwards held to be unauthorized, and reversed on appeal. See *Crescent City Live-Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U. S. 141, 7 Sup. Ct. 472, where the cases are reviewed at considerable length. Where, however, the court has not full jurisdiction to try the matter, and to render a judgment upon the merits, as where a justice sits as a committing magistrate with power merely to discharge a defendant or to hold him to answer for trial before a higher tribunal, the order made by the magistrate in such cases, lacking the essentials of a final judgment, is not held conclusive upon the question of probable cause. At the most it is but prima facie evidence. *Ganea v. Railroad Co.*, 51 Cal. 140; *Diemer v. Herber*, 75 Cal. 287, 17 Pac. 205. In this state, under the proceeding laid down in our Penal Code, the justice of the peace has full and complete jurisdiction over that peculiar form of preventive justice known as the proceeding for security to keep the peace. Pen. Code, §§ 701-714. The magistrate's determination that there is just reason to fear the commission of the offense justifies his order in putting the accused person under bonds to keep the peace, and, in the event of his failure to give the required bonds, then to order him committed to jail. From this order no appeal lies. The justice's jurisdiction is as complete as it is in cases of battery, petty larceny, and other like misdemeanors. His conclusion is, so far as the defendant is concerned, a final determination upon the merits of the controversy, and his order that the accused person stand committed contains all the essentials of a final judgment. In a sense the proceeding is an examination, but it is confusing so to employ the word which, under our system, is regularly used to denote the mere preliminary inquiry by a magistrate into the circumstances of a felonious charge concerning which his sole power is to hold the defendant over to answer. Respondent, however, relies upon the case of *Johnston v. Meaghr*, 14 Utah, 426, 47 Pac. 861, where a contrary rule is announced; but the cases cited by the court to support the proposition fail to do so. They refer either to examinations upon charges amounting to felony, or to a different procedure, which prevails in some of the



states, where the justice sits in a peace proceeding strictly as a committing magistrate. Such is the case of *Hyde v. Greuch*, 62 Md. 577. Under the Maryland procedure, when proper affidavit is made before a justice in a peace proceeding, it becomes that officer's duty at once to cause the arrest of the accused person, and without examination to bind him over to make his appearance before the next circuit court, there to receive what the court may impose on him. Where such a system obtains it is quite obvious that the order of the justice of the peace is precisely similar to the order of a justice with us in holding an accused person to answer upon a charge of felony, and that it contains none of the elements of a final judgment. The appellants' contention on this point, therefore, must be sustained, as there was no evidence that the order of the justice was procured by fraud, and without such evidence it conclusively established the existence of probable cause for the prosecution of the first proceeding, notwithstanding the fact that the plaintiff was afterwards discharged from her imprisonment under a writ of habeas corpus.

In actions of this character, what constitutes probable cause is always a question of law for the court. As said in *Ball v. Rawles*, 93 Cal. 222, 28 Pac. 937: "Malice is always a question of fact for the jury, but whether the defendant had or had not probable cause for instituting the prosecution is always a matter of law to be determined by the court. If the facts upon which the defendant acted are undisputed, the court, according as it shall be of the opinion that they constituted probable cause or not, either will order a nonsuit (or direct a verdict for the defendant), or it will submit the other issues to the jury; but, whether admitted or disputed, the question is still one of law to be determined by the court from the facts established in the case. If the facts are controverted, they must be passed upon by the jury before the court can determine the issue of probable cause; but the question of probable cause can never be left to the determination of the jury. \* \* \* The court cannot divest itself of its duty to determine this question, however complicated or numerous may be the facts. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that, if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly." In accordance with the law as above declared, the court, at the request of plaintiff, very briefly and meagerly grouped the facts which would constitute a want of probable cause,

and instructed the jury that, if they found those facts to be true, the verdict should be in favor of the plaintiff. And at the request of defendants the court very fully grouped the facts which the evidence tended to prove, and instructed the jury that, if they found those facts to be true, then they constituted probable cause for lodging the information against plaintiff and her arrest and prosecution, and the verdict should be for defendants on both causes of action. It is objected that the facts, as grouped at request of plaintiff, were insufficient to show a want of probable cause, and that this was a fatal error, which calls for a reversal. But all of the instructions must be read together, and, when so read, we fail to see that the jury could have been misled. The jury must be presumed to have understood that if the facts, as grouped at the request of defendants, were not found to be true, then there necessarily must have been a want of probable cause. It is essential to the maintenance of an action such as this that the proceeding complained of should have been finally terminated, and terminated in plaintiff's favor. The court instructed the jury that the dismissal by the justice on the motion of the district attorney, on August 31, 1895, was a sufficient termination of the second prosecution for the purposes of the action. Appellants complain of this instruction, and insist that the evidence discloses that the dismissal of the second proceeding was at the procurement of the accused, and under her promise to refrain from committing the injuries which she had threatened. It is, of course, true that the dismissal of a charge at the procurement of the accused cannot be construed as such a final determination of the matter in her favor as to support an action for malicious prosecution. *Langford v. Railroad Co.*, 144 Mass. 431, 11 N. E. 697; *McCormick v. Sisson*, 7 Cow. 715. But, as we read the evidence, it cannot be successfully contended that the dismissal of the second prosecution was by the procurement of the plaintiff. The testimony upon the matter is the testimony of the attorney who represented her in the peace proceeding. The deputy district attorney asked if the accused could give bail, and her attorney replied "No," that she could not give a dollar of bail. The deputy district attorney then said: "Mr. Jones, if you will answer that the woman will not do any damage, we will let her go on her own recognizance." To this Mr. Jones replied (quoting from his testimony): "Why, certainly, I have no idea that she has any intention of harming these defendants, and I will make that answer for her," and I did. I then asked her to state, and I think she did state to Justice Young, that she would not do any harm at all, and thereupon Justice Young released her on her own recognizance." Some days later the proceeding was dismissed upon the motion of the complainants represented by the deputy district attorney, upon the mere statement

of this plaintiff's attorney that "Mrs. Holliday would not molest the defendants or their property, and that they need not have any fears of her doing so." As the facts which we have recited stand in the record without conflict, we think the court was justified as matter of law in instructing the jury that there was a sufficient determination of the second prosecution in plaintiff's favor.

The court also, at the request of plaintiff, instructed the jury as follows: "The defendants rely upon the advice of counsel as one of their defenses to the causes of action for malicious prosecution, and upon this point the court instructs the jury that whether or not the defendants did, before instituting the proceedings, make a full, fair, and honest statement to their attorneys of all the material facts bearing upon the facts stated in the informations laid before Justice Young, of which they had knowledge, or which they could have ascertained by reasonable diligence, and whether in commencing such proceedings the defendants were acting in good faith upon the advice of their counsel, are questions of fact to be determined by the jury from all the evidence and circumstances proven in the case; and, if the jury believe from the evidence that the defendants did not make a full, fair, and honest statement of such facts to their counsel, then such advice cannot avail them anything in this suit." By this instruction the court, in effect, charged the jury that when, in an action for malicious prosecution, the defendant relies upon the advice of counsel as a defense for instituting the proceedings complained of, he must, in order to avail himself of that defense, prove to the satisfaction of the jury that before instituting the proceeding he made a full, fair, and honest statement to his counsel of all the material facts bearing upon the charge of which he had knowledge, or which he could have ascertained by reasonable diligence, and that he acted in good faith upon the advice of the counsel. In *Dunlap v. Insurance Co.*, 109 Cal. 365, 42 Pac. 29, instructions of similar import were given by the court, and held to be erroneous, and for the error in giving them the judgment was reversed. The court, after a review of the authorities, said: "Assuming that in seeking the advice of counsel, and in acting thereon, he has acted in good faith, and has disclosed all the facts within his knowledge relating to the defense and the accusation, his defense of probable cause will be established, even though the defendant should show at the trial other facts sufficient to secure his acquittal, and which might have been ascertained by the prosecuting witness if he had made diligent inquiry therefor. It is not necessary that he shall institute an investigation of the crime itself, or seek to ascertain whether there are other facts relating to the offense, or try to find out whether the accused has any defense to the charge. He is not required to exhaust all sources of information bearing upon the facts which have

come to his knowledge, for that would be to require him to perform the office of the committing magistrate, and thus thwart the very purpose of the law in inducing him to seek its immediate vindication for crimes committed against it. There are expressions in some opinions to the effect that, in addition to the facts within his knowledge, he must also have exercised reasonable diligence to ascertain whether there are any other facts bearing upon the charge; but in an extended examination of the authorities we have not been able to find any case in which it has been decided that such diligence must be exercised, or where the prosecuting witness has been held liable for failure to ascertain whether there were any other facts bearing upon the case." The case of *Sandell v. Sherman*, 107 Cal. 391, 40 Pac. 493, cited by counsel for respondent, does not sustain their claim that the instruction under review was not erroneous. In that case an instruction was given which stated that if the defendants "made a full and fair statement of all the facts of that case to their counsel," and he advised, etc., and they acted on his advice, "it is a good defense in this case." It was urged that the instruction was erroneous, for the reason, among others, "that it does not charge that they should have stated to the attorney all the facts within their knowledge, or which they reasonably could have obtained." But, tested by the general rule in such cases, the court failed to see any serious objection to the instruction, and held it to be sufficient.

Following the law as declared in the *Dunlap* Case, it must be held here that the instruction under review was erroneous in so far as it charged, in effect, that the defendants could not avail themselves of the advice of counsel unless the jury should find from all the evidence and circumstances proven in the case that before instituting the proceedings they made a full, fair, and honest statement to their attorneys of all the material facts bearing upon the case "which they could have ascertained by reasonable diligence." For the errors above noted, the judgment and order appealed from are reversed, and the cause remanded for a new trial.

I dissent: TEMPLE, J.

BEATTY, C. J., did not participate in the foregoing.

123 Cal. 42

McCALL v. PACIFIC MAIL S. S. CO. et al.  
(S. F. 741.)

(Supreme Court of California. Dec. 19, 1898.)

PERSONAL INJURY—MASTER AND SERVANT—CONTRACTOR'S LIABILITY—APPLIANCES—REASONABLE CARE.

1. Where a steamship company furnished appliances to a contractor with which to load its vessels, it is liable to the contractor's servants for injuries caused by its failure to use reasonable care in the selection of such appliances.



2. A contractor is not liable to his employes for injuries resulting from the use of defective appliances, unless he had the right to select them.

3. A steamship company furnished a contractor with slings with which to load its ships. The contractor's employes, who were experienced, examined the slings, using such care as is usually exercised by men in that employment, rejected two as defective, and accepted the others. In using one of those accepted, a rope broke, because of a latent defect in the sling, and injured an employe. *Held* that, since ordinary care had been exercised in selecting the slings before they were used, neither the company nor the contractor was liable for the injury.

Department 2. Appeal from superior court of city and county of San Francisco.

Action by Thomas McCall against the Pacific Mail Steamship Company and Henry Bingham. From a judgment for plaintiff, and an order denying a new trial, defendants separately appeal. Reversed.

T. C. Coogan, for appellants. Reddy, Campbell & Metson, for respondent.

HENSHAW, J. The Pacific Mail Steamship Company and Henry Bingham had contracted, the latter to load and discharge the cargoes of the company's ships, the former to furnish the power and appliances necessary for the work. Pursuant to their contract, Bingham was loading flour on one of the company's vessels, when a sling in which the flour was hoisted onto and lowered into the ship gave way; and plaintiff, who was stowing cargo in the hold, was severely injured by falling sacks. Plaintiff was a stevedore in the employ of Bingham. He sued Bingham and the company jointly, and obtained a judgment against both. They prosecute separate appeals from the judgment, and from the order denying a new trial.

In accordance with the contract, the steamship company had furnished Bingham's employes (Bingham not being personally present) with six slings to be used in hoisting the cargo. Upon receiving the slings, Bingham's men, according to their habit, examined them, and, rejecting two as defective, accepted four as fit for use. It was one of these four slings so accepted, which, breaking, caused plaintiff's injuries. The cause of the break was a latent defect in the rope attached to the sling. This rope, while sound to superficial observation, was for a foot or more of its length affected by a dry rot, which greatly impaired its strength. Bingham had absolute control over his employes, and over the conduct of the work.

It is contended on behalf of the appellant the Pacific Mail Steamship Company that these facts exonerate it from liability to the plaintiff in this action; that, even if it failed to exercise the due amount of care in the selection and furnishing of appliances, it was a breach only of its contract with Bingham; that there was no contractual privity between it and this plaintiff, and no duty owing by

it to plaintiff, since between it and plaintiff the relation of employer and employe did not exist. But the rule is too firmly settled to be open to successful attack, that, where one agrees to furnish to a contractor material or appliances which he is to use in the performance of his task, the principal is liable to the servants and agents of the contractor for injuries which may result to them from his negligence or inadequate performance of his contract in this regard. The liability is not based upon the relationship of employer and employe, but it is considered by some courts that the contract is made with the contractor for the benefit of his employes, who have, therefore, their right to a recovery for any breach of it which results in their injury. By other courts the contractor is considered to be the dependent agent of his employer in these respects, and the doctrine of respondent superior is brought into application. By still others it is placed upon the ground of the failure of the principal to exercise the ordinary care which is due to everybody, without regard to contract, under the principles announced in sections 1708, 1714, and 3281 of the Civil Code, and this seems to be the true reason for the rule. But, however that may be, the principle itself is settled beyond the possibility of successful controversy. *Mecham*, Ag. § 666, thus declares the doctrine: "If the principal was by the terms of the contract under obligations to the contractor to furnish the necessary machinery or appliances, or to supply a portion of the labor, he would be liable to the servant or agent of the contractor for an injury sustained by reason of his neglect to use due and reasonable care in selecting and supplying the proper machinery or appliances." In further support of the principle may be cited the cases of *Mulchey v. Society*, 125 Mass. 487; *Lee v. Railway Co.*, 116 Cal. 97, 47 Pac. 932; *McKenna v. The Carolina*, 30 Fed. 199; *Coughlan v. The Rhelola*, 19 Fed. 926; *Hamilton v. The Wm. Branfoot*, 48 Fed. 914; *Roddy v. Railway Co.*, 104 Mo. 234, 15 S. W. 1112; *Steel v. McNeil*, 8 C. C. A. 512, 60 Fed. 105; *Iron Co. v. Erickson*, 39 Mich. 492; *Kelly v. Howell*, 41 Ohio St. 438; *Coughtry v. Woolen Co.*, 56 N. Y. 124.

Upon behalf of appellant Bingham it is first insisted that, under the contract shown, if liability attaches to anyone for the injury sustained by plaintiff, it is to the steamship company, and not to himself, or that, if liability attaches to him, it does not to the steamship company, and that there is a misjoinder of parties defendant. This gives rise to a question whose determination, though far from unimportant, we think unnecessary in this consideration; but upon it this much may be said: It has been pointed out in *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017, that a contractor can be held liable by his employes for injury resulting from the use of defective materials in the work only when he has the right of selecting the materials. "If he is to per-

form the contract with only such materials as may have been previously selected and furnished by his employer, he cannot be held liable for any defect in such materials. These principles are, however, subject to the rule that this right of selection and control is to be determined by the terms of the contract of employment, and that, unless by the contract this right is reserved to the employer, the contractor will be presumed to have the right of selection and control." Applying this well-settled principle to the contract in the case at bar, if it was the duty of the steamship company to furnish these appliances, and the corresponding duty of the contractor to use the appliances furnished, without discretion as to their fitness or suitability, then, for the reasons which we have been considering, there would be no joint liability, and the steamship company alone would be responsible; the contractor being considered in this regard as its dependent agent, or the employé of the stevedore being held to have the right to complain of the steamship company for any tort upon himself or his property occasioned by the company's negligent performance of its contract, or, finally, the steamship company being held liable for the breach of an obligation imposed by law,—that of exercising due care to prevent injury to the person or property of another in the management of its affairs. But if, however, a discretion was left to the contractor, Bingham, and, while the steamship company was obliged to furnish suitable appliances, Bingham reserved the right of examination and rejection, and of compelling the company to supply proper appliances, then, clearly, Bingham would not be exonerated from liability to his employés for his failure to exercise due care in this respect. *Du Pratt v. Lick*, 38 Cal. 692. It appears from the evidence that the construction put upon the contract by the parties to it gave to Bingham the right of selection and rejection, and that in the case of these slings such right was actually exercised. In this respect, then, the case would be very similar to that of *Riley v. Steamship Co.*, 29 La. Ann. 791. The steamship company had hired an experienced stevedore under a contract to load and unload its vessel. He had full control of the work, and employed and absolutely controlled his own laborers. The vessel, as in this case, furnished the hoisting apparatus, which broke, and killed one of the stevedore's employés. In an action against the steamship company for damages, it was insisted that, as the vessel, under its contract, was to furnish and did furnish the hoisting apparatus, the company was responsible for any loss or damage resulting from its defects, and that in point of fact it was old, worn-out, and unfit for use. The court say: "In a case like this, we think the utmost extent of the liability of the company would be that they should employ a stevedore of experience and good repute, and that the tackle furnished on his requisition should be apparently good, satisfactory to the steve-

dore, and such as is usually furnished for like purposes." See, also, the cases of *Power v. Benbrack*, 33 Fed. 687; *Kenny v. The Dago*, 31 Fed. 574; *King v. Railroad Co.*, 66 N. Y. 181; *Roddy v. Railway Co.*, 104 Mo. 234, 15 S. W. 1112.

But, without pursuing this inquiry further, we are satisfied that the judgment must be reversed for a total failure of the evidence to show negligence upon the part of either of the defendants. By all the testimony in the case, the slings were examined by competent and experienced stevedores in Bingham's employ. The manner of examination was that usually adopted, and the care bestowed was that usually exercised by men in the like character of employment, and, in the experience of those men, was shown to be sufficient to avoid accident, though upon this last point some offered evidence was rejected which should have been admitted. Ordinary care, then, was exercised in the selection of the sling before it was put into use. It broke, as has been said, because of a latent defect, not discernible under an examination conducted with ordinary care. These facts would entirely exonerate Bingham from responsibility, conceding that he was properly chargeable in this action; and these facts would also exonerate the steamship company, for it would matter not whether it had or had not examined the slings before they were put into use, if in fact the slings were properly examined by competent persons and approved. An ordinary examination by the steamship company's agents would have disclosed no more than was disclosed by the examination made by the stevedores, and, for all that appears in the record, such an examination may have in fact been made (there is no proof to the contrary) before the slings were tendered to Bingham's men. And it is still to be remembered that the slings were merely tendered with the right of rejection to Bingham's men, which right was freely exercised without objection upon the part of the steamship company in this very case. The judgment and order are, therefore, reversed, and the cause remanded.

We concur: TEMPLE, J.; McFARLAND, J.

123 Cal. 107

SAN FRANCISCO SAV. UNION v. LONG  
et al. (S. F. 1,041.)

(Supreme Court of California. Dec. 20, 1893.)

INTERPLEADER—DISMISSAL OF PLAINTIFF—ATTORNEYS—APPEARANCE—PRESUMPTION OF AUTHORITY—LIFE INSURANCE—RESERVE FUND—RIGHTS OF BENEFICIARIES—JUDGMENT—CONCLUSIVENESS.

1. Where a bank interpleaded several parties in relation to the ownership of a fund in its hands, and defendants, without taking issue with plaintiff as to its right to compel them to interplead, litigated their claims thereto, and an interlocutory decree dismissing plaintiff from the cause was entered, plaintiff was released from performance of any contract in relation thereto, and defendants could not afterwards



object to plaintiff's dismissal on payment of the fund into court.

2. Until the contrary appears, an attorney's authority is always presumed where he appears in a party's behalf.

3. Though an attorney's authority is presumed on his appearance in a party's behalf, the court may always require evidence thereof.

4. St. 1891, p. 126, § 2, of the act relating to assessment insurance companies, provides, *inter alia*, that a mutual assessment life insurance company shall not do business until 200 applicants for membership or insurance have paid the company's treasurer \$5,000, which shall be invested, and placed with the state treasurer, and the principal sum held in trust for the contract holders of the company. Section 4 provides that the amounts due on policies shall be a lien on the company's property, with priority over all subsequent debts, except as hereinafter provided in cases of insolvency. Section 5 requires it to create a reserve fund, to be invested as directed in section 2, and, when the company discontinued business, to be returned to the corporation, or disposed of as the court might determine. There is no provision regarding its insolvency, but section 10 revokes its power to insure for failure to carry out its "terms of contract," or for failure to pay its obligations within three months from notice of default. *Held*, that sections 2 and 5 provide for the creation of a reserve fund for the security of beneficiaries only in case of a company's insolvency, with the intention that it should then go to them regardless of general creditors.

5. Beneficiaries equally entitled to a reserve fund on the insolvency of a company are not concluded from asserting their rights thereto by a judgment against the company establishing a lien thereon in favor of a beneficiary.

In bank.

For opinion in department, see 53 Pac. 907.

TEMPLE, J. This is an action of interpleader brought by the plaintiff, a savings bank, to have sundry claimants to a deposit in the bank litigate among themselves, and have determined to whom the money should be paid. In such cases there may always be a twofold contest: First, as to the right of the plaintiff to bring the suit and to force the defendants to interplead; and, if such right is maintained, the litigation among the defendants. There may be two sets of pleadings: First, those having reference only to the right of the plaintiff to compel the defendants to interplead; and the several complaints of the defendants, in which their respective rights to the subject in controversy are set up. These may be, and usually are, included in the answer to the bill of interpleader. Such answer is then in the nature of a cross complaint, and should be served upon each defendant, who may answer the same. Whether the plaintiff shall be permitted to maintain such an action is first determined, and, if his right is sustained, an interlocutory decree is entered, requiring the defendants to litigate their claims *inter sese*.

In this case no defendant in his pleadings took issue with the plaintiff as to its right to compel the parties to interplead. Some allegations of fact were controverted because not sufficiently favorable to some special de-

fendant. But those who appeared set out their respective rights as against the others, and upon this state of facts the interlocutory decree was entered, and the plaintiff, having deposited the money in court, was dismissed from the case. Now, certain defendants object that a proper case, showing the right of plaintiff to compel the defendants to interplead, is not stated in the complaint, and that it was error to allow the plaintiff to pay the money into court, and thereupon to be dismissed from the case; and it is contended that to dismiss the plaintiff from the case works a discontinuance of the action. The complaint shows that "conflicting claims," are made with reference to the deposit, and there can be no doubt of the right of plaintiff to maintain an action, under section 386 of the Code of Civil Procedure, to have them determined. The bank was not, however, a mere stakeholder. It was a party to a contract, which is shown by the certificate issued by it, by the statutes relating to such corporations, and by its by-laws and rules. The certificate was on its face payable "at the expiration of a term of not less than six months from the time that notice of demand of payment thereof shall have been given to said corporation in writing at its office." Of course, the plaintiff could not aver that any such notice or demand had been made by the owner of the certificate, for it averred that it was unable to determine such ownership. But when, as here, all parties come in, and, without objection, make up their pleadings and litigate their claims, we feel warranted in holding that all consent to the remedy sought, and to the payment into court and consequent dismissal as to plaintiff. They have consented to release plaintiff from the further performance of its contract, and have given it the position of a mere stakeholder.

The controversy is between beneficiaries and members of the defendant corporation, the Home Benefit Life Association, which was organized in 1880, and until 1894 was continuously engaged in a life insurance business upon the assessment plan. In 1891, at which time the corporation had a great many members and numerous contracts or policies outstanding, an act was passed by the legislature entitled "An act relating to life, health, accident and annuity or endowment insurance on the assessment plan and the conduct of the business of insurance" (St. 1891, p. 126), which contained the following provisions:

"Sec. 2. Corporations may be formed under the general laws of this state to carry on the business of mutual insurance upon the assessment plan, and shall be subject only to the provisions of this act. No such corporation shall issue contracts of insurance until at least two hundred (200) persons have applied, in writing, for membership or insurance therein, and have paid the treasurer of such corporation the sum of five thousand (5,000)

dollars. This sum shall be invested in bonds or securities, approved by the insurance commissioner of this state, or deposited in some bank in this state where it will earn interest. Said bonds or securities, or evidences of such deposit, shall be placed, through the insurance commissioner of this state, with the state treasurer, and the principal sum shall be held in trust for the contract holders of such corporation, with the right in the corporation to exchange such bonds, securities or evidence of bank deposit for others of like value. Such corporation shall also, as a condition precedent to issuing any contracts of insurance, obtain the written certificate of the insurance commissioner that it has complied with the requirements of this act; and that the name of the corporation is not the same as that of any other corporation of this or other states, as indicated by the insurance department reports in his office; nor shall the commissioner approve any name or title so closely resembling another as to mislead the public. No corporation formed hereunder shall have legal existence after one year from the date of its articles, unless its organization has been completed and business commenced; nor shall any corporation or individual solicit, or cause to be solicited, any business, until such corporation shall have complied with the provisions of section six hundred and thirty-three of the Political Code of this state.

"Sec. 3. Any existing corporation engaged in transacting the business of life, health, accident or endowment insurance, on the assessment plan, may reincorporate under the provisions of the Civil Code of this state, and under the provisions of this act: provided, that it shall not be obligatory upon such corporation to re-incorporate; and any such existing corporation may continue to exercise all rights, powers and privileges conferred by this act, the same as if incorporated hereunder."

In section 4 it is provided that the amounts specified in the contracts (policies) shall be paid as therein named, "and such indebtedness shall be a lien upon all the property of such corporation with priority over all indebtedness thereafter incurred, except as hereinafter provided in case of insolvency." Furthermore, a failure to make such payment within 30 days after notice provided would constitute a forfeiture of the right to do business.

In section 5 the corporation is required, within one year after the passage of the act, to create an emergency or reserve fund, not less than the largest benefit contracted to be paid, to be invested as directed in section 2. When the corporation should discontinue business, this fund was to be returned to the corporation, or disposed of "as may be determined by the superior court of the county."

The act contains no provision in regard to the insolvency of the corporation, but in section 10 a procedure is provided for revoking its authority to do business, when it is carrying on a fraudulent or unlawful business, is

not carrying out "its terms of contract," or cannot within three months from the notice of default pay its obligations.

Pursuant to the act, the corporation, on March 15, 1892, deposited with plaintiff \$5,000, and took a special certificate of deposit, and caused the same, through the insurance commissioner, to be placed in the state treasury, and plaintiff was immediately notified of the assignment to the state treasurer. In September, 1894, the corporation defendant ceased to do business, being then indebted to the beneficiaries of deceased members in the sum of \$55,000, and having more than 100 living members. Many suits were then pending against it, and some judgments had been obtained, and each sought to establish his right to the fund, which was about all the property the association had. This action was then brought against about 125 defendants, including the insurance association, the insurance commissioner, and the state treasurer. Answers and cross complaints were put in by some of the defendants. Mr. Spelling appeared and answered for a great number of them. Other attorneys subsequently appeared, and answered for some of these defendants, without having been substituted. As to Mrs. Mills and the defendant corporation, it is now contended on the part of Meisel and Gower, who were at the time also clients of Spelling, that they were not represented at the trial. Of course, this involves the proposition that Spelling was not authorized to appear as their attorney. It is now practically admitted that Meisel is but a representative of Mrs. Koneke, who is still represented by Spelling; and Gower, so far as the conduct of the case is concerned, seems also in accord, although having an apparently adverse claim.

It is always presumed, until the contrary appears, that an attorney is duly authorized to appear for and represent any parties for whom he assumes to act. This confidence, which underlies all judicial action in this country, rests not only upon a belief in the honor and integrity of the attorney, but upon the fact that he is a sworn officer of the court. There can scarcely be a more gross violation of the duty of an attorney than knowingly and willfully to appear for and represent a party to an action without authority. And it is especially so if the person for whom the unauthorized appearance is made has not been served, and does not know that an attempt is being made to obtain a judgment against him. In this case we are satisfied that the unauthorized appearance was unintentional, and, as we are assured, resulted from a mistake made in copying and filling out the rough draft of the answer. I think the judgment must be reversed on other grounds, and it is not necessary to pursue this matter further. Although the authority of an attorney is taken for granted, yet the court can always require evidence of his authorization, and in the trial court these matters may all be put right.



An appeal is taken by the defendant corporation. It is hinted by indirection that the attorney assuming to act for the corporation was not and could not have been authorized to appear for the association. If a direct charge to that effect were made, this court might feel called upon to require the attorney to show his employment. Unless parties are prepared to do so, such grave insinuations should not be made.

The insurance association on May 1, 1886, issued to one Samuel T. Murrey a certificate of membership by which, conditioned upon previous performance on the part of the member, it contracted to pay at his death \$6,000 to Mrs. Murrey. Murrey died September 29, 1886, and in 1888 Mrs. Murrey commenced an action against the corporation on the contract of insurance. Mrs. Murrey, then Mrs. Mills, recovered judgment May 17, 1892, for \$8,255.08. An appeal was taken to this court, and W. H. Chickering and F. C. Havens were sureties on the appeal bond. The judgment was affirmed, on appeal, December 26, 1894. After the remittitur was sent down the judgment was paid, \$4,310.10 being paid by the sureties. October 8, 1896, Chickering and Havens assigned to one Shoup all their right and title to the judgment and their claim and lien upon the assets of the corporation. Neither Shoup, Chickering, nor Havens was made defendant in the original complaint, nor does the record here show how Shoup became a party defendant, or was entitled to file a cross complaint, or to be heard in regard to the disposition of the fund. The court found, however, that Mrs. Mills "acquired a lien, securing her claim, arising, as aforesaid, upon the money paid into court by the plaintiff immediately upon its deposit with the plaintiff by said Home Benefit Life Association," etc. The fund, to the extent of \$4,310.10, with interest from the date of payment by Chickering and Havens, was awarded to Shoup. The residue was given to Mrs. Koneke. Mrs. Koneke recovered a judgment against the association March 23, 1896, establishing and foreclosing a lien upon the money in bank and upon the certificate of deposit. Under this decree a receiver was appointed to take and sell the property, and the certificate of deposit was actually delivered to the receiver, and such receiver then, under the order of the court, assigned and delivered the certificate to Mrs. Koneke, upon condition that she would credit the full amount due upon the certificate upon her judgment. This was done; but subsequently, by some means, the receiver again came into possession of the certificate, and formally sold it as personal property is sold under execution, and appellant Meisel became the purchaser. Both Koneke and Meisel now claim the entire fund, and each has appealed from the judgment. Meisel and Gower also appeal from the order refusing a new trial.

Quite a number of appellants were members of the corporation at the time it sus-

pended business. They contend that the fund was solely for the benefit of members, and not for the creditors, and therefore could not be subject to a lien for debts or to execution for the debts of the corporation. Many appellants are beneficiaries of deceased members. The aggregate amount of such claims is about \$55,000. They contend that the fund was for the benefit of such creditors, but not subject to execution or to the lien provided in section 4, but, in case the corporation became insolvent, it was to be disposed of by the court to the beneficiaries of the fund. They contend for a pro rata division among the creditors.

It is claimed that Gower has a lien second only to that of Mrs. Koneke. Shoup, of course, contends that his assignors were subrogated to the rights of Mrs. Mills, when, as sureties upon the appeal taken by the corporation, they were compelled to pay a portion of Mrs. Mills' judgment against the corporation. Their right to be thus subrogated is strenuously resisted. But, under the view I take of the matter, it is not necessary to determine the very many difficult and much argued points involved in the contention in regard to priority of the Mills and the Koneke claimants; for, in my judgment, neither has any claim to priority over the other or over other beneficiaries. Included in the act are health, accident, annuity, and endowment companies, as well as life insurance. In all except life insurance, the corporation contracts, in certain events, to pay money to living contract holders or members. The statute does not otherwise designate the purpose for which the fund is designed, than that it "shall be held in trust for the contract holders of such corporation, with the right in the corporation to exchange such bonds, securities, or evidence of bank deposits for others of like value." No mode is provided by which the fund can be subjected to the payment of any demands of the contract holders, nor is there a mode for replenishing the fund when it has once been depleted. In all the corporations which come within the purview of the act, a fund is provided for the payment of benefits, annuities, or insurances; that provided in the life insurance companies being, as the terms of the act indicate, by assessments upon the surviving members. Since, therefore, the special fund provided was to be held by the state treasurer for the benefit of contract holders, and no provision was made for a resort to it in any event, and no mode provided for keeping it up, it is to be presumed that it was not to be resorted to, under ordinary circumstances, by those whose claims are made payable only out of other specified funds. For this reason it was placed out of the reach of the officers of the corporation. It was set apart for a specific purpose, and taken out of the available assets of the corporation.

In section 5 of the act the corporation is

required to accumulate an emergency or reserve fund "not less than the largest benefit contracted to be paid any one person." It must be invested as directed in section 2, and the fund there provided may be added to and made part of the emergency or reserve fund. Of course, under this permit, it always would be made a part of the last-named fund, and when the largest benefit does not exceed \$5,000 there would be no other fund. The statute does not state for what emergency this fund is provided, nor does it provide a mode by which it can be used, except that when the corporation shall discontinue business this fund shall be returned to such corporation, or so disposed of as may be determined by the superior court of the county. It is evident that this fund, which might, and therefore would, include the fund provided for in section 2, was provided solely for the emergency arising when the corporation should cease to do business. This express provision as to the mode in which it could be made available negatives all claim that there was any other. Of course, the lien provided for in section 4 could not extend to it, notwithstanding the very general language of that section. In case of insolvency, by the very terms of the statute, the priority of the lien claimants should cease. If the corporation was not insolvent, there could be no occasion for the enforcement of a lien; for by the terms of the contract the beneficiary was to be paid by the assessment to be levied upon the death of a member. The failure of the corporation to pay, as provided by section 4, must be the insolvency provided for, as it is also the occasion upon which the funds can be resorted to as provided in section 5.

As to existing corporations and contracts, it may well be doubted whether the legislature could provide such a fund for the payment of benefits in a going concern. The scheme is the reverse of the tontine system. The contract holder first to die will have paid no death assessment. The one who survives to the last will pay many assessments. If the fund could be reached by the first beneficiary, contract holders will be forced to contribute contrary to the terms of their contracts. Whether the legislature could require the creation of a reserve fund to be available in case of insolvency is a different question. But if it can be used to pay benefits due from the corporation while solvent, instead of resorting to assessment, it impairs the obligation of contracts between the members and the corporation. It is not to be presumed that the legislature intended to do this. It is said that in the case of *Kruger v. Association*, 106 Cal. 98, 39 Pac. 213, this court held that the lien of such a claim did extend to this fund. The only appellant there was the state treasurer, who insisted that the suit was in effect an action against the state, and could not be maintained. Other points were not maturely considered. The court says that it does not

there appear that there were other contract holders; that is, that there were other beneficiaries. If there were no other beneficiaries, and the corporation had ceased to do business, why should plaintiff not have the money, as directed by the superior court? It was not necessary in such a case to establish a lien. I think no lien was created upon this fund. It was placed in the state treasury, subject to be disposed of only by the superior court upon the happening of the emergency provided for, to wit, when the corporation should cease to do business. If, when it ceased to do business, there were no outstanding liabilities, the fund would be returned to the corporation.

If these views are correct, it must follow that Mrs. Mills had no lien upon the fund to which the assignors of Shoup could be subrogated. It also must follow that Koneke had no lien to foreclose. Her judgment would, however, not having been appealed from, be conclusive of her rights so far as the corporation was concerned. Does it bind also the beneficiaries of deceased members? A judgment against a going corporation necessarily concludes every one, as to the property of the corporation, so far as the property can be reached by ordinary process. But when the corporation has ceased to do business, and the proceeding is to appropriate funds which are for the security of creditors only in case of insolvency, it is a different matter. The corporation, as such, has no interest in the question as to which creditor shall have the fund. The creditors have several interests, and must be brought in. Koneke's judgment establishing her lien does not, therefore, bind the other beneficiaries. The state treasurer could assert the existence of their claims, and ask that they be brought in for his protection, but he cannot represent them in a suit to dispose of the fund.

There is nothing in the contracts appearing here, nor in the rules and by-laws of the association, providing for any payments in any event by the corporation to the living contract holders. To divide the fund among the members per capita would not be to apply it for their benefit as contract holders. The fund must be for the purpose of securing, wholly or partially, in some event, the performance of their contracts by the corporation. In the case of endowments or annuities, it would then be divided among living contract holders. In this case it must go to their beneficiaries. They are the persons for whose benefit the contracts were made. Although the fund here is created in quite another mode, yet the rights of the claimants to an equal or pro rata distribution of it are precisely like those of the creditors in the case of *Winchester v. Mabury* (recently decided by this court) 55 Pac. 393. There being no provision giving any creditor priority or preference, it should be divided in proportion to their respective claims. The general creditors, of course, cannot share in the division, the fund



being for policy holders only. The judgment is reversed, and the cause remanded for a new trial in accordance with this opinion. If all the necessary parties are not before the court, they should be brought in.

We concur: HENSHAW, J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.

(123 Cal. 1)

**GLOCK v. HOWARD & WILSON COLONY CO.** (Sac. 367.)

(Supreme Court of California. Dec. 18, 1898.)

**VENDOR AND PURCHASER—LIQUIDATED DAMAGES—RESCISSION—RECOVERY OF PAYMENTS.**

1. Civ. Code, §§ 2306, 2307, declaring the damages recoverable for breach of a contract to convey land, apply only to the legal redress to which the parties are entitled, and do not affect their rights to equitable relief. Per Henshaw, McFarland, and Temple, JJ.

2. A vendor of land is entitled to retain money paid by the vendee on account of the price as liquidated damages, after the vendee's breach, whether they are so designated in the contract or not. Per Henshaw, McFarland, and Temple, JJ.

3. A purchaser of land in default for failure to pay the purchase price as stipulated cannot rescind the contract in the absence of equitable grounds entitling him so to do, so as to entitle him to recover installments paid, without the vendor's consent. Per Henshaw, McFarland, and Temple, JJ.

4. Where the purchaser of land failed to pay within the stipulated time, which was declared to be of the essence of the contract, he cannot acquire a right to recover the payments made by a subsequent tender of the amount due, which the vendor refused, without showing equitable grounds excusing his breach of contract.

In bank. Appeal from superior court, Madera county.

Action by Charles A. Glock against the Howard & Wilson Colony Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

R. E. Rhodes, for appellant. R. L. Hargrove, for respondent.

**HENSHAW, J.** This action was brought to recover from the corporation defendant moneys paid by plaintiff on a contract for the purchase and sale of a tract of land situated in the then county of Fresno, now in the county of Madera. Plaintiff had judgment, and defendant appeals therefrom, and from the order denying its motion for a new trial. The appeal is supported by a bill of exceptions. The facts, briefly stated, are the following: On the 21st day of February, 1891, the defendant, as party of the first part, entered into a written agreement with the plaintiff, as the party of the second part, whereby said party of the first part agreed that upon the performance of the covenants to be kept by the plaintiff it would convey to him a tract of five acres of land situate in the county of Fresno, and certain water rights, all of which are fully described. Plaintiff was to pay therefor \$625, as fol-

lows: \$125 down, the receipt whereof was acknowledged; \$125 on or before February 21, 1892; and a like sum annually until and including February 21, 1895, with interest payable annually on all deferred payments at 6 per cent. per annum. Plaintiff, also, by the agreement, requested the defendant to plant the tract of land to fruit trees, and to cultivate them for three years from February 21, 1891, for all of which plaintiff was to pay \$375, as follows: \$62.50 on execution of the agreement, the receipt whereof was acknowledged, and a like sum semiannually on the 21st days of August and February, until and including August 21, 1892. Plaintiff further agreed to pay all taxes, state and local, and all water rates and dues, assessed or due and payable on said property from and after the date of the agreement. Time was made of the essence of the contract, and performance by the plaintiff was made a condition precedent whereof depended the agreement of defendant to convey; and, if plaintiff failed to perform his covenants, the party of the first part (defendant) was to be released from all obligations to convey, and plaintiff was to forfeit all moneys paid and all rights under the agreement, and the sums so paid were to be treated, not as a penalty, but as liquidated damages. Plaintiff paid on account of the agreement the sum of \$382.50, viz. two payments of \$125 and interest, as provided in the agreement, and two payments of \$62.50 and interest, on account of the planting and care of the trees, which sums were accepted by defendant. On the 9th day of August, 1895, plaintiff, in writing, tendered to defendant all sums due the latter on account of the agreement, and offered to comply with all the terms and conditions of his contract, demanded a deed, and tendered to defendant a deed for its execution. The tender also contained a further demand that, if defendant refused to accept the sum of \$1,000, tendered, and to execute a deed, defendant return to plaintiff the sum of \$382.50 paid it on account of the contract, all of which was refused by defendant. Plaintiff has never been in possession of the property, or any part thereof.

The complaint contains two counts. The foregoing facts are pleaded in the first count. By the second count the plaintiff seeks a recovery as for money had and received. By the first count, which seems to have been framed upon some theory of equitable relief, the averments of the plaintiff amount to this, and to no more: That he entered into a contract for the purchase of land; that he made certain payments according to his covenants; that he defaulted in later payments; that 3½ years after his first default, and more than 6 months after default in the time of final payment, he made a tender to defendant of the full amount due under the contract, which tender was refused; that by the express declaration of the parties time was made essential in the contract, and that payment of the

moneys upon time was a condition precedent to the right to a conveyance; that, for failure to pay upon time, defendant, by the terms of the agreement, is released from all obligation to convey, and the moneys paid are forfeited as liquidated damages; yet, notwithstanding these covenants, by a tender made and refused long after plaintiff's default, defendant is itself in some way placed in default, and plaintiff may recover his money. This, moreover, without the slightest averment or the shadowiest proof in excuse of plaintiff's breach of contract. The case stands, then, upon this proposition: that under a contract for the sale of realty, where time is of the essence, a vendee, after breach of covenant to pay, performance of which is made a condition precedent to his right to a conveyance, may, without excusing his default, by a tender of the amount due, acquire some legal or equitable right which warrants his recovery of the moneys he has paid. Respondent insists that his position finds abundant support in the line of cases beginning with *Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 749. The trial judge evidently entertained the same view. If this be the law, it is important that it be so declared without equivocation. If it be not, then it is equally important that the misunderstanding and doubts of the profession should be promptly removed. Land is one of the very highest forms of property. Contracts for its sale are required to be solemnly evidenced by signed writings. The value of such sales amounts to untold millions of dollars annually. It becomes a matter of the utmost consequence, then, that the reciprocal rights and duties of vendors and vendees under the conditions and covenants usually found in such contracts—conditions and covenants in such general use that their employment may be said to be universal—should be clearly defined and understood. It is in this view alone that this case becomes important, for the amount involved is only about \$380. But the doubts which seem to exist concerning legal and equitable rights under such contracts demand for their removal a somewhat extended examination of the subject.

It may be as well at the outset to quote the code provisions bearing upon the question. Their consideration will arise as the discussion proceeds. Civ. Code, § 3306: "The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto in case of bad faith the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." Id. § 3307: "The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the

amount which would have been due to the seller under the contract over the value of the property to him." Id. § 1670: "Every contract by which the amount of damage to be paid, or other compensation to be made for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." Id. § 1671: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage." Id. § 3384: "Except as otherwise provided in this article, the specific performance of an obligation may be compelled." Id. § 3387: "It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and that the breach of an agreement to transfer personal property can be thus relieved." Id. § 3389: "A contract, otherwise proper to be specifically enforced, may be thus enforced, though a penalty is imposed or the damages are liquidated for its breach, and the party in default is willing to pay the same."

Of any contract for the sale of land there may be a breach, either by the vendee refusing to pay, or by the vendor refusing to convey. Actions at law for the breach of contracts are as old as the law itself. As the common law long antedated the system of equity jurisprudence, there was a time when the only recovery available to the injured party was a recovery in damages,—money, for money is the only recompense which the law affords for a private injury. The establishment of equity jurisprudence afforded a different redress, one unknown to the law. Acting upon the wrongdoer, it forced him specifically to perform his contract. This, however, but increased the suitor's remedies, and left it optional with him in proper cases either to rest upon his legal action for damages, or to seek in equity the relief of compulsory performance. Even so, however, there still were, and there must always be, breaches of such contracts for which equity is powerless to afford redress. Thus, if a vendor contracts to convey land to which he has no title, equity cannot compel him to obtain title, and the vendee must of necessity be limited to his action at law. If there were not such an action, and a rule and measure of damage under it, he would be remediless. Again, it is to be remembered that equity, designed but to supplement the deficiencies of the law, will withhold its aid where the law affords full redress. For both these classes of cases, then,—that is to say, for those where the law is sufficient, and for those where equity is powerless to aid,—the injured party must seek legal redress.

The two sections of the Code first above quoted deal with the legal redress to which the party is entitled, either at his option or



from the compulsion of circumstances. It is true that under our system the court of law and the court of equity are merged into one, and that a party is awarded such legal or equitable redress as a simple pleading of ultimate facts shows that he merits; but, nevertheless, the distinctions between the kinds of redress and the modes in which they are administered cannot and are not sought to be obliterated. It was well recognized, however, that the damages of the law afforded inadequate compensation for the breach of many contracts. In contracts for the sale of chattels, for a breach the vendee usually (though not always) received adequate compensation in money, since with the money he could buy another article identical in kind and value. In contracts for the sale of land it was otherwise. No other piece of land upon the earth could duplicate that which the purchaser desired. Pretium affectionis was an important element of the vendee's contract, and this could not be measured. A pecuniary recompense, then, failed to meet the case. On the part of the vendor, since he is selling his land for a money price, it would appear logically that an action at law for the recovery of damages would answer the requirements of his case upon a breach by the vendee, and that he should not be allowed, therefore, to resort to equity for relief. But mutuality is an essential element in contracts for which specific performance may be decreed. In other words, before a contract may be specifically enforced against the one party to it, it must be enforceable against the other; and, moreover, as was said by Lord Eldon in expressing his dissatisfaction with the relief against forfeitures granted by equity: "The result of experience is that, where a man, having contracted to sell his estate, is placed in this situation: that he cannot know whether he is to receive the price when it ought to be paid,—the very circumstance that the condition is not performed at the time stipulated may prove his ruin, notwithstanding all the court can offer as compensation." *Hill v. Barclay*, 18 Ves. 59. It may frequently be of the utmost consequence to the vendor that he should have the right to enforce the contract and receive payment for his land in money, since he may much prefer the full purchase price to retaining the estate and receiving smaller monetary compensation by way of damages. And, finally, it is to be considered that during the life of such contracts the vendor foregoes his right to convey to another. He may thus lose an opportunity to make an advantageous sale, and, while this right is admittedly valuable, it is extremely difficult to put a price upon it. For these reasons the equitable action for specific performance is as available to the vendor as to the vendee. *Pom. Spec. Perf.* §§ 6-12.

From this difficulty in meting out adequate compensation at law arose two things: First. The parties, by convention, were allowed to

agree upon the value of the injury occasioned by the breach as liquidated or stipulated damages. These damages were not only recoverable at law, but courts of equity would not and could not relieve against them. *Story, Eq. Jur.* § 1318; *Williams v. Green*, 14 Ark. 315; *Westerman v. Means*, 12 Pa. St. 97. Second. Equity immediately took cognizance of the violation of such contracts, and made whole the injured party by decreeing specific performance. It also did the same in the case of contracts for the sale of chattels, where the peculiar circumstances warranted it. Thus, in *Senter v. Davis*, 38 Cal. 450, it is said: "The jurisdiction of a court of equity to decree specific performance does not turn at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach complained of can be adequately compensated in damages. If it can, the plaintiff's remedy is at law only; if not, he may go into a court of equity, which will grant full redress by compelling specific performance on the part of the defendant. Accordingly, while it is a general rule that contracts for the sale and transfer of personal property will not be specifically enforced, yet, if there are circumstances in view of which a judgment for damages would fall short of the redress which the plaintiff's situation demands, \* \* \* equity will decree specific performance." In *Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1085, this court was again called upon to consider the question, and decreed the return of specific stock pledged, refusing to allow compensation in money in lieu thereof, because of the peculiar circumstances which rendered damages inadequate and equitable relief necessary. But the presumption is that damages are adequate for the breach of a contract to transfer personal property, and are inadequate, for the reasons we have been considering, for the breach of a contract to convey real property. This is the precise declaration of section 3387 of our Civil Code. It presents the sole reason why liquidated damages are countenanced under section 1671 of the Civil Code, and specific performance is decreed. In further confirmation is found section 3389 of the Civil Code, recognizing the universal rule that liquidated damages are proper in such contracts, and, notwithstanding the fact that damages may be thus stipulated, specific performance will be decreed. This declaration was to set at rest a question which somewhat vexed the courts, namely, that, as the parties made their damages certain by stipulation, uncertainty, which alone justified the interposition of equity, was removed, and therefore only redress at law remained. *Whitney v. Stone*, 23 Cal. 275; *Bagley v. Peddie*, 16 N. Y. 469; *Williams v. Dakin*, 22 Wend. 201; *Hahn v. Society*, 42 Md. 460; *Chilliner v. Chilliner*, 2 Ves. Sr. 528; *McCaull v. Braham*, 16 Fed. 37; *Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419. Thus, so far as this state is concern-

ed, the question is concluded by the Code, and a party may either rest satisfied with a recovery of stipulated damages, or, waiving them, may resort to equity for specific performance.

One other point invites brief attention before application is made of these well-settled principles to the contract and facts in the case at bar. In this, as is usual in such contracts, time is expressly declared to be essential. It was always considered essential at law, but it has sometimes been said that equity will not or does not so regard it. This, however, means no more than that, if equitable grounds in excuse of the default are shown, equity, to avoid forfeiture, will relieve the vendee, and uphold a tender made after time. It is the more willing to do this since, the price having been agreed upon, the vendor can usually be compensated for the delay by adding interest. In no other sense is the expression true. Where time is expressly made of the essence of the contract, equity will not ignore the provision, for equity follows the law, and will neither make a new contract for the parties nor violate that which they have freely and advisedly entered into. *Grey v. Tubbs*, 43 Cal. 359; *Martin v. Morgan*, 87 Cal. 203, 25 Pac. 350; *Woodruff v. Water Co.*, 87 Cal. 275, 25 Pac. 354; *Vorwerk v. Nolte*, 87 Cal. 236, 25 Pac. 412; *Newton v. Hull*, 90 Cal. 487, 27 Pac. 429; *Bennett v. Hyde*, 92 Cal. 131, 28 Pac. 104. The equitable rule where time is not of the essence is succinctly stated in section 1492 of the Civil Code. Now, in such contracts, upon a breach by the vendor of the covenant to convey, what courses are open to the vendee? Obviously these: He may stand upon the contract, and sue at law for damages for the breach. Here his recovery will be governed by section 3306 of the Civil Code. Or, still standing upon his contract, he may go into equity, seeking its specific performance; or he may sue at law to recover the amount that may have been agreed upon as stipulated damages; or, finally, treating the vendor's breach as an abandonment, he may himself abandon it, when, the contract having thus come to an end, he may sue at law to recover what he has paid, in an action for money had and received, for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise. Upon the other hand, after the vendee's breach of the covenant to pay, what are the vendor's rights? First, to stand upon the terms of his contract, and sue for its breach under section 3307 of the Civil Code; second, still resting upon the contract, he may remain inactive, yet retain to his own use the moneys paid by the vendee, so that it is of no moment whether or not the contract declares that such moneys shall upon the breach be forfeited as liquidated damages; third, going into equity, still upon his contract, he may seek specific performance; or, finally, if his generosity prompts him so

to do, he may agree with the vendee for a mutual abandonment and rescission, in which last case, and in which last case alone, the vendee in default would be entitled to a repayment of his money. One thing more he may do, but this is rather incidental to the fact that he has made the contract than a right growing out of it. It has heretofore been said that in certain cases equity will relieve the vendee from the effect of a breach of his covenant to pay upon a day certain. When such relief is granted, it is only after a showing of fraud, mistake, surprise, or other ground of purely equitable cognizance, excusing the breach. Now, as the vendee in default may maintain such an action, so may the vendor call the defaulting vendee into a court of equity, and compel him to show why all his rights under the contract should not be held to be at an end. The vendor, when he prosecutes such an action, does so to cut off the possibility of any future claim by the vendee to equitable relief, which might embarrass or cloud his title. In some forums this is designated an action for rescission. With us it is commonly called an action to foreclose the vendee's rights. *Keller v. Lewis*, 53 Cal. 113; *Fairchild v. Mullan*, 90 Cal. 190, 27 Pac. 201.

In the foregoing statement of the rights of the vendor and vendee it has been said that the vendee, upon the breach of the vendor, is entitled to recover the moneys stipulated as liquidated damages. The foregoing discussion sets forth the reason: the inability of the law to afford adequate compensation in money, and the right consequently accorded to the contracting parties to stipulate what should be the measure and amount of the detriment caused by the default,—a reason recognized by sections 3387 and 3389 of the Civil Code. In the case of the vendor, where the vendee's breach is merely a failure to pay money, under the general principle that damages for a failure to pay money can usually be accurately measured, and compensation made by the allowance of interest, courts have inclined to disallow stipulated damages to the vendor, and have limited him to compensatory damages actually proved. But, where the breach of the vendee is of some act not thus readily to be measured, stipulated damages will be allowed the vendor. *Tinglee v. Cutler*, 7 Conn. 297; *Leggett v. Insurance Co.*, 53 N. Y. 394; *Decamp v. Feay, & Serg. & R.* 322; *Remington v. Irwin*, 14 Pa. St. 143; *Grigg v. Landis*, 21 N. J. Eq. 494. But while equity will thus, in the cases indicated, refuse to recognize stipulated damages, and will often permit a vendee in default to excuse his breach as to the time of payment, and, after excuse made, compel the vendor to perform, it does not do so arbitrarily. The vendee must always show equitable grounds for relief before equity will interpose. *Pom. Spec. Perf.* § 335. When an equitable showing is not made to excuse the breach, the vendor has the right in eq-



uity, as he always has at law, to retain the moneys paid by the vendee. Therefore we have said that it matters not in such contracts that the parties have declared that the vendor may retain the moneys paid as stipulated damages. The name which the parties thus give does not alter the fact nor change the vendor's rights. If it be said that the clause for stipulated damages is void, still the vendor is entitled to retain the money. Thus, in *Hansbrough v. Peck*, 5 Wall. 497, the supreme court of the United States, having under consideration this identical question, say: "No rule in respect to the contract is better settled than this: that the party who has advanced money or done an act in part performance of the agreement, and then stops short, and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done." In precise illustration of the proposition may be quoted the language of the learned Chancellor Walworth in *Edgerton v. Peckham*, 11 Paige, 352: "The contract, it is true, contains a general provision that, if default be made in either of the payments, Strobeck shall forfeit all the previous payments, and give up the possession of the premises. This, however, is but the legal effect of the contract without such a provision; for, if no such provision had been contained in the agreement, the defendant might have brought an action of ejectment to recover the possession of the premises, which ejectment suit this court would not have restrained, except upon the terms of paying the balance of the purchase money and the costs of suit. Nor could the payments already made pursuant to the terms of the contract have been recovered back if the vendee had refused to complete his purchase, even if this clause of forfeiture had not been inserted in the contract. The question here presented, then, is whether this clause was intended by the parties to deprive the purchaser of all legal and equitable right to the premises, or to the previous payments, if for any cause the last payment should not be made at the precise moment when it became due and payable; and, if so, whether it is not the duty of this court to relieve against such a forfeiture." Prof. Pomeroy, in his *Equity Jurisprudence* (section 455), thus considers the matter: "Where an ordinary contract for the sale of land is so drawn that the vendee's estate, interest, and right under it are liable to be forfeited and lost upon his failure to pay the price at the time specified, the question whether equity will relieve him ought to be a very plain and simple one; but in the face of the authorities it is impossible to be answered in any general and certain manner. I shall therefore simply state the general conclusion derived from the decided cases. It is well settled that where the parties have

so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default. With respect to this rule there is no doubt. The only difficulty is in determining when time has thus been made essential. It is also equally certain that when the contract is made to depend upon a condition precedent,—in other words, when no right shall vest until certain acts have been done; as, for example, until the vendee has paid certain sums at certain specified times,—then, also, a court of equity will not relieve the vendee against the forfeiture incurred by a breach of such condition precedent."

It has been said that after the vendee's breach the vendor may agree to a mutual abandonment and rescission, in which last instance, and in which alone, the vendee in default would be entitled to a repayment of his money. Such was the precise condition of affairs pleaded, and not denied, in *Drew v. Pedlar*, where it is said: "Both the complaint and answer admitted that the agreement had been rescinded and annulled by the parties, and, as the judgment on the pleadings partly rests upon this fact, it is conclusive evidence of the fact." And again: "From the time the defendants elected to rescind the contract, or to consider and treat it as rescinded, it was their duty to refund the money they had received under the contract, and no demand before suit was necessary." Such, indeed, is the law, and, if *Drew v. Pedlar* be confined to cases in the condition thus represented,—that is to say, to cases where the vendor has rescinded after vendee's breach,—then no misunderstanding need arise, and no confusion will result. What is there said as to the covenant for liquidated damages being void is, as we have seen, of no consequence in contracts such as that and the one at bar, where the liquidated damages are expressed as the moneys paid by the vendee; for in all such cases, as has been shown, the vendor is entitled to retain these moneys, whether designated as liquidated damages or not. *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774, affords a typical instance of such rescission by the vendor. There the vendee was in default, but the vendor elected to rescind, and, notwithstanding the default, refunded to the real-estate agent the moneys that had been paid by the vendee under the contract. The action was against the real-estate agent, and it was correctly decided—and, indeed, over the decision there could be no question—that in such a case the vendee is entitled to recover his money. But while it is essentially true that in case of a rescission the vendee may demand that he be restored to his original condition, it does not follow that a vendor who refuses to convey after such breach by the vendee thereby rescinds. To the contrary, in refusing to convey after the vendee's default he is not treating the contract as at an end, but is expressly

standing upon it, and basing his rights upon its terms, covenants, and conditions. The misleading feature in *Drew v. Pedlar* comes from the long statement of facts, from which it appears that all the plaintiff vendee did was to make tender long after his default, which tender the vendor refused to accept. But the vendee likewise pleaded a mutual abandonment and rescission, and, as appears from the opinion, the pleading as to these matters was not denied. It would be to the last degree unjust and inequitable to allow a vendee, after his default under such a contract, to put the vendor in default by a mere tender. The practical effect of such a rule would be that a vendee, without risk, could speculate indefinitely in the land of the unfortunate vendor. The vendee would enter into a contract in which time would be declared of the essence, and stipulate under condition precedent, as in this case, to make payment at a certain time. Failing to make payment, he would, three months, six months, one year, or, as in this case, over three years, after the date of the failure, make an offer to perform, and, if the land had risen in value, according to the theory of respondent here, could compel performance; but in every case he could recover the moneys paid. Lord Loughborough, in *Lloyd v. Collett*, 4 Brown, Ch. 469, well says: "There is nothing of more importance than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed, and that it should certainly be known when a man is bound and when he is not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say that time is so essential that in no case in which the day has been by any means suffered to lapse the court would relieve against it, and decree performance. The conduct of the parties, inevitable accident, etc., might induce the court to relieve. But it is a different thing to say that the appointment of a day is to have no effect at all, and that it is not in the power of the parties to contract that, if the agreement is not executed at a particular time, they shall be at liberty to rescind it. \* \* \* I want a case to prove that, where nothing has been done by the parties, this court will hold, in a contract of buying and selling, a rule that the time is not an essential part of the contract. Here no step had been taken from the day of the sale for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do? An equity arising out of one's own neglect! It is a singular head of equity." In *Bradford v. Parkhurst*, 96 Cal. 102, 30 Pac. 1106, this court, having under consideration *Drew v. Pedlar*, said: "That case does not go to the extent of holding that a vendee can elect to consider the contract at an end, and recover what he has paid, when the vendor has not abandoned the contract." In *Merrill v. Mer-*

rill, 103 Cal. 287, 35 Pac. 768, and 37 Pac. 592, *Drew v. Pedlar* was again under review, and it is said: "Nor do I think it was held in any of the cases cited that a rescission was effected simply by the act of a vendor in claiming a forfeiture. In some of the cases the contract provided that the vendor might rescind upon default of the vendee. In such cases the rescission is by consent of the parties. In others it seems to be held that when the vendor refuses further performance, and claims the damages according to the contract, he abandons the contract, and thereupon the vendee may also abandon it, and reclaim his money. Whether the conclusion be correct or not is not a question here. Unless the rescission is by consent, it is difficult to understand how it has been brought about; for, as respondent justly says, it is, in effect, enacted in section 1691 of the Civil Code that rescission cannot be otherwise effected without a compliance with that section. The idea must be that the abandonment of the contract by the vendor is equivalent to a claim of rescission on his part which may be acquiesced in by the vendee. In *Cleary v. Folger*, 84 Cal. 316, 24 Pac. 280, it was simply held that the vendor was also in default, in that he did not tender a deed on the very day it was due on the contract. Both being in default, either could treat the contract as rescinded. It was not there held that when a vendor refuses to complete performance because of a breach on the part of the vendee, and claims damages as stipulated in the contract, he thereby rescinds or consents to a rescission. It has been said in several cases that this doctrine was announced in *Drew v. Pedlar*, 87 Cal. 449, 25 Pac. 749. Perhaps it does so hold, but such conclusion seems to be based in that case partly upon the pleadings in which both parties recognize the fact of a rescission; in other words, it was a rescission by mutual consent."

In the case at bar the payment of the final amount under the contract, at the time and in the manner agreed upon, was a condition precedent to the right of the vendee to demand a conveyance. Upon his failure to make payment the vendee committed a breach, and no affirmative act upon the part of the vendor was necessary to bring about this result. Months after, and without any equitable showing to relieve the default, the vendee makes tender, and because of its refusal claims the right of recovery. But the vendor, in refusing to accept the tender and to repay the money, is neither violating his contract nor rescinding it, nor treating it as at an end. He is standing squarely upon its terms. The vendee is within the rule declared by *Pomeroy*, and above quoted. The contract is made to depend upon a condition precedent. By its terms no right is to vest in the vendee until certain acts of payment have been done by him, and a court of equity no more than a court at law will relieve a vendee, under such circumstances, from the penalties arising from the breach of such condi-



tion, in the absence of an equitable showing to excuse his default. None is here even attempted to be made. It follows that the judgment and order should be reversed, and the cause remanded, and it is ordered accordingly.

We concur: McFARLAND, J.; TEMPLE, J.

HARRISON, J. I concur in reversing the judgment and order appealed from upon the following grounds:

The plaintiff and the defendant entered into a written agreement February 21, 1891, whereby the defendant agreed that "in consideration of, subject to, and upon the full and due performance of the covenants and agreements on the part of the party of the second part hereinbefore contained," it would convey to the plaintiff a certain tract of land; and whereby the plaintiff, in consideration of said agreement, agreed to pay to the defendant the sum of \$625, as follows: \$125 upon the execution and delivery of the agreement, \$125 on or before the 21st day of February, 1892, and \$125 on or before the 21st day of each succeeding February, the last of said payments to be made on or before the 21st day of February, 1895, with interest at the rate of 6 per cent., payable annually on the 21st day of February of each year on each and all deferred payments. The agreement also contained the following provisions: "It is expressly understood and agreed between the parties hereto that in all matters and things hereunder to be done, and all payments hereunder to be made, time is and shall be of the very essence of this agreement. The due performance of all covenants and agreements on the part of the party of the second part is a condition precedent, whereon depends the performance of the agreements on the part of the party of the first part. In the event of a failure of the party of the second part to comply with the covenants and agreements, or any thereof, on his part entered into, the party of the first part shall be released from all obligations in law or in equity to transfer and convey said properties, or any thereof, and the said party of the second part shall forfeit all rights under this agreement, and all rights to any and all moneys which he shall theretofore have paid hereunder, as liquidated damages for such default, and not as a penalty." Other provisions, not necessary to be considered herein, are also found in the agreement. At the execution of the instrument the plaintiff paid to the defendant the sum of \$125 therein provided for, and on February 21, 1892, paid the further sum of \$125, together with \$7.50 for interest. No other installment of the purchase price of the land, or interest thereon, was paid. The plaintiff did not enter into possession of the land. August 9, 1895, the plaintiff tendered to the defendant the full amount then unpaid upon the said agreement, and demanded a conveyance of the land, tendering at the same time a deed for execu-

tion proper in form. The defendant refused to make the deed, and thereupon the plaintiff brought the present action to recover the money which he had paid to the defendant under the provisions of the contract. Judgment was rendered in favor of the plaintiff as prayed for in his complaint, from which the defendant has appealed.

Under the agreement between the plaintiff and the defendant neither could maintain an action thereon against the other without having performed all of the conditions previously to be performed by himself. The plaintiff could not maintain an action for a conveyance of the land until he had paid or tendered the money which he was to pay therefor. By the terms of the agreement he agreed to pay certain installments of the purchase price at designated times, and although the defendant could have brought an action for each of these installments except the last, at its maturity, without tendering a conveyance, yet, if it failed to bring such action until after the maturity of the last installment, it could not maintain an action therefor without a previous tender of the conveyance. *McCroskey v. Ladd*, 96 Cal. 455, 31 Pac. 558. Each of the parties to the contract had the right to compel the other to comply with its terms, and any action of this nature would be an action upon the contract, and to enforce it according to its terms. A contract for the purchase and sale of real estate does not differ from any other contract so far as the rights of the parties under its terms are affected. Parties have the right to make their contracts in such form and with such terms as they desire, and it is the function of courts to construe and enforce them as they have been made by the parties. Each has the right to the enforcement of the obligations of the other, and neither can free himself from his obligation against the will of the other, so long as the contract remains in force. Whether the action be to enforce the contract or to recover damages for its breach, it is incumbent upon the plaintiff in such action to show a performance on his part of all the acts required to be performed by him before he can call upon the other to comply with his part of the agreement, or to respond in damages for a failure so to do. *Easton v. Montgomery*, 90 Cal. 307, 27 Pac. 280.

There have been many cases before this court involving the rights of parties to agreements for the sale and purchase of real estate, in which it has been held that after the parties have rescinded the agreement, or mutually agreed to abandon it, the vendee may recover the money which he had paid in part performance of his contract (*Drew v. Pedlar*, 87 Cal. 443, 25 Pac. 749; *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774; *Shively v. Water Co.*, 99 Cal. 259, 33 Pac. 848); but it has never been held that while the contract was insisted upon by the vendor, and he had done no act by which it might be contended that he had abandoned the contract, or was

In any respect in default, the vendee could recover the money paid by him in part performance of the contract. On the contrary, it has been held that the vendee, who was himself in default in the payment of a portion of the money, could not, against the will of the vendor, repudiate the contract, and recover the portion already paid. *Bradford v. Parkhurst*, 96 Cal. 102, 30 Pac. 1106; *Joyce v. Shafer*, 97 Cal. 335, 32 Pac. 320; *Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857. In the present case the parties have made their agreement in clear and definite terms. The plaintiff agreed with the defendant that he would pay to it certain sums of money at certain times, and the agreement of the defendant is equally explicit and clear that in consideration of the full and due performance of the agreements on the part of the plaintiff it would execute to him a conveyance of the land. That there might be no misunderstanding of these respective obligations, they further declared that it was expressly understood and agreed between them that in all matters and things to be done, and all payments to be made, by virtue of the contract, "time shall be of the very essence of this agreement"; and, further, that the due performance of all covenants and agreements on the part of the plaintiff was a condition precedent to the obligation of the defendant to perform its agreement. The plaintiff does not claim that he performed his covenants and agreements according to the terms of the contract, but by express allegation shows that he did not do so; nor does he offer any excuse for their nonperformance. Neither does he allege nor contend that the defendant has violated any of the obligations assumed by it under the contract. By the terms of the agreement the defendant was not required to make the conveyance except upon the full payment of the purchase price by the 21st of February, 1895, and it is not alleged in the complaint that such purchase price was then paid, or that it was tendered until many months thereafter. The plaintiff could not maintain an action against the defendant to recover the money paid by him, unless there had been a breach of the contract by the defendant; and the defendant was not guilty of a breach of its obligation by failing to execute the conveyance, when the plaintiff was himself in default, or by refusing to comply with the demand of the plaintiff made many months after he had lost his right to the enforcement of the contract. Section 1490, Civ. Code, provides: "Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterwards." The time for the performance of the obligation by the plaintiff was fixed by the contract, and under the provisions of this section he was required to perform his contract at that time, and not before or afterwards. As the contract also declared that time was of the essence of the obligation, the provisions of

section 1492, Civ. Code, are inapplicable, and the offer of performance subsequent to the time fixed by the contract was unavailing.

The provision that in case of default by the plaintiff to comply with his agreement he should forfeit his right to whatever moneys he might theretofore have paid, and that the defendant should be released from all obligation to convey the property, was but a declaration in express terms of what would have been the legal rights of the parties without such provision. The plaintiff had agreed to pay the money to the defendant as a condition precedent to his right to demand a conveyance of the land, and as the consideration for the defendant's agreement to make the conveyance, and he could not, by his mere default, become entitled to repossess himself of the money which he had paid under this express agreement. Whether the money thus paid was styled by the parties as penalty, or forfeiture, or liquidated damages, is immaterial. This provision was not an executory agreement for "damage to be paid or compensation to be made for the breach of an obligation," for which provision is made in section 1670, Civ. Code, but the money therein referred to was money that had been paid by the plaintiff in discharge of an obligation which he had assumed, and the right of the defendant to receive and retain it was not impaired by the terms in which it was styled in the agreement.

We concur: GAROUTTE, J.; VAN FLEET, J.

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123 Cal. 93

HAMILTON v. BELL et al. (Sac. 432.)

(Supreme Court of California. Dec. 20, 1898.)

ATTACHMENT—REDELIVERY BOND—NONSUIT—RELEASE OF SURETIES.

Code Civ. Proc. § 553, provides that in attachment, if the defendant recover judgment, any undertaking received in the action and all property attached must be delivered to the defendant and "the order of attachment shall be discharged." Section 554 prescribes the proceeding to be taken to release attached property by giving a bond that "in case the plaintiff recover judgment in the action" the property shall be redelivered, or the value thereof paid, to the proper officer. *Held*, that a nonsuit discharges the sureties on such bond, notwithstanding the judgment of nonsuit is reversed on appeal and plaintiff finally recovers "judgment in the action" on a retrial.

Commissioners' decision. Department 1. Appeal from superior court, Placer county.

Action by George W. Hamilton against M. C. Bell and another. From a judgment for plaintiff, defendants appeal. Reversed.

John M. Fulweiler, for appellants. Jo Hamilton and G. W. Hamilton, for respondents.

HAYNES, C. The question for decision arises out of the following facts: In May, 1891, the Auburn Opera House & Pavilion Association brought suit against George M. Hill to recover the sum of \$1,000, claimed to be due upon contract, and caused a writ of attachment to be issued therein under which money and other property were attached. On September 22, 1891, on the application of the defendant in said action, the court fixed the amount of the bond or undertaking for the redelivery of the attached property at \$1,500, and the defendants in this action became the sureties on such bond, and the attached property was released and delivered to the defendant. In November, 1891, the cause came on for trial, and at the conclusion of plaintiff's evidence the court granted defendant's motion for a nonsuit. From that judgment and an order denying a new trial the plaintiff appealed, and this court on March 9, 1893, reversed said judgment and order. 32 Pac. 587. On January 9, 1895, said cause was again tried, and the plaintiff had judgment for the full amount of its claim and interest. Thereafter, in September, 1895, execution was issued thereon, and was returned wholly unsatisfied, and on November 25, 1895, said Auburn Opera House & Pavilion Association assigned to George W. Hamilton, the plaintiff in this action, its said judgment and said redelivery bond, and said Hamilton, after due demand for the delivery of said property or payment of its value, brought this action against the sureties on said bond, and obtained judgment against them, and this appeal is from that judgment and an order denying a new trial.

Appellants contend that the judgment of nonsuit entered against the plaintiff in the action in which the attachment was issued

operated to discharge them from all liability upon said bond which was given to release the property attached in that case. They base this contention upon section 553 of the Code of Civil Procedure, which provides: "If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and moneys collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent. The order of attachment shall be discharged and the property released therefrom." Section 554, Code Civ. Proc., prescribes the proceedings to be taken to release property seized under the writ from the operation of the attachment, which is accomplished by giving the undertaking prescribed in section 555, Id., in an amount fixed by the court, conditioned "to the effect, that in case the plaintiff recover judgment in the action, defendant will, on demand, re-deliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or, in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released." Respondent's contention is, in effect, that the judgment of nonsuit having been reversed and the cause remanded for a new trial, and having obtained a judgment upon such new trial, it was a judgment recovered "in the action" in which the undertaking was given, and that therefore the defendants are liable upon the undertaking. But, while it is true that the judgment rendered upon the second trial was rendered in the same action, it does not follow that the liability of the sureties upon said undertaking continued until the second judgment was rendered. Indeed, it is quite clear that it did not. In *Loveland v. Mining Co.*, 76 Cal. 562, 18 Pac. 682, it was held that, "an attachment being merely a creature of statute, its existence and operation in any case can continue no longer than the statute provides it may"; and it therefore devolves upon the respondent here to point out some provision of the statute, sustaining the existence of the attachment after judgment against the plaintiff, which was not complied with. In *Loveland v. Mining Co.*, supra, an attachment in an action in justice's court was levied upon stock owned by the defendant in a corporation. Upon the trial judgment was rendered against the plaintiff, and he appealed to the superior court, where he recovered judgment. After the appeal was taken, and before judgment, the defendant sold the stock to a third party, and it was duly transferred on the books of the corporation. After judgment in superior court execution was issued and levied upon the shares which had been attached, and they were sold. This court held that the judgment against the plaintiff in justice's court dissolved the attachment, and that the defendant had legal right to sell his stock. The fact that in the case at bar the appellants



gave an undertaking for the redelivery of the property to the sheriff in case the opera house association should recover judgment against the defendant in that action, or would pay the value of the property so released, does not affect the question. The dissolution of the attachment by the judgment of nonsuit discharged the obligation of the sureties upon the bond. *Drake, Attachm.* §§ 341b-341d, and cases there cited. In *Gass v. Williams*, 46 Ind. 253, it was held that "where an attachment was dissolved all the proceedings in attachment are quashed and become of no effect, and a delivery bond in such case falls with the writ on which it is based." The conditions of the bond in that case were the same as in this. The supreme court of the United States, in *Hagan v. Lucas*, 10 Pet. 400, 403, held that property once levied on remains in the custody of the law, and is not liable to be taken under another execution in the hands of a different officer, though it has been delivered into the possession of the claimant on his giving bond and security that he will deliver it to the officer if it shall be found subject to the execution. See, also, *Drake, Attachm.* § 331, and cases there cited. If the attached property had remained in the hands of the sheriff it is perfectly clear that upon judgment being rendered against the plaintiff it would have been the duty of that officer to surrender the property to the defendant; and it is equally clear that in such case he was bound by the provisions of section 553, Code Civ. Proc., to deliver to the defendant the "undertaking received in the action" for the redelivery of the attached property. The Bank of D. O. Mills & Co. intervened in the action, having served process of garnishment upon appellants, and Crowell and Safford also intervened, as assignees of a part of plaintiff's demand; but, in view of our conclusion that appellants are not liable upon said undertaking, questions made in regard to said interveners need not be noticed. We advise that the judgment and order appealed from be reversed.

We concur: BELCHER, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

123 Cal. 170

BERNHEIM et al. v. CERF. (S. F. 742.)  
(Supreme Court of California. Dec. 27, 1898.)

JUDGMENT—HOW CORRECTED—REMEDY.

Under Code Civ. Proc. § 473, providing that on application and notice the court may in furtherance of justice and on proper terms relieve a party from a judgment or other proceeding taken through inadvertence, a decree of foreclosure after sale is properly set aside where an answer had been inadvertently stricken because not verified, when in fact the complaint itself was falsely assumed to be verified.

Department 2. Appeal from superior court, Santa Cruz county.

Action by Carl Bernheim and another against M. Cerf. From an order in plaintiffs' favor vacating a decree, reinstating an answer, and restoring the cause to the calendar, defendant appeals. Affirmed.

J. J. Burt, for appellant. Spalsbury & Burke, for respondents.

HENSHAW, J. Plaintiffs brought their action to foreclose a mortgage upon realty executed to them by the defendant, Cerf. The complaint was unverified. The defendant filed an unverified answer. At the trial defendant did not appear. Plaintiffs' attorneys moved the court to strike the answer from the files for lack of verification, upon the somewhat negligent assumption that the complaint was a verified pleading. The motion was inadvertently granted by the court. A decree for plaintiffs was given upon May 26, 1896. The property was sold upon June 24, 1896, and was bought by plaintiffs. After this the discovery was made that the answer had been improperly stricken from the files, and upon July 6, 1896, plaintiffs moved the court to vacate the judgment, reinstate the answer, and restore the cause to the calendar for trial. The motion was granted, and Cerf appeals. His contention is that, as plaintiffs were present at the trial and induced the error, their remedy was not under section 473, Code Civ. Proc., but by motion for a new trial. In this, however, he is mistaken. The course pursued by respondents was the appropriate one. "Courts of equity are ever ready to relieve from sales made upon their decrees where there has been irregularity in the proceedings, \* \* \* provided application be made to them in the suits in which such decrees are entered, within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others." *Goodenow v. Ewer*, 16 Cal. 461. Section 473, Code Civ. Proc., is in recognition of this equitable principle. Its aid may be invoked by one in whose favor the judgment is rendered, even though he was present at the trial. *Brackett v. Banegas*, 99 Cal. 623, 34 Pac. 344. In this case the injury worked by the inadvertent order of the court striking out defendant's answer is apparent. The application for relief was timely made. Its allowance did not prejudice any of defendant's just rights. The order appealed from is affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

123 Cal. 163

TARKE v. BINGHAM et al. (Sac. 465.)  
(Supreme Court of California. Dec. 24, 1898.)

REFORMATION OF MORTGAGE—MISTAKE—DISCOVERY—DILIGENCE—LIMITATIONS.

1. Where a note payable in three years was, through a clerical error, set out in the mortgage given to secure it as payable in one year, the mortgage may be reformed to correspond to the note.

2. That the holder of a mortgage, which, by mistake, set out an incorrect copy of the note it was given to secure, had possession of the mortgage, and therefore had opportunity to discover the mistake, does not import such lack of diligence as would bar an action for reformation in three years from its date, instead of within three years from the discovery of the mistake, as provided by Code Civ. Proc. § 338, subd. 4.

Department 2. Appeal from superior court, Sutter county.

Action by Louis Tarke against William J. Bingham and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

M. Shepardson and E. A. Bridgeford, for appellants. M. E. Sanborn, for respondent.

PER CURIAM. This action was to re-form, and, as reformed, to foreclose, a mortgage upon real estate. Plaintiff had judgment, from which, and from the order denying defendants' motion for a new trial, this appeal is taken.

The note to secure which the mortgage was given was a note payable three years after date, and was signed, "James Dunne, William J. Bingham, Anne Bingham." The note described in the mortgage for which the security was given was made payable "one year after date," and was signed, "James Dunne, William J. Bingham, Anne Dunne." The complaint set forth the note and mortgage, and alleged that the copy of the promissory note set out in the mortgage was intended by all the parties to the mortgage to be a true copy of the promissory note actually made by the parties, and that the mortgage was intended to secure the payment of the promissory note so executed, but that, by a clerical error of the scrivener, the terms of the promissory note were incorrectly copied into the mortgage. Defendants do not deny any of the material allegations of the amended complaint, except that they allege that the note intended to be secured was correctly described in the mortgage, saving as to the name "Anne Dunne," which they admit was signed "Anne Bingham," as alleged in the amended complaint. The note was given for a loan of \$10,000 to Bingham, which has never been repaid. The mortgage was signed in the same manner as the note and at the same time. The action was commenced more than three years after the execution of the mortgage, and by answer defendants pleaded the bar of the statute of limitations, relying upon subdivision 4 of section 338 of the Code of Civil Procedure. Upon sufficient evidence, the court found that the copy of the promissory note set out in the mortgage was intended by all the parties to the mortgage to be a true copy of the promissory note actually executed by the defendants, and that the misdescription in the mortgage was a clerical misprision. There is in this finding sufficient to support the reformation upon the ground of mutual mistake.

Plaintiff's complaint failed to plead a discovery of the mistake within the three years limited by subdivision 4 of section 338 of the Code of Civil Procedure. Advantage was taken of this by the defendants, and the statute of limitations was pleaded. As this new matter set up in the answer is, under our code system, taken as denied by the plaintiff, it became incumbent upon him to bring himself within the terms of the exception of the statute. His evidence upon this point was to the effect that he did not discover the mistake until a few days before the commencement of his action, and that up to the time of the discovery he had always thought that the mortgage contained an accurate copy of the note to secure which it was given. The court found generally that none of the allegations of defendants' answer was true, and specifically that the discovery was not made by plaintiff until within three years before the commencement of his action. We think, under the facts, that plaintiff has brought himself within the exception of the statute permitting an action for relief upon the ground of fraud or mistake to be brought within three years after the discovery by the aggrieved party of the facts constituting the fraud or mistake. It is very true, as the cases relied upon by appellants declare, that it is not sufficient for the plaintiff in such an action merely to plead or prove his ignorance at one time and his discovery or knowledge at another, and that where he is required to plead it is incumbent upon him to show diligence, and that he has not failed to avail himself of avenues of information of which he had knowledge, and to follow which was a duty incumbent upon him. This is but the declaration of the equitable rule enunciated in section 19 of the Civil Code: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which by prosecuting such inquiry he might have learned such fact." But the converse of the proposition is equally true. Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, "a prudent man" would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission. *Bank v. Baker*, 82 Cal. 114, 22 Pac. 1037; *Prouty v. Devin*, 118 Cal. 258, 50 Pac. 380. In this case, though means of information were open to the plaintiff, it does not appear that there was any duty devolving upon him to make use of them. Nothing had occurred to excite his suspicion, or to put him upon inquiry, and for these reasons, under the facts of this case, we



think the finding of the court sufficient and sufficiently supported by the evidence. The judgment and order appealed from are therefore affirmed.

123 Cal. 84

McFARLAND v. HOLCOMB et al. (S. F. 1,349.)

(Supreme Court of California. Dec. 20, 1898.)

WORK AND LABOR—PLEADING—DEMURRER—UNCERTAINTY—ACTIONS—JOINDER—LIMITATIONS—APPEAL.

1. A complaint showing that plaintiff nursed and cared for defendant, and furnished him board and lodging, entitles plaintiff to their reasonable value, on general demurrer, though it does not aver that the services were rendered, or the board and lodging furnished, at defendant's request.

2. A complaint alleging that plaintiff nursed and cared for defendant, and furnished him board and lodging "almost continuously," between certain dates, is not demurrable as uncertain for failure to show the amounts claimed for nursing, care, and board and lodging, respectively.

3. Nor for failure to state the time when the services were rendered, or when the claim for the items thereof accrued.

4. Nor does such complaint unite different causes of action.

5. A complaint for services extending over a period of 25 years is not demurrable for uncertainty because it does not show whether any of the claim is barred by limitations.

6. The statute of limitations cannot be urged on demurrer to a complaint, unless it is specifically stated as a ground of demurrer.

7. The objection of uncertainty in a complaint must be taken by demurrer, in view of the fact that Code Civ. Proc. § 430, makes it ground of demurrer.

8. Since a motion to make a complaint more definite will not lie, no appeal can be taken from an order granting such a motion.

Department 1. Appeal from superior court, Alameda county.

Action by Sophia McFarland against Lullie Carr Holcomb and others, executors. From an order requiring plaintiff to make the complaint more definite, and from a judgment for defendants on demurrer, plaintiff appeals. Reversed.

B. B. Newman, for appellant. Metcalf & Metcalf, for respondents.

HARRISON, J. The plaintiff brought this action to establish a claim against the estate of the defendants' testator, which she had previously presented to them for allowance, and which they had rejected. In her complaint she alleges, as the basis of her claim, "that William A. Holcomb was at the time of his death indebted to the plaintiff in the sum of seven thousand five hundred dollars as a balance due to plaintiff for nursing, boarding, lodging, counseling, advising, and taking care of the said William A. Holcomb almost continuously from the 29th day of November, 1870, down to the 4th day of November, 1895, in the city and county of San Francisco, state of California." The defendants demurred to the complaint upon the grounds of want of facts and uncertainty,

and, their demurrer having been sustained, the plaintiff has appealed from the judgment entered therein against her.

In support of their demurrer for want of facts to constitute a want of action, the respondents contend that, as the complaint does not aver that the services of the plaintiff were rendered at the request of their testator, it fails to state a cause of action against his estate.

Under the system of pleading at the common law, it was requisite that the declaration in an action of assumpsit upon an executed consideration should show that the consideration for the promise by the defendant was sufficient to support his promise, and it was sufficient to aver that the consideration was executed at his request; but this averment was unnecessary when the consideration as well as the promise were implied from the nature of the transaction set forth in the declaration, as in an action for goods sold and delivered to the defendant, or for money loaned to him by the plaintiff. *Fisher v. Pyne*, 1 Man. & G. 265, note. Under our system of pleading, where only the facts which constitute the cause of action are to be alleged, it is not requisite to aver either the consideration or the promise, when they are implied as a legal conclusion from the facts which are alleged. While counsel and advice are frequently given without any request, and may be of no benefit to the party to whom they are given, yet a complaint which shows that the plaintiff rendered services to the decedent which were received by him in person, and were presumptively at his request, and of which he has enjoyed the benefit, states facts from which the liability of the decedent therefore is presumed, and is good as against a general demurrer. In the present case the nursing of the decedent by the plaintiff, and his acceptance from her of his board and lodging during the time specified, was a consideration sufficient to support the promise for compensation therefor which is implied in law, and to render him liable therefor.

The demurrer to the complaint for uncertainty in failing to show how much is claimed for nursing, and how much for boarding and lodging, and how much for taking care of the deceased, and also in failing to show to what extent the defendants are liable on the different causes of action contained therein, should not have been sustained. It sufficiently appears from the complaint that the plaintiff's cause of action is for services rendered by her to the deceased. The nature of the services alleged to have been rendered, and the averment that they were rendered "almost continuously" between certain dates, sufficiently show that she has but a single claim therefor, and the enumeration in the complaint of the different kinds of services does not constitute a uniting of different causes of action any more than a complaint for goods sold and delivered is a union of different causes of

action for each item that was sold. It does not appear from the complaint that the plaintiff makes separate claims for the different kinds of services rendered, and they are not of such a nature as presumptively to indicate that separate compensation should be made for them. If the defendants desired to ascertain the items of the claim, they could have obtained the same under the provisions of section 454, Code Civ. Proc.

The failure to state the times at which the services were rendered, or when the claim for the items thereof accrued, or the amount claimed for each kind of service, does not authorize a demurrer for uncertainty or ambiguity. *Wise v. Hogan*, 77 Cal. 184, 19 Pac. 278; *Pleasant v. Samuels*, 114 Cal. 34, 45 Pac. 998. Neither is the complaint uncertain because it cannot be determined therefrom whether any portion of the claim is barred by the statute of limitations. The statute of limitations is an affirmative defense, and, if relied upon, must be asserted by the defendant. It cannot be raised by demurrer unless it affirmatively appears upon the face of the complaint that the defense exists, and, even in that case, it must be specifically stated in the demurrer as the ground relied upon to show that no cause of action exists against the defendant from the averments in the complaint. *Wise v. Williams*, 72 Cal. 544, 14 Pac. 204; *Pleasant v. Samuels*, supra.

At the time of filing their demurrer the defendants moved the court that the plaintiff make her complaint more definite and certain. The court granted their motion, and made an order May 3, 1897, that she make her complaint more definite and certain, and that she state her cause of action for services rendered and for board and lodging separately from each other, and that she so amend her complaint within 10 days, and at the same time continued the hearing of the demurrer until the 7th of June. On this last day the court made its order sustaining the demurrer upon which the judgment appealed from was entered. In New York and in other states where the reform procedure prevails, uncertainty and ambiguity are not made grounds of demurrer to the complaint, but by a section of the Code authorizing the same the court may require the plaintiff to make his complaint more definite and certain. In this state, however, the legislature in 1877 added to section 430, Code Civ. Proc., as one of the grounds of demurrer to the complaint, "that the complaint is ambiguous, unintelligible, or uncertain," and by reason of this provision any objection to the complaint upon these grounds must be taken by demurrer. There was no authority, therefore, for the court to make the order of May 3d, and its subsequent action sustaining the demurrer must be regarded as the action upon which the judgment was entered. The plaintiff has appealed from the order of May 3d, but that order is not appealable. The judgment is reversed, and the superior court is directed to overrule the

demurrer, and give to the defendants leave to answer the complaint within such time as it may deem proper.

We concur: GAROUTTE, J.; VAN FLEET, J.

123 Cal. 205

CITY ST. IMP. CO. v. BABCOCK. (S. F. 845.)

(Supreme Court of California. Dec. 30, 1898.)

MUNICIPAL IMPROVEMENTS—OBJECTIONS OF ABUTTING OWNERS.

St. 1891, p. 196, § 3, provides that the owners of a majority of the frontage of the property on proposed street improvement may make a written objection to the same, and that such objection "shall be a bar, for six months, to any further proceedings in relation to making said improvement." *Held*, that such objection not only suspends the right of the board of supervisors to make the improvement, but that, after the six months have expired, the work cannot be ordered without again passing a resolution of intention, and taking such other steps as were necessary in the first instance.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by City Street-Improvement Company against one Babcock. From a judgment for defendant, plaintiff appeals. Affirmed.

J. C. Bates, for appellant. Geo. D. Collins, for respondent.

HARRISON, J. Action upon a street assessment. The proceedings for the work covered by the assessment were taken under the street-improvement act as amended in 1891. Section 3 of the act (St. 1891, p. 196) contained the following provisions: "The owners of a majority of the frontage of the property fronting on said proposed work or improvement, where the same is for one block or more, may make a written objection to the same within ten days after the expiration of the time of the publication and posting of said notices, which objection shall be delivered to the clerk of the city council, who shall endorse thereon the date of its reception by him, and such objection, so delivered and endorsed, shall be a bar for six months to any further proceedings in relation to the doing of said work or making said improvement, unless the owners of the one-half or more of the frontage as aforesaid shall meanwhile petition for the same to be done."

In the present case the board of supervisors passed a resolution of intention to order the work February 26, 1894, and the court finds that within 10 days after the expiration of the time of the publication and posting of the notice of said resolution the owners of a majority of the frontage filed their protest and objection to the doing of said work. Without passing any other resolution of intention, the board of supervisors passed a resolution ordering the work on the 22d day of October, and the work for which the assessment was



made was done in pursuance of proceedings taken by virtue of this order. The superior court held that the board had no jurisdiction to order the work, and that the assessment created no lien upon the land of the defendant, and gave judgment in his favor.

It is contended by the appellant that by the passage of the resolution of intention on the 22d of March, and the publication and posting thereof, the board acquired jurisdiction to order the work, and that its subsequent resolution ordering the work was within the jurisdiction thus acquired; that the filing of the protest had the effect to merely suspend the exercise of this jurisdiction for the period of six months; and that after this period it could order the work the same as if no protest had been filed. Section 3 of the street-improvement act, as it existed prior to the amendment in 1891, contained the following provision immediately after the clause above quoted: "At or after the end of said six months, if said work so barred for six months shall not have been done, the city council may order said work to be done after re-publication and posting of a resolution of intention, by virtue of the proceedings already had and taken, but within like time like objections may again be filed with like effect, and so on at the expiration of each six months until the work is done." And the appellant urges in support of his contention that the omission of this provision in the section, as amended in 1891, indicates that the legislature intended that the work might be ordered without again passing a resolution of intention therefor. We are of the opinion, however, that a contrary inference is to be drawn from the amendment. The provision in the act as it stood prior to the amendment of 1891, that after the expiration of six months the board might order the work to be done "after republication and posting of a resolution of intention," clearly shows that under that act it was not necessary to again pass a resolution of intention; that it was sufficient to republish and repost the original resolution of intention; but by the omission of this provision in the amendment of 1891 the legislature intended that such republication and reposting should not be sufficient to authorize the board to order the work to be done, but that the matter of the improvement should be again submitted to the legislative discretion and judgment of the board to determine whether, upon further consideration, and in view of the objections that had been made, it was still for the public interest that the improvement should be made, and, if so, that it should be initiated by a new resolution of intention. By filing their protest, the owners of a majority of the frontage placed a veto upon "any further proceedings in relation to the doing of the work," which was absolute for six months, but at the expiration of that period the board could exercise its power to order the improve-

ment in the same manner, and by the same proceedings, as it could order any other improvement. If it had been the intention of the legislature that the power of the board to order the work was merely suspended for six months, and that at the expiration of that period it might order the work without any other proceedings, it is reasonable to believe that it would have expressed its intention in direct language to that effect; but its use of the term "bar," and its declaration that the board should not take any further proceedings "in relation to the doing of the said work," indicates that it intended more than a suspension of action, and that the further proceedings in relation to the work should be such as were required in the first instance for effecting the improvement. The provision of the section is that the protest shall be not merely a "bar" to ordering the work, but a bar to any further proceedings "in relation to" the doing of the work,—language which must include every step which is necessary to give to the board the power to order the work to be done; and it is further to be noticed that it is not a bar to further proceedings "under said resolution," but further proceedings "in relation to doing said work." The provision for terminating the six-months veto by a petition from the owners of one-half or more of the frontage is to be read in connection with section 4 of the act, which provides that, even though the work be petitioned for by the owners of a majority of the frontage, a resolution of intention must be passed by the board; thus corroborating the conclusion that, after a sufficient protest has been filed, the work cannot be ordered without again passing a resolution of intention therefor.

The construction thus given to the act is further corroborated by the following provision in the same section: "At the expiration of ten days after the expiration of the time of said publication of said street superintendent, and at the expiration of fifteen days after the advertising and posting as aforesaid of any resolution of intention, if no written objection to the work therein described has been delivered as aforesaid by the owners of a majority of the property liable to be assessed for the expense of said work or improvement, the city council shall be deemed to have acquired jurisdiction to order any work to be done or improvement to be made which is authorized by this act." The declaration that the board shall be deemed to have acquired jurisdiction to order the work, "if no written objection to the work therein described has been delivered," necessarily imports that, if such protest has been filed, jurisdiction shall not be deemed to have been acquired. The judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J; VAN FLEET, J.

123 Cal. 154

CORBETT et al. v. WIDBER, County  
Treasurer. (S. F. 798.)

(Supreme Court of California. Dec. 23, 1898.)

CITY AND COUNTY OF SAN FRANCISCO—DEMANDS—  
PRESENTATION—SET-OFF—PUBLIC FUNDS—JUDICIAL AND EXECUTIVE OFFICERS—PARTISAN  
JUDGES.

1. By Pol. Code, §§ 3640, 3714, 3820-3830, the assessor of the city and county of San Francisco is required to collect and turn over to the treasurer taxes on personal property unsecured by real estate, in advance of the fixing of the rate by the supervisors, the collection being made at the rate established for the preceding year; and, if the amount so collected exceeds the amount finally determined to be due, the excess "must be repaid by the county treasurer to the person from whom the collection is made \* \* \* on demand." Section 3824 provides that the excess shall not be apportioned to the state. *Held*, that this excess is not a public fund of the city and county, and hence a demand therefor is not within Consolidation Act, §§ 82, 84 (St. 1856, pp. 169, 170), providing that no demand on the treasury or on the public funds shall be paid until allowed by the auditor, and that such demands shall be subject to set-off on account of debts due from claimant to the treasury.

2. A demand for such excess need not be presented to the auditor, for the further reason that it is not for one of the enumerated objects which Consolidation Act, § 95 (St. 1856, p. 172), declares are the only ones for which demand may be made on the treasury.

3. Consolidation Act, § 82 (St. 1856, p. 169), provides that no demand on the treasury of the city and county of San Francisco shall be allowed by the auditor without first deducting any debt due from claimant to the treasury. *Held*, nevertheless, that the city and county's right of set-off may be urged only in court.

4. To permit a county auditor to exercise in behalf of the treasury the right of set-off against a claim presented to him for allowance would invest him with judicial functions.

5. A county auditor would be a partisan judge in exercising, in behalf of the treasury, the right to set-off against a claim presented to him for allowance.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by one Corbett and others against A. C. Widber, treasurer of the city and county of San Francisco. A writ of mandate was awarded, and defendant appeals. Affirmed.

H. T. Cresswell, for appellant. Haven & Haven, for respondents.

HENSHAW, J. This appeal is from a judgment awarding a writ of mandate to the plaintiffs against the treasurer of the city and county of San Francisco. The assessor of the city and county of San Francisco is required to collect taxes upon personal property unsecured by real estate some months in advance of the fixing of the rate by the supervisors. He is, therefore, directed by law to collect at the rate established for the preceding year. These moneys he turns over to the treasurer. In the event that the taxes so collected for the current year shall exceed the amount finally determined to be due, the excess "must be repaid by the county treasurer to the person from whom the collection is made, or to

his assignee, on demand therefor." Pol. Code, §§ 3640, 3714, 3820-3830. It is admitted that there was an excess of \$40.05 in the treasury paid by plaintiffs' assignors in accordance with these laws. Plaintiffs made verbal demand upon the treasurer for the payment back to them of the money, and upon his refusal applied for and obtained a writ of mandate. In support of this appeal reliance is had upon the provisions of the consolidation act (St. 1856, p. 170), section 84 of which declares that "every demand upon the treasury \* \* \* must, before it can be paid, be presented to the auditor of the city and county, to be allowed," etc. Section 82 of the same act declares: "No payment can be made from the treasury, or out of the public funds of said city and county, unless the same be specifically authorized by this act, nor unless the demand which is paid be duly audited, as in this act provided." Notwithstanding these provisions, we think that the demand made by plaintiffs in this case was legally sufficient, and that to this character of demand the sections of the consolidation act above cited do not apply. The excess moneys so received by the treasurer are no part of the moneys of the city and county, and, if the aggregate of them be denominated a fund, it is in no sense a public fund of the city and county. As to these moneys the treasurer is but a bailee, holding them subject to the demand of the rightful owners. The revenue laws expressly declare that these moneys shall not be apportioned to the state, but shall be held in the treasury, and repaid to the rightful owner upon his demand. Pol. Code, § 3824. Moneys so held constitute no part of the public funds. *Pacific Mut. Life Ins. Co. v. San Diego Co.*, 112 Cal. 314, 41 Pac. 423, and 44 Pac. 571; *Elberg v. San Luis Obispo Co.*, 112 Cal. 316, 41 Pac. 475, and 44 Pac. 572. A demand upon the treasury for the repayment of moneys so held is not "a demand upon the treasury," or a demand upon any "public fund" in the treasury, within the meaning of the consolidation act. Section 95 of the consolidation act declares that "demands on the treasury may be made for the following objects, and none others." Under 15 subdivisions of the section are enumerated the kinds and characters of such demands, and the objects for which the public moneys of the city and county may be expended. The section will be read in vain to discover therein any authority whatsoever for the payment of a demand such as the one in question. It is not within the contemplation of the consolidation act, yet clearly it is within the contemplation of the law, and, indeed, within its express declaration, that such moneys should be repaid upon demand. In *Ex parte Reis*, 64 Cal. 233, 30 Pac. 806, notwithstanding the reliance placed by the treasurer of the city and county upon these very provisions of the consolidation act, he was adjudged guilty of contempt



in refusing to pay a demand for the fees of a stenographic reporter, though the demand had not been made in compliance with the charter provisions. In *Ex parte Widber*, 91 Cal. 367, 27 Pac. 733, it was held that a demand ordered paid by the judge for the necessary expenses of providing him with a suitable court room was not within the limitations of the consolidation act. In brief, the fact is, as clearly pointed out by Justice Thornton in his concurring opinion in *Ex parte Reis*, 64 Cal. 240, 30 Pac. 807, namely, that the demands referred to in the consolidation act are only those mentioned in and authorized by it. The demand in question is not such a one. It is not even a demand upon the moneys of the city and county, as were those in the *Reis* and *Widber* Cases. It is simply a demand by the absolute owner of moneys upon its custodian, who chances to be an officer of the city.

Appellant next urges the sufficiency of a special defense which was pleaded on behalf of the treasurer. Section 82 of the consolidation act provides that "no demand upon the treasury shall be allowed by the auditor in favor of any person or officer in any manner indebted thereto, without first deducting the amount of such indebtedness." Plaintiff's assignors, it was averred, were indebted to the city for delinquent taxes of a preceding year. The right to reduce plaintiffs' demand by setting off the amount of such delinquent taxes was insisted upon. The court properly sustained a demurrer to this defense, for, in the first place, plaintiffs' demand, as we have said, was in no sense a demand upon the treasury. It was a demand for the return of moneys owned by the plaintiffs; and, in the second place, while the right to urge a counterclaim or insist upon a set-off is as available to a municipal corporation as it is to a natural person, that right must be invoked before the judicial department of the state. This provision of the consolidation act is an attempt, not only to impose judicial functions upon an executive officer, but also to constitute him sole judge in a manner affecting the interests of the city and county which he represents. It is sought, therefore, not alone to make an executive officer a judge, but to make him a partisan judge. The assignment proved by plaintiffs was sufficient to support their claim. The judgment appealed from is affirmed.

I concur: McFARLAND, J.

TEMPLE, J. I concur in the judgment. I think the money, while in the treasury, does constitute a part of the county funds. A special method is provided for the payment of this class of demands, which relieves the claimant from the delay, expense, and trouble of the usual mode. If the taxpayer does not call for it, the treasurer—in my opinion—must account therefor to the county, and cannot retain it. The provision that such money

shall not be distributed to the state means only that the county shall retain it, and be liable to the taxpayer therefor.

123 Cal. 70

PEOPLE v. SMITH et al. (Sac. 466.)

(Supreme Court of California. Dec. 19, 1898.)

TAXATION—ASSESSORS—FAILURE TO COLLECT—ACTION ON BOND—EVIDENCE.

1. Pol. Code, § 3820, providing that the assessor must collect taxes on all personal property when, in his opinion, such taxes are not a lien on real estate sufficient to secure their payment, makes it imperative on the assessor to collect the personal property taxes if there is no real estate on which they are a lien, and allows an exercise of discretion only where the taxes are a lien on real estate, and the question arises whether the real estate is sufficient to secure their payment.

2. Where a bond requires the faithful exercise of all official duties, the neglect to perform a duty which is ministerial, and does not involve an exercise of discretion, is a breach of the obligation.

3. Pol. Code, § 3840, provides that poll taxes must be collected by the assessor between the first Monday in March and the second Monday in January of the ensuing year. Section 3846 provides that the assessor must demand payment of the poll tax of every person liable therefor, and, on a neglect or refusal to pay the same, he must collect by sale of personal property. Section 3858 provides that, on the third Monday in January of each year, the assessor must deliver the tax roll to the auditor, who must deliver same to the tax collector, and charge him therewith. *Held*, that the assessor is liable on his bond for failure to collect the poll taxes.

4. An assessor's list which shows that persons assessed for poll taxes were also assessed for personal property taxes makes a prima facie case against the assessor for failure to collect the poll taxes, since Pol. Code, § 3846, provides that, if any person fails to pay his poll tax, the assessor must collect by seizure of personal property.

5. Where an assessor's return shows that no real estate was assessed to the persons named in his list, and that the personal property tax was not collected, a prima facie case is made against him for such failure to collect, since, under Pol. Code, § 3820, the assessor must collect the personal property taxes, if there is no real estate on which they are a lien.

6. Pol. Code, § 3820, provides that the assessor must collect taxes on all personal property when, in his opinion, they are not a lien on real estate sufficient to secure their payment. Section 3617 defines real estate as including improvements. Section 3717 declares that every tax due on personal property is a lien on real estate. *Held*, that taxes assessed to the owner of improvements on his personal property are a lien on the improvements.

7. An assessor is responsible on his bond for failure to collect poll taxes, since Pol. Code, § 3840, makes it a part of his official duty to collect such taxes, and his bond covers all official duties.

8. Where an assessor fails to collect taxes which it is his ministerial duty to collect, it is immaterial whether his failure to collect is from neglect or from motives of personal popularity.

Commissioners' decision. Department 2. Appeal from superior court, Modoc county.

Action by the people against A. A. Smith and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

Atty. Gen. Fitzgerald and J. E. Raker, for the People. D. W. Jenks and G. F. Harris, for respondents.

HAYNES, C. This action is upon the official bond of A. A. Smith, assessor of Modoc county, to collect from his sureties the amount of certain personal property taxes and poll taxes for the years 1892, 1893, and 1894, which it is alleged he failed and neglected to collect. The respondents answered the complaint, a trial was had, and, at the conclusion of the plaintiff's evidence, the defendants moved for a nonsuit; the motion was granted; and from the judgment of dismissal entered thereon the plaintiff appeals. The proceedings are shown by a bill of exceptions. Smith, the assessor, was not served, and did not appear. The motion for a nonsuit contains nine specifications of grounds for the motion, but the last three only need be noticed. These are as follows: "(7) That the complaint does not state facts sufficient to constitute a cause of action against these defendants, or any of them. (8) That it has neither been alleged nor proven that there has been any breach of the obligations of said bond by or on the part of these defendants, or either or any of them. (9) That it has not been alleged or proven that there was ever any willful or intentional or corrupt or unlawful failure or neglect, or either, on the part of said assessor, to do any official act whatever required of him by law." The court, in granting the motion, filed a written opinion, from which it appears that he based his decision upon the ground that no breach of the conditions of the bond had been alleged or proved; that the law as it stood during the years covered by the complaint vested in the assessor a discretion in regard to the collection of personal property taxes; that, while it appears from plaintiff's proofs that the county had sustained a financial loss by reason of the failure and neglect of the assessor to collect certain taxes, neither the assessor nor his sureties are liable for the improper exercise of his discretion, unless such discretion was unlawfully or fraudulently exercised, and that is not alleged. The sufficiency of the complaint is therefore the first and principal question to be considered.

The condition of the bond in suit is "that if the said A. A. Smith shall well and faithfully perform all the duties now required of him by law, and shall well and faithfully execute and perform all the duties of such office of assessor, required by any law to be enacted subsequently to the execution of this bond, then this obligation is to be void." The complaint alleges that the personal property of certain persons was assessed as required by law, that the taxes were duly levied, "and that the taxes due thereon for state and county purposes were not a lien upon any real estate of the various parties assessed for such taxes as aforesaid." It then proceeds to al-

lege that certain poll taxes were duly levied, and after stating the amount of the personal property taxes which were not a lien on real estate, and which were not collected, and the amount of the poll taxes not collected, further alleged: "That the said assessor failed and neglected to collect the said personal property tax, the said hospital poll tax, and the said state poll tax, as above specified, and every part thereof, and the whole thereof is now due and unpaid," and was not collected or paid over to the county treasurer. The like allegations were made as to the unpaid personal property and poll taxes for the succeeding years 1893 and 1894, and a list or schedule of such taxes for each year, with the names of the persons assessed both for personal property unsecured by lien on real estate, and whose poll tax had not been paid, were attached as exhibits, and made part of the complaint, and for the years 1893 and 1894 a road poll tax was included.

It is contended by defendants, and held by the court below, that the statute gave the assessor a discretion as to whether he would collect these taxes, and hence a mere "failure or neglect" to collect them is not a breach of his bond, and that it must be alleged that he "unlawfully, fraudulently, or corruptly exercised his discretion, since the law presumes that his official duty was properly performed." This discretion with which the assessor is supposed to be clothed is based upon section 3820 of the Political Code as it stood prior to the amendment of 1895, which added a new provision. That section read as follows: "The assessor must collect the taxes on all personal property when, in his opinion, said taxes are not a lien upon real estate sufficient to secure the payment of the taxes." (The remainder of the section applies only to San Francisco.) Section 3821, Pol. Code, provides: "In the case provided for in the preceding section at the time of making the assessment, or at any time before the first Monday of July, the assessor may collect the taxes by seizure and sale of any personal property owned by the person against whom the tax is assessed." Under the first of these sections, it is imperative upon the assessor to collect the personal property tax where there is no real estate upon which it can be a lien, and the discretion there given can be exercised only where the taxes are a lien on real estate; and the question arises whether the real estate upon which they are a lien is "sufficient to secure the payment of the taxes." The complaint does not touch the cases where the personal property tax is a lien on real estate, except as hereinafter noticed, whether sufficient or insufficient to secure its payment, but only those cases where—in the view of the pleader—there is no lien on real estate, and where there is, for that reason, no discretion on the part of the assessor. In such case, after the assessment is made, the duty of the assessor to collect the tax is



merely ministerial, and gives no room for opinion or discretion, and the neglect to discharge that duty is a breach of the obligation of the bond. In *People v. Gardner*, 55 Cal. 304, 307, it was said. "It is the duty of an officer to do what the law requires to be done in his office, for the law is to him a command which he must obey. If it prescribes the course which shall be taken, and the thing which must be done by any one in office, the officer cannot disregard it. A failure to obey the law, or a disregard of duty, is a nonperformance of duty, and a breach of the official bond of the officer, for which he and the sureties thereon are liable. When, therefore, the plaintiff had proved that the defendant Gardner, during his term of office, had failed to collect the fees on one thousand two hundred and eighty-one applications to purchase land from the state, and to account for the same as required by law, that proof should have been considered by the court, and the court erred in granting a nonsuit." In *Amy v. Supervisors*, 11 Wall. 136, 138, it was said: "The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect." Of course, there may be a failure to perform a ministerial official duty resulting from an impossibility of performance, which would not create a liability; but a nonperformance arising from neglect implies an ability to perform the act, and to such nonperformance liability attaches.

As to the poll taxes, respondents contend that it was not intended the assessor should be responsible, inasmuch as the tax collector is required to collect the poll taxes that are delinquent on the third Monday in January. Pol. Code, § 3858. But section 3840, Pol. Code, provides: "Poll tax must be collected by the assessors between the first Monday in March and the second Monday in January of the ensuing year." And section 3846, Pol. Code, provides: "The assessor must demand payment of poll tax of every person liable therefor, and, on the neglect or refusal of such person to pay the same, he must collect by seizure and sale of any personal property owned by such person." Doubtless, there are cases, perhaps many of them, where the person owing the poll tax has no property, and where no debtor of the delinquent can be found by the assessor after using reasonable diligence, and hence there may be delinquent poll taxes to be turned over to the tax collector; but the evidence shows that a large number of persons who were assessed for poll taxes were also assessed upon personal property, and in such case it would appear that it was in his power to make the collection, the assessors' lists themselves making a *prima facie* case

for the plaintiff, and shifting the burden to defendants. And so in relation to the personal property tax; if the assessor's returns show that no real estate was assessed to the persons named in the schedules or lists attached to the complaint, and that the personal property tax was not paid, a *prima facie* case is made for the plaintiff, since in such case it must be assumed that, if the person whose personal property was assessed owned real estate upon which such tax might be a lien, it also would be assessed and appear upon his assessment book; and, as the tax was levied by the assessor upon personal property, he must have known of property which he could seize to collect the tax.

Leaving out of view for the present those cases where improvements upon government land and improvements on homestead and pre-emption claims were assessed, there was sufficient evidence to have sustained a judgment for the plaintiff. As to the improvements above mentioned, subdivision 12, § 3650, of the Political Code, provides that they shall be assessed "as other real estate upon the assessment roll." But it further provides: "No value shall, however, be assessed against the exempt land, nor under any circumstances shall the land be charged with or become responsible for the assessment made against any taxable improvements located thereon." Section 3617 of the Political Code defines the terms used in the assessment of property for the purposes of taxation, and these definitions must control in matters relating to taxation, whether they conform to the definitions used in the law for other purposes or not. That section, prior to the amendment of 1895, among other things, provided: "Second. The term real estate includes: (1) The possession of, claim to, ownership of, or right to the possession of land; \* \* \* (4) improvements. Third. The term improvement includes: (1) All buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land. (2) All fruit, nut bearing, or ornamental trees and vines not of natural growth." "Improvements," for the purposes of taxation, are therefore real estate; and section 3650, *Id.*, requires them to be assessed as such, but the land, if exempt from taxation, cannot be charged with the tax or made responsible for it; and section 3717, *Id.*, declares that "every tax due upon personal property is a lien upon the real property of the owner thereof"; and the next section (3718) provides that "every tax due upon real property is a lien against the property assessed; and every tax due upon improvements upon real estate assessed to others than the owner of the real estate is a lien upon the land and improvements; which several liens attach as of the first Monday of March, in each year." The taxes assessed upon improvements made upon public non-assessable land are therefore taxes upon real

estate, and a lien upon the improvements; and taxes assessed to the owner of the improvements upon his personal property are also a lien upon his improvements, and as to such personal property taxes the question is presented to the assessor whether such improvements are sufficient to secure the payment of the personal property tax. For an error of judgment in such case the assessor is not liable upon his official bond. Poll taxes, however, are not made a lien upon real estate; and it is the imperative duty of the assessor to collect them wherever he can, by reasonable diligence, find the means of enforcing payment. It follows that, as to the poll taxes and personal property taxes assessed to persons not assessed upon land or improvements, the complaint states a cause of action, and the evidence would have sustained a judgment.

It is said by respondents that there is no provision in the codes or statutes making the assessor responsible for a failure to collect a poll tax. But the Code makes it part of the official duties of the assessor to collect these taxes, and his bond covers and extends to all his official duties.

Upon the trial, plaintiff attempted to prove that the assessor instructed his deputies "not to press the collection of these taxes, as he did not want the parties mad at him." An objection to the question was sustained. Under the allegations of the complaint, it was immaterial as to whether his failure to collect taxes which it was his duty as a ministerial officer to collect was from mere neglect or from motives of personal popularity. If the complaint had charged malfeasance in office, the unlawful and corrupt failure and neglect to collect taxes, as where his discretion was exercised, not as a matter of judgment where there was room for a difference of opinion, but for a corrupt or unlawful purpose where there was no reasonable ground for the exercise of discretion, the evidence would have been material and competent.

Whether the court erred in denying plaintiff's motion to set aside the nonsuit, and permit an amendment to the complaint, need not be considered.

Some other questions were made in the motion for a nonsuit, but none of them are noticed in the briefs, and it is therefore assumed that they are not relied upon by respondents. We see nothing in any of them, however, which would avail defendants, and we shall not therefore state or discuss them. We advise that the judgment appealed from be reversed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed.

123 Cal. 192

**KNIGHT v. CITY OF EUREKA.** (S. F. 892.)  
(Supreme Court of California. Dec. 29, 1898.)

MUNICIPAL CORPORATIONS — DELEGATION OF POWERS.

A municipal corporation cannot delegate discretion to its attorney to employ an assistant, if he think it necessary, and to fix the assistant's compensation.

Department 2. Appeal from superior court, Humboldt county.

Action by George A. Knight against the city of Eureka. From a judgment of nonsuit, plaintiff appeals. Affirmed.

F. A. Cutler, for appellant. A. J. Monroe, for respondent.

PER CURIAM. Action upon an express contract to recover for services as attorney at law. At the close of plaintiff's evidence, the court gave judgment of nonsuit, from which plaintiff appeals.

It appears that an action was brought against defendant in the circuit court of the United States, at San Francisco, on January 21, 1886, by certain Chinamen, who sued for damages alleged to have been suffered by reason of the destruction of their property by a mob in defendant city on February 27, 1885. These claims aggregated the sum of \$132,820. Defendant employed S. M. Buck, Esq., by ordinance of its council, to take charge of the suit. The ordinance recited the pendency of the action against the city, and the necessity to retain counsel to defend it, and concluded as follows: "Therefore it is ordered that S. M. Buck, Esq., be and he is hereby, retained and authorized to act for the city of Eureka as its attorney in defense of said action; and he is also authorized to retain and associate with himself in defense of said action some able attorney and counselor residing in San Francisco, Cal., if, in his judgment, it becomes necessary. And said S. M. Buck, Esq., is instructed to conduct said defense as economically as it can be done consistent with vigorous and successful defense thereof." Acting under this authority, and not otherwise, Mr. Buck retained plaintiff, and entered into an agreement with him on March 2, 1889, by which he employed plaintiff as an attorney on behalf of defendant, to assist in the defense of said action, and, "on behalf of defendant, agreed to and with said Knight that said city of Eureka would pay him the sum of five thousand dollars for such retainer and services." Plaintiff "accepted said employment, and rendered such services for defendant from time to time in said action during its pendency as were required of him, such services consisting of consultations with S. M. Buck"; and the defendant in that action prevailed. It appeared that the council were not informed of Mr. Knight's employment until after Mr. Buck presented his claim for payment in May, 1889, and not until in 1890, as Mr. Knight



testified, at which time he presented his bill to the council. The reason for not sooner informing the council was stated to be that it was thought Mr. Knight could be more serviceable if his employment were kept a secret. He did not appear in court, but did talk with the attorney of the Chinamen about the case in addition to consulting with Mr. Buck. The extent or nature of plaintiff's services, however, does not seem to be material, as he does not sue for their value but upon the contract.

It is also immaterial that Mr. Buck had become the city attorney of defendant when he contracted with plaintiff, for the only claim of authority to make the contract rests upon the ordinance above quoted. The single question in the case is, was defendant bound by the contract? The legality of Mr. Buck's employment is admitted. It is also admitted that the council could have legally employed plaintiff to assist Mr. Buck. It is admitted, too, that the council could have authorized and directed Mr. Buck to employ appellant, for in that case the council would have exercised its judgment and discretion in determining that an assistant attorney was necessary, and that appellant was the choice of the council to perform the service. The point of objection to the ordinance seems to be that it substituted the judgment of Mr. Buck for that of the council. It is quite clear that the council did not determine that an additional attorney was necessary. That function was delegated to the employed attorney, Mr. Buck. He was to pass upon the question and to act upon his own judgment as to the expediency or necessity for retaining another attorney. Conceding the legality of Mr. Buck's appointment, we think it did not carry with it the authority to appoint an assistant attorney, nor could the council delegate its power to make such an appointment. Practically, the authority here delegated left with the agent of the council the discretion to determine the necessity for employing an assistant, and to fix his compensation. These were powers which, in our opinion, the council alone could exercise, and therefore could not be delegated. We find nothing in any of the cases decided by this court where the power of a municipal corporation to employ counsel was involved, from *Smith v. Mayor*, etc., 13 Cal. 531, to *Merriam v. Barnum*, 116 Cal. 619, 48 Pac. 727, contrary to this view. The power of boards of county supervisors and of the legislative bodies of cities and towns to employ counsel in certain cases has been frequently passed upon here; but no case has been called to our attention, and we think none can be found, holding that such bodies may appoint an attorney, and delegate to him the discretion to employ other attorneys; as in his judgment he may deem necessary or expedient, and fix their compensation. The correct principle is stated in *Scollay v. Butte Co.*, 67 Cal. 249, 7 Pac. 661, where it was held that the powers conferred

upon a municipal corporation involving the exercise of judgment or discretion are in the nature of public trusts, and cannot be delegated to others. There are numerous cases where it has been held that the county boards of supervisors may authorize the employment of an attorney other than the district attorney under certain circumstances, as in *Scollay v. Butte Co.*, supra; *Hornblower v. Duden*, 35 Cal. 664; *Lassen Co. v. Shinn*, 88 Cal. 510, 26 Pac. 365; *Kelley v. Sersanous* (Cal.) 46 Pac. 299, and some other cases; but in all of them the boards determined the necessity, made the selection, and fixed the compensation. In the case before us the council performed these functions as to Mr. Buck, but no further. The necessity for and the employment of plaintiff or some other able attorney were left entirely to the judgment and discretion of the attorney employed by the council. That it exceeded its authority in doing this is, we think, beyond doubt.

We are cited by appellant to section 90 of Mr. Dillon's *Municipal Corporations*, where it is said that corporations may exercise all the powers within the fair intent and purposes of their creation which are reasonably proper to give effect to powers expressly granted; and in doing this they have a choice of means adapted to ends. This is true, and it is upon some such principle that the appointment of an attorney by a municipal corporation may be made in certain cases, although the body is already provided by law with a legal adviser. But no authority can be derived from such an implied power to authorize its delegation. This power to appoint an attorney is one of those incidental powers which, of necessity, reside in the council, in order that its granted powers may be fully exercised, but is one of that class of powers devolved upon the council which, in their very nature, should be exercised by it, and could not with safety to the public, whose servants the members of the council are, be conferred upon an agent to exercise. No exigency or emergency is likely to arise where full opportunity would not be given the council to act directly in selecting its own attorney or his assistant; and there is every reason why the power to do so should be lodged in the governing body itself. We think the true doctrine is correctly stated by Mr. Dillon, at section 96: "The principle is a plain one that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others." See, also, *Cooley*, Const. Lim. 248. The case *In re Flaherty*, 105 Cal. 562, 38 Pac. 981, is cited by appellant, where a city ordinance prohibited the beating of a drum in the public street without the permit of the president of the board of trustees, which permit he was authorized to issue whenever in his judgment it was deemed expedient. The ordinance

was held valid by a majority of the court, mainly, as we understand the prevailing opinion, as an exercise of the police power. We do not think that case is authority for appellant's contention here. The two cases rest upon wholly different reasons. The case now here is also quite unlike that of street superintendents, chiefs of police, and other municipal officers, whose daily duties make it not only reasonable and proper, but necessary, that they should exercise certain delegated powers, such as may be administrative or ministerial in their character. The case of *City of Huron v. Campbell*, 3 S. D. 309, 53 N. W. 182, is closely analogous to this. In that case the council authorized the city attorney to "appoint as many assistant attorneys as the mayor of the city may deem necessary to protect and defend in the various courts" certain suits. The ordinance placed the full control and management of all these suits with the mayor. The ordinance was held invalid, while holding that the council had authority itself to employ one or more assistant attorneys. The court said: "In fixing this compensation [i. e. of the city attorney] the city council must exercise its judgment upon that particular question; and, in determining the necessity for an assistant or assistants, the city council must equally exercise its judgment as to the necessity for an assistant or assistants, and the compensation to be allowed him or them." The judgment is affirmed.

123 Cal. 102

In re CARVER'S ESTATE. (Sac. 365.)  
(Supreme Court of California. Dec. 20, 1898.)

ADMINISTRATORS—RIGHT TO COMMISSIONS—WAIVER—BASIS OF COMPUTATION—APPEAL—ESTOPPEL TO ASSIGN OBJECTION.

1. In the absence of a statute so providing, an administratrix cannot be deprived of commissions because of neglect or default in management of the estate, but may be charged with loss thereby resulting.

2. A waiver of commissions in a petition for letters of administration does not deprive the administratrix of the right to commissions, where the waiver was without objection, and by leave of court withdrawn before she was appointed.

3. The reasonable value of decedent's mortgaged realty, which was charged to the administratrix as assets, and was taken, under foreclosure, into immediate possession of the mortgagee on a compromise, in consideration of a waiver of a deficiency judgment against the estate, is properly included in the value of property administered as a basis of computing commissions.

4. An administratrix who was directed to charge herself in her first account with a certain sum as money on hand, the order showing that in fact it was in another's hands, is concluded, by her omission to appeal, from disputing the correctness of the charge.

Commissioners' decision. In bank. Appeal from superior court, Stanislaus county.

In the matter of the estate of A. G. Carver, deceased, Ann A. Carver, administratrix, appealed from an order settling her final account. Modified.

Maddux & Stonesifer, for appellant. C. W. Eastin and P. J. Hazen, for respondent.

HAYNES, C. The administratrix appeals from an order settling her final account, in which the court denied her right to any commissions, and charged her with the sum of \$535.72, as cash on hand; "said sum being the amount found due said estate from Ann A. Carver in the settlement of the action of McHenry against Carver et al." No other items are involved in this appeal.

1. Is appellant entitled to commissions in the sum charged or in any sum? The value of the property, as shown by the inventory and appraisal, was \$33,248.03, and the commissions charged were based upon that sum, computed at the statutory rate, and amount to \$1,317.44. The findings of the court are those recited in the preliminary part of the order or decree, and, so far as they affect appellant's right to commissions, are, in substance, that the administratrix failed and neglected for an unreasonable length of time to render a proper or legal account, that she neglected for an unreasonable time to pay debts and claims while she had sufficient money in her hands to pay them, "and has been negligent in other particulars without sufficient cause or excuse, and that she is not entitled to any commissions as claimed in her final account." It was also found "that she had not used any of the property or money of said estate for her own benefit, nor has she mingled the funds of said estate with her own funds; that the sales of the personal property of said estate made by said administratrix were fairly made, and the fair market price was obtained therefor." I think the court erred in refusing to allow commissions to appellant. Section 1618, Code Civ. Proc., provides: "When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of estate accounted for by him, as follows: \* \* \* The same commission shall be allowed to administrators. \* \* \*" The statute imposes no conditions as to the allowance of the commissions at the rate stated in said section, though it permits the court, in its discretion, to make a further allowance for extraordinary services. The administrator is chargeable with debts which remain uncollected through his fault or neglect (section 1615, Code Civ. Proc.); and if he has been guilty of neglect, or has wasted, embezzled, or mismanaged the estate, his letters may be revoked (section 1626); but it is nowhere provided that, for any fault, mismanagement, neglect, or loss resulting therefrom, he shall be deprived of the compensation provided by law, though in such cases the administrator will be charged with the loss and credited with his commissions; so that, so far as necessary, his commissions will be applied to the payment of such losses. In *Osborn's Estate*, 87 Cal. 4, 25 Pac. 157, one of the executors was held liable for a loss



occurring through the default and insolvency of his co-executor, and the court charged him with the loss, less the amount of his commissions. In *Re Moore*, 96 Cal. 522, 31 Pac. 584, the administrator was charged with various sums lost to the estate through his neglect, but he was allowed full commissions, and charged with the losses. In 2 *Woerner*, Adm'n, § 526, the author says: "It is held in numerous cases that compensation must be refused if the administrator has been guilty of willful default or gross negligence in the management of the estate, whereby the same has suffered loss: \* \* \* But it would seem that the language of the statute in most states fixing the compensation of executors and administrators precludes all discretion in this respect. The court can neither add to, nor detract from, nor in any wise vary, the compensation directed to be allowed by the statute. It can neither allow nor disallow commissions scaled by the degree of skill or of vigilance, of good or bad faith, displayed in the management of the estate, unless such discretion is vested in the court by statute." It is conceded that in other jurisdictions, where the compensation is fixed by statute, the decisions are not uniform; that in some the principle upon which compensation is refused is that, where the estate has suffered loss by the dereliction of the administrator, the loss will not be enhanced by the allowance of commissions, but where the loss is made up to the estate full commissions are allowed. I think the true rule, and one that is sustained by our own decisions, is that an administrator should be charged with losses resulting from his default or neglect, and allowed his commissions.

It is argued by respondent, however, that appellant, in her application for letters, waived commissions, and for that reason, if no other, compensation should not be allowed. This was not made a ground of objection in the court below, though about four printed pages of the record are devoted to the statement of the grounds of exception to this item in appellant's account; nor was any finding made thereon, or other notice taken thereof, in the court below. It appears, however, from appellant's testimony, that at the time of the compromise of the contests over the probate of the two wills left by the deceased, and before her appointment, her waiver of compensation was withdrawn, with the consent of the court, and that no objection was made to the withdrawal.

It is further contended that, if appellant is entitled to any compensation, the amount upon which commissions are computed is too large. The inventory and appraisement showed the total value to be: Personal property, \$4,448.03; and real estate, \$28,800; total, \$33,248.03; and the commissions charged by appellant are computed upon that sum at statutory rates. Respondent, in his exceptions to appellant's account, says that "she [appellant] has not administered the property

of said estate of the value of more than \$3,954.21." It is not suggested that the appraisement placed too high a value upon either the real or personal property, but it is contended that \$3,954.21 is the whole amount administered, and this amount, as the exceptions indicate, includes no part of the real estate. The deceased, A. G. Carver, died (in September, 1891) seised of 963 acres of land. Prior to his death he and his wife executed to one McHenry a mortgage upon said real estate, and another parcel belonging to Mrs. Carver, to secure the sum of \$32,700, and a suit to foreclose said mortgage was brought in December, 1892. The land belonging to the estate was cultivated after Mr. Carver's death, Mrs. Carver furnishing the money to pay the expense of putting in the crop. A receiver was appointed by the court to take charge of and harvest the crop, which afterwards went to the mortgagee. The foreclosure suit was eventually compromised, the mortgagee waiving a deficiency judgment, and paying \$2,500, which was claimed by Mrs. Carver to be the amount expended by her in putting in the crop, and she and the estate giving to the mortgagee the immediate possession of both tracts. It is true the valuation in the inventory is not conclusive (*Hinckley's Estate*, 58 Cal. 516; *Fernandez's Estate*, 119 Cal. 579, 51 Pac. 851), but it is *prima facie* evidence of its value (*Simmons' Estate*, 43 Cal. 549). In the petition of Mr. Ward for the probate of one of the wills he estimated the value of the land at \$45 per acre, while the appraisement fixes its value at \$30 per acre. Not only, therefore, is no question made as to the value of the land, but there are no circumstances tending to induce even a suspicion that the appraised value was not fair and reasonable. The appraised value of the land was charged to appellant in her account, and the fact that it was taken under a decree foreclosing the mortgage, and applied to the payment of a debt against the estate, was shown by the account. Appellant should, therefore, be allowed commissions in the amount stated in her account.

2. As to the sum of \$535.72, which the court directed to be charged as moneys in the hands of appellant, its history is somewhat obscure, but need not be traced to its origin. Upon the settlement of appellant's first account, she was directed by the court to charge herself with that sum as moneys in her hands, though it appeared upon the face of the order that the money was in fact in her mother's hands. In her final account she did not charge herself with it, but in her report said she had not done so because she had been unable, after using all reasonable efforts, to collect it. She thus treated it as money due the estate, but not as money that she should be responsible for whether collected or not. But if the court erred in its first order, which made her liable for the money in any event, she should have appealed from that order, and, not having done so, she is concluded.

Besides, in her said report, after explaining that she had been unable to collect said sum, she said: "That she is willing that said sum may be deducted from her commissions for administering upon said estate in so far as the same may be necessary for the payment of claims of creditors herein." As it appears that the whole of said sum is necessary for the payment of creditors, the offer should have been accepted.

As the order appealed from rightly charges her with said sum of \$535.72, but is erroneous in not allowing commissions, the cause should be remanded to the court below, with directions to modify its order by allowing appellant commissions in the sum of \$1,317.44, and that respondent pay the costs of this appeal, and as so modified the judgment be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the cause is remanded, with directions to modify the order appealed from by allowing appellant commissions in the sum of \$1,317.44, and that the costs of this appeal be taxed to respondent, and as so modified the judgment is affirmed.

123 Cal. 145

PEOPLE v. CITY OF OAKLAND. (S. F. 1,589.)

(Supreme Court of California. Dec. 23, 1898.)

NEW TRIALS—WHEN ALLOWED.

A new trial is allowable in actions for usurpation of a franchise brought under Code Civ. Proc. § 803.

Department 2. Appeal from superior court, Alameda county.

Action by the people against the city of Oakland. From a judgment and an order denying a motion for new trial, plaintiff appeals. Motion to dismiss the appeal from the order denying a new trial. Denied.

W. F. Fitzgerald, Atty. Gen., and Fitzgerald & Abbott, for the People. W. A. Dow, for respondent.

PER CURIAM. A motion is made herein to dismiss the appeal from the order denying a new trial. The question involved in the appeal is the sufficiency of the proceedings for changing the boundaries of the city of Oakland, and the present motion is made upon the ground that under the statute by virtue of which those proceedings were taken there is no provision for a new trial. The action herein is for the usurpation of a franchise, and is brought under the provisions of section 803, Code Civ. Proc., and the proceedings for changing the boundaries of the city were only evidence in support of the action. Section 803 is found in chapter 5 of part 2 of the Code of Civil Procedure, and the sections under which new trials are authorized are in

the same part of the Code, and contain no limitations respecting the character of the action in which they are to be granted. Other questions of fact than those relating to proceedings for changing the boundaries of the city may have been involved, and errors of law may also have occurred at the trial. New trials have frequently been granted in actions under this section. *People v. Sutter St. Ry. Co.*, 117 Cal. 604, 49 Pac. 736; *People v. Rodgers*, 118 Cal. 393, 46 Pac. 740, and 50 Pac. 668. The motion is denied.

EDE v. CUNEO et al. (S. F. 905.)

(Supreme Court of California. Dec. 23, 1898.)

APPEAL—DEATH OF APPELLANT AFTER SUBMISSION—ENTRY OF JUDGMENT.

Where an appellant dies after argument and submission of the appeal, but before decision thereon, the judgment will be entered as of the day before his death.

Order entering judgment on appeal. For former opinion, see 55 Pac. 388.

PER CURIAM. It appearing by the affidavit of J. P. Langhorne, filed herein, that the appellant, William Ede, died on the 25th day of October, 1898, after the argument and submission of the appeal, it is ordered that the judgment of affirmance heretofore given herein (55 Pac. 388) be entered as of the 24th day of October, 1898.

122 Cal. 405

COMMERCIAL BANK OF MADERA v. REDFIELD et al. (Sac. 451.)

(Supreme Court of California. Dec. 22, 1898.)

Modification of opinion. For former opinion, see 55 Pac. 160.

PER CURIAM. The opinion heretofore rendered herein (55 Pac. 160) is modified by striking from the paragraph preceding the last one in the opinion all thereof commencing with the words, "It was competent for the parties," etc., and inserting in lieu thereof, "We are of the opinion, however, that the consideration of the promise was sufficiently presented by the pleadings in the case as an issue for determination by the court."

122 Cal. 400

FRASSI v. McDONALD. (S. F. 851.)

(Supreme Court of California. Dec. 22, 1898.)

Modification of opinion. For former opinion, see 55 Pac. 139.

PER CURIAM. The opinion in this case, filed November 22, 1898 (55 Pac. 139), is hereby modified by striking therefrom all of that paragraph relating to the excavation being a nuisance by reason of having been made without a permit from the city authorities.



123 Cal. 132

**GARTHWAITE et al. v. BANK OF TULARE.** (Sac. 455.)

(Supreme Court of California. Dec. 22, 1898.)

**BANKS—DRAFTS—FORGERY—DILIGENCE—EVIDENCE—APPEAL—PRESUMPTIONS—HARMLESS ERROR.**

1. On a question of want of diligence in suing a bank for the amount of a draft on which the payee's indorsement had been forged, it was irrelevant that the payee had previously sued the bank for possession of the draft and recovered judgment.

2. Where irrelevant evidence is admitted over objection, it is presumed on appeal that the court considered it material, and the error is reversible.

Department 2. Appeal from superior court, Tulare county.

Action by W. W. Garthwaite and Elizabeth M. Smith, executors of the will of B. F. Smith, deceased, against the Bank of Tulare. From a judgment for defendant, plaintiffs appeal. Reversed.

John Yule, W. W. Cross, and D. C. Martin, for appellants. Davis & Allen and Bradley & Farnsworth, for respondent.

**PER CURIAM.** This is an appeal by plaintiffs from the judgment of the court below dismissing the action upon the ground of want of prosecution. The appellants contend, among other things, that the court below erroneously admitted in evidence the judgment roll in a former action entitled B. F. Smith, Plaintiff, vs. Bank of Tulare, a Corporation, and Pacific Bank, a Corporation, Defendants, No. 2,340; and this contention must be sustained. The latter action was commenced in the same court in which the case at bar is pending, on August 25, 1890, and its purpose was to recover possession of a certain check or draft drawn by the Bank of Tulare on the Pacific Bank for \$750, payable to the order of the plaintiff therein, B. F. Smith, which check or draft was alleged in the complaint to be unlawfully in the possession of the defendants in said case. It appears that the check was sent by one Lovejoy, who resided at Tulare, in Tulare county, to Smith, who resided at Oakland, in Alameda county, through the United States mail, and that it was taken from the post office by some person other than Smith; that Smith's name was forged on the back of the check, and that the Pacific Bank paid the amount of the check to the person who presented it, and upon demand refused to deliver the check to Smith. These facts were averred in the complaint in said case No. 2,340, which contained a prayer for the recovery of the possession of the check, or for its value in case a delivery thereof could not be had. That case was pending for about four years, but five days before the commencement of the present action the defendants in the former case delivered up possession of the check to the plaintiffs herein, who are the executors of said Smith, he having died in February, 1893. That action was dismissed by consent of the parties on the day

on which this present action was commenced. The plaintiffs, having recovered possession of the check, brought this action to recover the amount of money expressed on the face of the check, with legal interest. Under these circumstances the judgment roll in the former case had no relevancy as evidence to the issue presented in the case at bar as to lack of diligence in prosecuting the present action, and it was error to admit it. As objection to the admission of this judgment roll was specifically made by the appellants and overruled, it must be assumed that the court below considered it material, and attached importance to it. The error must therefore be considered as material and prejudicial (*Storch v. McCain*, 85 Cal. 304, 24 Pac. 639), and for this error the judgment must be reversed.

The above view makes it unnecessary to consider the point made by respondent that, as the appeal was not taken within 60 days after the judgment, and there was no specification in the bill of exceptions as to the insufficiency of the evidence, therefore the point cannot be considered here that the evidence was not sufficient to support the judgment. The judgment appealed from is reversed.

123 Cal. 134

**BALL et al. v. PUTNAM et al.** (Sac. 435.)

(Supreme Court of California. Dec. 22, 1898.)

**NOTES—PLEADING—EVIDENCE—CONTRACT—PUBLIC POLICY.**

1. Where, in an action on a note, one defense is a general denial, and another sets out the circumstances under which the note was made, but fails to put in issue the amount alleged in the complaint to have been paid thereon, proof of other payments is competent under the general denial.

2. Where plaintiff, suing on a note, testified that no other payment than the one credited had been made, it was proper on cross-examination to ask him who made the payment, and to whom, and when, and whether more had not been paid, and whether he had not at the time and place, and to the person stated, admitted receipt of further payments.

3. Neither the silence nor consent of the parties justifies a court in retaining jurisdiction of an action on a contract void as against public policy.

Department 2. Appeal from superior court, Yolo county.

Action by J. C. Ball and J. R. Troxel against J. E. Putnam and others. There was a judgment for plaintiffs, and defendants appeal. Reversed.

Cannon & Freeman and Ben. F. Geis, for appellants. F. C. Lusk and S. Millington, for respondents.

**PER CURIAM.** Action upon a promissory note. The cause was tried without a jury, findings were waived, and judgment entered for plaintiffs. Said appellants appeal from the judgment and from an order denying a new trial.

The complaint alleges that on March 6,

1889, the defendants made their promissory note "in words and figures following: "Sacramento, Cal., March 6, 1889. For value received, we, and each of us, promise to pay to J. C. Ball and J. R. Troxel the sum of six thousand dollars (\$6,000) on or before the 15th day of March, 1889, with interest at the rate of ten per cent. per annum from date. [Signed] August Henning. K. E. Kelley. J. E. Putnam. F. G. Crawford. W. H. Kelley. Joseph Muller." It is also alleged that plaintiffs are the owners and holders of said note, and that no part of it has been paid except the sum of \$2,892.50, which was paid on March 8, 1889. The complaint was not verified. The defendants, for a first defense, denied each and every allegation of the complaint; and, for a second and separate defense, set out a detailed history of the circumstances under which the note was made, and, with much less perspicuity, the purposes for which the money represented thereby was intended, and was in fact used. The substance of said second defense is that all the parties to the note were in the city of Sacramento on March 6th; that plaintiffs represented to defendants that they had promised to pay to "certain persons" in said city the sum of \$6,000, and were in immediate need of the money, which was to be paid to said persons at 10 o'clock the next morning; that they did not have the money, but would receive that sum from the Bank of Willows, in Colusa county, at 4 o'clock the next day; that, if the defendants would make said note, the plaintiffs would indorse it, and raise the money at a bank in Sacramento, and, when the money should arrive from Willows in the afternoon, they would take up said note, and destroy it; that such was the only purpose for which they would use the note, and that in no event would any of the defendants ever be required to pay it, or any part of it; that, relying on these representations, they made the note; that defendants received no consideration for it, and the facts set out was the only consideration; that plaintiffs never used said note for the purposes for which they said it was intended, and now hold said note without paying any consideration therefor. The statement on motion for a new trial contains nearly 200 specifications of errors of law occurring at the trial, and also specifies several particulars wherein it is claimed the evidence is insufficient to justify the decision. Findings having been waived, we look to the evidence for the circumstances surrounding the execution of the note upon which this action is based.

At the time this note was made, a certain bill was pending in the legislature for the division of Colusa county and the creation of the county of Glenn. Prior to the meeting of the legislature, meetings of people interested in the creation of the new county were held, and a committee was appointed for the purpose of raising money in aid of its crea-

tion. The town of Willows seemed to be the center of activity. At the time the note here in suit was executed the bill for the creation of Glenn county had passed, and was then pending on a motion to reconsider it. The promoters of the bill had a "headquarters" in the city of Sacramento, and on the evening of March 6, 1889, at the time the note in suit was executed, all the parties to the note, and many others interested in the new county, were present in the rooms occupied as the Glenn county headquarters. The finance committee above mentioned, consisting of Mr. O'Brien, Mr. French, and another, were not present at Sacramento. J. C. Ball, one of the plaintiffs, was the disbursing agent, to see that the money was properly expended. At the time the note was executed, it was stated and understood that an obligation had been entered into with a person not named, but who was then in Sacramento, by which there was to be paid to said person, on the following morning at 10 o'clock, a sum roundly stated at \$15,000, and in order to meet that payment the sum of \$6,000, in addition to the money on hand, would have to be raised. The defendants testified, in substance, that the plaintiffs represented that said sum of \$6,000 was then on deposit in the Bank of Willows, but that it could not reach Sacramento until 4 o'clock the next day, but that, if defendants would execute said note, the plaintiffs would indorse it, and raise the money thereon at a bank in Sacramento, and when the money arrived in the afternoon they would take up the note, and destroy it. The note was accordingly executed. Plaintiffs testified, in substance, that they did not represent that said or any sum was in the Bank of Willows; that they did not represent that they would raise said sum of \$6,000 on said note, but, if defendants would make said note, that they would raise or furnish the money; and that they did not use the note, but raised said sum on their own sight draft on the Bank of Willows. \$14,500 was drawn from the bank at Sacramento on the morning of the 7th, and paid over to the "person" with or to whom the obligation was contracted. The particulars of this part of the transaction will be more fully stated in another connection.

The differences between the note set out in the complaint and the note put in evidence did not constitute a material variance. The objection having been made that they were not the same, good practice required that the variance be explained, and, if the errors were found to be in the copy set out in the complaint, an amendment should have been made. J. C. Ball, one of the plaintiffs, was called on their behalf, and testified that no payments had been made on said note other than the sum of \$2,892.50, indorsed thereon March 8, 1889. On cross-examination he was asked several questions in relation to said credit, and as to whether the payments were made



to him, when it was paid, whether it was paid by the defendants, whether it was not a fact that more money had been paid that should be credited, whether \$1,000 had not been paid that was not credited, whether he had not stated at a time and place, and to a person named, that he had received or would receive and credit upon said note the sum of about \$1,500. These questions were each objected to upon the ground that they were immaterial, and not within the issues; that it is not denied by the answer that a certain sum was paid; and that it was not cross-examination. The objections to each of said questions were sustained, and exceptions taken. These rulings were erroneous. There were two defenses, the first being a general denial, which put in issue every material allegation of the complaint. The second defense alleged the circumstances, purpose, and consideration of the note, but did not put in issue the amount alleged in the complaint to have been paid thereon, or the amount remaining unpaid; and, because issues upon these allegations of the complaint were not taken by the second defense, the court and counsel for the plaintiffs treated the allegation of the complaint that no part of said note had been paid other than the sum credited as undenied, and therefore admitted. But this conclusion nullifies the denials contained in the first defense, which put in issue all the material allegations of the complaint. It is well settled that an admission in one answer or defense is not available by the plaintiff in proof of issues raised by another answer or defense pleaded in the same case. *Siter v. Jewett*, 33 Cal. 93; *Nudd v. Thompson*, 34 Cal. 39, 47; *Miller v. Chandler*, 59 Cal. 541; *Botto v. Vandament*, 67 Cal. 332, 7 Pac. 753. These questions were also proper cross-examination. Mr. Ball testified that no other payment than the one credited had been made, and thus the door for cross-examination was thrown wide open.

At the time plaintiffs raised said sum of \$6,000 on their sight draft upon the Bank of Willows they had no funds to their credit in said bank. Afterwards the note here in suit appears to have been deposited to the credit of plaintiffs in said bank, or as collateral to their own obligation. It further appears that said bank was the depository of contributions to the Glenn county fund collected by the finance committee, and that the credit indorsed upon said note was paid from funds so collected, and was credited on March 8th,—the second day after the note was made, and before its maturity. Mr. Burton, the cashier of said bank, was called by the defendants, and shown the note in suit, and recognized pencil memoranda thereon made by him. He was then asked by counsel for defendants: "Is it not a fact that there has been paid into the Bank of Willows, since the time the note was given to the bank and held by the bank as collateral security, the sum of one thousand dollars as a credit upon the note, for which this note was held as collateral security to

you, and which sum would release this note to that extent?" An objection was sustained. Thereupon defendants offered to prove by said witness that there was paid \$1,000 into the bank, and that the parties making the payment requested at the time the payment was made that it be applied to the payment of the note in suit. Plaintiffs objected that it was not competent or material, in that there is no answer setting forth a defense of payment, and the objection was sustained. The evidence was clearly admissible under the general denial which put in issue the averment of the complaint that no other payment had been made than the one credited.

Other erroneous rulings were made, some of which were prejudicial, but, as the matters involved will not necessarily arise upon another trial, they need not be noticed. Enough has been shown to require a reversal of the judgment. But, since the judgment is to be reversed, this should be added: There is evidence in the record tending to show that the contract which lay at the bottom of all the transactions between these parties was a contract void as against public policy. Not enough appears to justify this court in saying that such is the fact, but enough appears to call for rigid inquiry by the trial judge; and if, after such inquiry, the evidence elicited leads him to believe that such is the fact, he will withhold all relief in this action, for a contract which is against public policy, good morals, or the express mandate of the law cannot be made the basis of any action, legal or equitable. Neither the silence nor the consent of the parties to it justifies the court in retaining jurisdiction of such an action. *Chateau v. Singla*, 114 Cal. 91, 45 Pac. 1015. The judgment and order are reversed, and the cause remanded.

123 Cal. 172

GEORGE v. PIERCE et al. (S. F. 883.)

(Supreme Court of California. Dec. 29, 1898.)

ASSIGNMENTS FOR CREDITORS—RIGHTS OF ASSIGNEE AND OF CREDITORS—PLEDGES—CHANGE OF POSSESSION—LIEN—EXECUTION—SALE—CONVERSION—TITLE—DAMAGES.

1. An assignee for creditors stands in his assignor's shoes, and hence he cannot attack a pledge of the assignor's property because the change of possession was not sufficient.

2. Creditors for whose benefit an assignment has been made may nevertheless prosecute their claims to judgment and levy execution.

3. The pledgor of cattle owned the ranch where they grazed. M. lived there, and cared for and milked them, and gave the milk to the pledgor, who sold it, the profits being divided. By direction of the pledgor, M. drove the cattle into a corral, the pledgor and pledge holder counting them, and the cattle then passed back into the pasture, and the pledge holder saw them but once afterwards. A bill of sale was then given by the pledgor to the pledge holder, who gave a lease of the cattle to M. The relations between the pledgor and M. remained the same, except that M. thereafter refused to give the pledgor any of the cattle for beef, as had been the custom. Held that, in spite of the writings, there was no actual or visible change of possession as to creditors.

4. A debtor pledged property, without, however, surrendering possession, and then assigned for creditors. The property was sold under execution by creditors, and the purchaser conveyed to the assignee. *Held*, that the assignee acquired title free from the pledge.

5. An assignee for creditors took possession of property pledged by the assignor. The taking was a conversion, because, standing in his assignor's shoes, the assignee had no right to attack the pledge. *Held*, in an action for the conversion, that the assignee might show, at least in mitigation of damages, that he had acquired title through a judgment creditor, who levied on and sold the property *pendente lite*.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Henry C. George against Henry Pierce and another. There was a judgment for plaintiff, and, from an order denying a new trial, defendant Pierce appeals. Reversed.

T. M. Osmont, for appellant. Warren Olney, for respondent.

GAROUTTE, J. Plaintiff, claiming to be pledge holder, brings this action for conversion of the pledged property. Some of the facts presented by the record are as follows: De Long owned a large tract of land in Marin county, upon which land he kept a great number of dairy cows. He borrowed \$25,000 from Cowell, and gave these dairy cows into the possession of George, the plaintiff herein, as pledge holder, to secure the lien. During the life of the pledge De Long, under the provisions of the Civil Code, made an assignment for the benefit of creditors, and Pierce, the defendant, became the assignee under such assignment. Thereafter, deeming the proceedings pertaining to the pledge void, he took possession of the cows. The pledge holder thereupon brought the present action in conversion for damages. One herd of these cows is involved in the present case. Other cases are pending, resting largely upon similar facts, as to the remaining herds. In *Francisco v. Aguirre*, 94 Cal. 180, 29 Pac. 495, it was held that an assignee, such as this defendant Pierce, stood in the shoes of his assignor. Hence, if De Long had no right to take the possession of these cows from the pledge holder, then Pierce had no right to do so, and his taking would be wrongful and a conversion. Pierce, in taking possession of the cattle, appears to have acted upon the theory that the possession of George as pledge holder was not such a possession as the Civil Code contemplated, and therefore no lien rested upon the cattle, as against the assignee for the benefit of creditors. This position is untenable, for the reason that the sufficiency of George's possession was a matter that De Long, the pledgor, could not attack. Measuring and testing the case from this standpoint, the judgment against Pierce finds full justification in the law. But at this point complications present themselves by reason of the following facts: While this action was pending certain creditors of De Long secured a judgment against him, levied upon these cows by execu-

tion, and sold them. The title under this sale thereafter vested in Pierce for the benefit of the creditors, by reason of a transfer from the purchaser. By supplemental answer Pierce set out these facts as a defense to the action. The trial court refused to admit evidence tending to establish them, and this refusal is assigned as error.

An important question meets us at the threshold of the investigation. Did Pierce, by the action of the creditors, get title to the property? There is no question but that the creditors, after the assignment of De Long, had the right to prosecute their respective claims against him and levy executions upon this property to satisfy judgments recovered. *Francisco v. Aguirre*, supra, is directly to this point. It follows that title to the property passed to Pierce as a result of the action if the property was subject to execution and sale at the hands of the creditors. It certainly was so subject if the transfer by De Long of the possession of the cattle to the pledge holder, George, plaintiff in this action, was not accompanied by an actual and continued change of possession; for any other kind or character of transfer to the pledge holder would leave the property subject to the satisfaction of the debts of De Long's creditors, regardless of Cowell's lien. We have examined the record with extreme care, and have failed to find evidence supporting a finding of fact to the effect that there was an actual and continued change of possession from De Long to George. To sustain the validity of a pledge, as against creditors of the pledgor, there must be an open and visible change of custody of the property. Secret liens of all kinds are abhorrent to the law, and for these reasons are not supported. Let us look at the facts surrounding this transfer.

When George went upon the De Long ranch to take possession of the cattle he found matters in this condition: De Long owned the ranch and the cattle. Matoni, the co-defendant, lived upon that particular part of the ranch where these cattle grazed. He cared for them and milked them. The milk was given to De Long, who sold it, and divided the net proceeds with Matoni. Such was the present situation at the time of the delivery of the cows to George. Upon that day the following events took place: Matoni, under orders from De Long, drove the stock into the corral from the pasture land. Then George stood upon one side of the gate and De Long upon the other, and, as the cows slowly passed from the corral through the gate back to the same pasture land from which they had been driven, they counted them. A bill of sale of the stock was given by De Long to George, and George thereupon gave a written lease to Matoni of the cows for the rental of \$30 per month. These things having taken place, George rode away, and never saw the cows but once again. The relations between De Long and Matoni as to the cows continued exactly the same after this eventful day as



before, with the single exception that Matoni thereafter refused to give De Long on demand any of the cows for beef, which had been the past custom. We believe we have stated all the material facts bearing upon the transfer of the possession of the cows from De Long to George, and, weighing and measuring these facts, they entirely fail to disclose that actual and continued change of possession demanded by the statute in cases of pledge in order that creditors of the pledgor may not successfully attack the transaction.

The transaction pertaining to this transfer was enveloped in writings, which was well enough for the purpose of evidencing the rights of the respective parties to it; but the statute which deals with the change of possession sufficient to defeat creditors does not contemplate writings, but acts. No writings pertaining to a transfer of personal property, regardless of their number or character, can create an actual and continued change of possession as to creditors of the pledgor. Acts only can do it. A visible, actual, continued change of possession must be had, and the law will be satisfied with nothing else. Writings can never accomplish these results. In the investigation of the question now before us, the bill of sale from De Long to George goes for naught. The lease from De Long to Matoni of the land upon which these cows had previously pastured, and upon which they were subsequently to pasture, is an unimportant circumstance. The lease of the cattle by George to Matoni at a rental of \$30 per month in no way tends to prove either an actual or a continued change of possession to George. Let us, then, see the surrounding conditions after George, the pledge holder, mounted his horse and rode away. The cows still fed on the same pasture lands, and were still cared for and milked by the same man. The increase was still divided between De Long and Matoni, the dairyman. The milk was turned over by Matoni to De Long, and disposed of by him the same as before, the net profits being divided as in the past. There was not only no real change of the possession of the cattle, but absolutely no apparent change. Everything went on exactly as it had gone on in the past. Under these circumstances, the transfer to the pledge holder was void as to creditors, and the sale under execution carried good title; which title was in Pierce, the defendant, at the date of the trial.

It is claimed upon the part of plaintiff that Pierce's title to the cattle under the execution sale is only such title as De Long had, and therefore he stands as De Long stands. But there is this material difference: De Long had title to the cattle subject to the pledge holder's lien; Pierce has title relieved of such lien, and this resulted from the levy and sale of the cattle by the creditors.

The title to the property alleged to have been converted being in Pierce at the date of the trial, was that fact a defense to the action in conversion? In other words, plain-

tiff having a perfect cause of action for conversion when his complaint was filed, has that cause of action been abated by a subsequent acquirement of legal title of the property by the party guilty of the conversion? Without going into this question in extenso, it is sufficient to say that, if the facts set out by the supplemental answer in this case are not a complete bar to the action, they are, at least, material and relevant, as tending in mitigation of damages. At least, it must be that, under such conditions, the damages claimed by plaintiff should be mitigated to the extent of the value of the cattle at the time of the trial. For these reasons the judgment roll in the action of the creditors against De Long should have been admitted in evidence.

The contention of appellant that the complaint does not state a cause of action has no merit. We are also satisfied with the trial court's position as to the splitting of the various causes of action. The objection to the prosecution of the motion for a new trial, based upon laches, is not well taken. For the foregoing reasons it is ordered that the order denying a new trial be reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRISON, J.

6 Cal. Unrep. 202

THOMSON-HOUSTON ELECTRIC CO. v.  
CENTRAL ELECTRIC RY.  
CO. (Sac. 389.)

(Supreme Court of California. Dec. 20, 1898.)

PRINCIPAL AND AGENT—SALES—PAYMENT—CONTRACTS—CONSIDERATION.

Plaintiff was to act as purchasing agent for defendant, but was to assume no responsibility for the satisfactory working of the apparatus purchased. The contract contemplated that plaintiff should pay for the apparatus, and be repaid by defendant in a lump sum, which was to include all supplies. The apparatus proved defective, and defendant notified plaintiff not to pay therefor until an adjustment was reached, stating that it had claims on other purchases against the seller almost equaling the entire cost, to which plaintiff's agent agreed, and unsuccessful attempts were made to adjust defendant's claims extending over several months, and until after the insolvency of the seller. In an action for the price, plaintiff's treasurer and the seller testified that plaintiff paid for the apparatus soon after delivery, and before the notice of defect. *Held*, that the agreement to withhold payment by plaintiff's agent, who did not know payment had already been made, did not prevent recovery, since it was without consideration.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county.

Action by the Thomson-Houston Electric Company against the Central Electric Railway Company. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

Page & Eells, for appellant. Johnson & Johnson, for respondent.

CHIPMAN, C. Action to recover the sum of \$1,100, the contract price of four so-called Tripp trucks, furnished by plaintiff to defendant under written contract executed March 19, 1892. The cause was tried by a jury, and defendant had the verdict and judgment thereon. The appeal is from the judgment and from the order denying motion for new trial. The pleadings are verified.

Plaintiff is a Connecticut corporation, transacting business in San Francisco and other places through branch agencies. The manager of the San Francisco branch was Thomas Addison, with authority to make the contract. Plaintiff proposed that defendant purchase quite a large lot of electrical and other supplies suitable for defendant's use, and the proposal was accepted. The part of the contract now in question was as follows: "We propose to furnish four (4) latest improved roller-bearing Tripp trucks, you to guaranty that the above trucks shall not cost us to exceed two hundred and seventy-five dollars each f. o. b. cars Boston, Mass. In furnishing said trucks, however, it is agreed and understood that we act only as your agent in the matter, assuming no responsibility for their proper or satisfactory working, or for any delays in delivery of same, nor for any costs or expenses growing out of suits for alleged infringements of patents." The clause as to payment was for a gross sum (\$10,000) for all the supplies "thirty days after the same has been delivered to you as above agreed upon, ready for successful operation." The complaint alleges that plaintiff fully performed all the conditions of the contract, including the purchase from the Tripp Manufacturing Company of, and payment to it for, the trucks in question. Defendant denies the purchase by plaintiff as alleged, and the payment by it to Tripp Company; avers as a separate defense that plaintiff, as special agent of defendant, received the trucks from the Tripp Company, and that plaintiff was authorized to do nothing else in connection with said trucks; that upon receipt of the trucks by defendant it notified plaintiff of a claim defendant had against said Tripp Company which defendant desired to offset against said Tripp Company for the purchase price of said trucks, all of which plaintiff knew before it paid said Tripp Company as alleged in the complaint, and, if such payment was made by plaintiff, it was in violation of its authority; that said Tripp Company at the time of said alleged payment was, and ever since has been, insolvent; and by reason of said payment, if made, defendant has been damaged \$1,187. A second separate defense by way of counterclaim and offset is pleaded, alleging an indebtedness of Tripp Company to defendant of \$1,187 for money paid and expended by defendant in the repair and alteration of Tripp trucks purchased by defendant from said Tripp Company within two years last past, of which claim plaintiff, at all times

mentioned in the complaint, had knowledge; that plaintiff was acting only as special agent of defendant, and was instructed by defendant not to pay \$1,100, or any part of it, to the Tripp Company, and that any payment made by it was without authority, and in violation of the agency and its instructions; avers that defendant has been prevented from collecting its said claim of \$1,187, or offsetting the same by plaintiff's payment of said \$1,100, and to defendant's damage.

1. Appellant contends that the evidence is insufficient to justify the verdict. By the terms of the contract, plaintiff became the agent of defendant to purchase the trucks, but no responsibility was to attach to the agent for the proper and satisfactory working of the trucks, nor for delays in the delivery. The cost was included in the gross sum to be paid for the entire equipment, which was \$10,000; and defendant agreed to pay this sum "thirty days after the same has been delivered \* \* \* ready for successful operation." The words "successful operation" had reference to the other equipment, and not to the trucks, for it was specially agreed that plaintiff assumed no responsibility for their proper working. These trucks were to be purchased by plaintiff and paid for by plaintiff, for it agreed to furnish them; and defendant was to pay plaintiff, and not the Tripp Company. The agency feature of this part of the contract was introduced to relieve plaintiff from liability as to the proper working of the trucks and as to delay in delivery, and properly so, because plaintiff had no interest or profit in these items. The evidence is uncontradicted that plaintiff gave the order to the Chicago branch, and the trucks were ordered by the Boston branch, and were delivered to that branch June 29, 1892. The bill reached plaintiff's Boston branch July 6th, and August 4th a statement of account of plaintiff was rendered by the Tripp Company, and on August 5th the trucks were paid for by the Boston branch. Notice of this payment was not sent to the San Francisco branch. When the trucks were shipped to Sacramento does not appear, but it does appear that they were first used or examined about September 1st. Some repairs were found to be necessary upon them, and on September 7th defendant wrote the San Francisco branch not to pay the Tripp Company in full until defendant made settlement with plaintiff. September 8th Dr. Addison wrote: "We cheerfully comply with your request, at the same time asking you to complete the repairs as promptly as possible, and give us a full account of the same, together with costs." September 30th defendant sent account of charges "in perfection of trucks purchased from you for our use and account," charging plaintiff \$134.34. On October 1st Dr. Addison replied, and, among other things, said: "While we should be glad to continue to act as your agent in this matter, if you so desire, and forward this [the account] to the



Tripp people, yet we should prefer to have you take it up yourselves, and fight it out. You will note by our contract, dated March 19, 1892, that we simply act as your agent in this, and do not assume any responsibility whatever for these trucks. For this reason we return these bills to you, and ask you to take the matter up directly with the Tripp people." October 3d defendant replied: "We will do as requested; therefore do not pay the Tripp Manufacturing Company anything on these trucks until we can get this adjusted." On the same day (October 3d) Dr. Addison wrote to the Boston house, calling attention to the claim of defendant of \$134.34 for repairs of these trucks, and, at the request of defendant, suggesting "that you defer settlement for these trucks until the same is adjusted with the Central Electric Railway Co.," and disclaiming responsibility for the trucks not working. October 11th the San Francisco house received a reply to its letter of October 3d, from the Boston branch, stating: "We will defer settling with the Tripp Company until this matter is arranged. We suppose you will secure a claim from the railway people covering the expense incurred by them, which we will submit to the Tripp Company before making settlement." The evidence of defendant was that there was no claim against the Tripp Company on account of these four trucks except the \$134.34. But it appears that defendant had purchased other trucks directly from the Tripp Company, the satisfactory working of which that company had guaranteed. Defendant made certain necessary repairs on these latter trucks, and on October 10th defendant wrote the San Francisco branch, again asking that the Tripp Company be not paid for the four trucks, as the Tripp Company owed defendant "nearly enough to balance the account," but sending no items of account. Several other letters were exchanged between defendant and Dr. Addison on the subject, showing that defendant was endeavoring to effect a settlement with the Tripp Company without much success, and asking that plaintiff do not pay the Tripp Company for the trucks; and on November 7th Dr. Addison wrote to defendant: "If you feel that you cannot settle it, send the account to me, and I will see what can be done, but of course cannot take any responsibility for such settlement." Defendant continued its efforts to settle with the Tripp Company direct. February 17, 1893, Dr. Addison asked defendant if it could not, in making its settlement with the Tripp Company, collect a claim of his company against the Tripp Company for \$228. It does not appear that defendant ever notified the plaintiff of its claims against the Tripp Company other than those on the four trucks, except in the letter of October 10th, as already stated. Finally, February 20, 1893, Dr. Addison wrote the defendant that he was advised by the Boston office that the Tripp Company had made an assignment for the benefit of its

creditors, and that, unless a certain proposed compromise was accepted, his company would not get over 10 or 20 per cent. of its claim, and adds: "I give you this information in case you should desire to take advantage of the same." This brought the matter to a focus, and defendant wrote to plaintiff, March 4th, inclosing balance as settlement of account to February 1, 1893, and added: "The eleven hundred dollar item, as shown in your statement February 28th, is wholly incorrect, as the T. H. [Thomson-Houston] contract is settled so far as you are concerned, we having (by your own suggestion) taken up the matter of settlement with the Tripp Manufacturing Company for the trucks. We hope you will save us further correspondence over this matter," etc. March 6th, Dr. Addison replies, and for the first time informs defendant that plaintiff had already paid the Tripp Company for the trucks, claiming that defendant owed plaintiff for them, and stating that, "if the Tripp Company had not failed, this matter would be easier of adjustment than it is." The remaining correspondence consists of restatements of former letters, and the writers' construction of their meaning. It will be observed that all this correspondence occurred after the Tripp people had been paid. That they were paid by the Boston house on August 6, 1892, is undisputed, except as it may be otherwise inferred from this correspondence. We think the sworn testimony of the treasurer of the Boston branch of plaintiff, and also that of the manager of the Tripp Company, may be consistently accepted as true, notwithstanding the ignorance of the fact of the San Francisco house and of the person in charge of the correspondence at Boston. We see no necessary conflict between the fact of payment sworn to and the subsequent correspondence.

The repairs upon trucks purchased directly by defendant from the Tripp Company, or other items of charge of defendant against that company, with which plaintiff had nothing to do, and which items were never furnished plaintiff, had no connection with the defendant's contract with the plaintiff. When defendant asked plaintiff to withhold payment for the four trucks until defendant could adjust its differences with the Tripp Company as to matters of no concern to plaintiff, it was asking something it had no right to ask under the contract. What plaintiff did in respect of those claims was voluntary, and without consideration. Even as to the four trucks, plaintiff, by the terms of the contract, was to assume "no responsibility for their proper and satisfactory working, or for any delays in delivering the same." The contract required plaintiff to make the purchase of four trucks, and contemplated that plaintiff should, in the first instance, pay for them; and there was no restriction upon plaintiff as to when it should pay for them. The very matter as to which repairs became necessary was in terms taken out of plain-

tiff's responsibility. It was guarantied by defendant that the trucks should not cost plaintiff "to exceed two hundred and seventy-five dollars each, f. o. b. cars Boston, Mass.," which was the price paid by plaintiff; and this price was included in the gross sum of \$10,000 to be paid for the entire equipment by defendant.

As to the knowledge of the insolvency of the Tripp Company, there is no evidence that plaintiff knew it until after the assignment for the benefit of the creditors in February, 1893, which fact was promptly communicated to defendant; and there is no evidence that the Tripp Company was insolvent at the times alleged in the answer.

2. We do not feel called upon to examine the alleged errors of law occurring at the trial in giving instructions and refusing or admitting evidence. Many, if not all these, are connected with the question of plaintiff's liability for the claim of defendant for \$1,187 arising out of repairs to trucks not purchased through plaintiff, as to which we have held that plaintiff incurred no liability. The judgment and order should be reversed, and the cause remanded.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded.

123 Cal. 178

CHICO BRIDGE CO. v. SACRAMENTO  
TRANSP. CO. (Sac. 425.)

(Supreme Court of California. Dec. 29, 1898.)

STATUTES — REPEAL — BRIDGES — SUPERVISORS —  
NAVIGABLE STREAMS — STEAMBOATS — NEGLIGENCE  
— PLEADING — EVIDENCE — EXPERTS — APPEAL —  
REVIEW.

1. Act March 24, 1874 (Pol. Code, § 2872), prohibiting supervisors from licensing bridges across certain named streams, was, by necessary implication, repealed by Acts 1881, p. 76, § 1, authorizing them to erect bridges on public highways across navigable streams, or to grant franchises for the same.

2. An action for damages inflicted to a bridge by a steamboat is not one of trespass, but negligence must be proved.

3. In an action for damages to a bridge inflicted by a steamer, the evidence showed that for several years the river had been navigable at all stages, boats passing the bridge once a week, with but a single slight injury to the bridge before the one in suit, and a few slight touches since. The injury was not caused by any defect in the draw, or in opening it. There was expert evidence that the river could at all times be navigated safely. *Held* to make a prima facie case of negligence.

4. A finding cannot be set aside on the weight of the testimony and the credibility of the witnesses.

5. Where, in an action for damage to a bridge inflicted by a steamer, there was no averment of faulty construction of the bridge, evidence that, if there had been a fender or cluster of piles above the bridge, the collision would not have happened, was properly excluded.

6. A civil engineer, with eight years of ex-

perience in charge of a government snag boat, and of observation and study of river currents, and with knowledge of the locality in question, is qualified to give an opinion as to whether a river can be safely navigated at all times at a point where a steamer collided with a bridge.

7. Where supervisors gave to a bridge company the use of parts of an old bridge and the right to attach a draw thereto, provided it would put and keep in repair the approaches, the company was not prevented from recovering the whole damage caused to the bridge by a collision, by the fact that the supervisors could at any time resume control and possession of the bridge, the company having repaired the injury.

Commissioners' decision. Department 1. Appeal from superior court, Butte county.

Action by the Chico Bridge Company against the Sacramento Transportation Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Reardon & White, for appellant. F. C. Lusk, for respondent.

HAYNES, C. Action to recover damages alleged to have been sustained by plaintiff through injury to its bridge across the Sacramento river, at or near Chico, by a collision therewith by defendant's barge while navigating said river. Plaintiff had judgment, from which, and from an order of the court denying its motion for a new trial, defendant appeals. Plaintiff and defendant are both corporations organized and existing under and pursuant to the laws of the state of California. At a point near Chico, on the Sacramento river, between the counties of Butte and Glenn, is a bridge connecting highways in those respective counties. A drawbridge was originally constructed at this point in 1882, by the county of Butte. The greater portion of this bridge, including the draw, was carried away by a flood in the Sacramento river in the winter of 1889-90. Neither of the counties of Butte or Glenn being desirous of reconstructing the bridge, the supervisors of the county of Butte (the county lying on the left-hand side of the Sacramento river), upon the application of one T. H. Barnard, on the 22d day of July, 1890, granted him a franchise to construct a tollbridge across said Sacramento river at the site of the former free bridge. The order also permitted Barnard "to use the parts of said bridge now remaining, and to attach the drawbridge thereto, provided said party shall put and keep in good repair said approaches, and, whenever Butte county may deem it for the best interests of the county so to do, purchase said bridge so erected, they may do so, in the form and manner provided by law, paying only for the new part that may be built," etc. Barnard assigned his franchise to the Chico Bridge Company, a corporation, the plaintiff herein; and it constructed the bridge in consonance with a previous order of the state engineer, except that the draw was made 101½ feet wide, while the order only required it to be



90 feet. This draw turned upon a pier in the center. The bridge was completed and opened for traffic as a tollbridge on the 11th of December, 1890, and has ever since been owned, possessed, and operated as such by the plaintiff. The Sacramento river, at the point where said bridge is constructed across it, is a navigable stream. On the 9th day of March, 1893, and for a long time prior thereto, defendant (appellant here) was the owner of sundry steamers and barges, and was engaged in the business of navigating with them the said Sacramento river. On said last-mentioned day, defendant's steamer *Jacinto*, with its barge *Utah* in tow, was descending said river. Plaintiff, in due time and in a proper manner, opened the draw of its bridge for the passage of said steamer and barge, to pass down and through. The court finds that said defendant negligently and carelessly, and without any fault or neglect of plaintiff, caused and suffered its said barge to run into and collide with that portion of said bridge which was east of the draw, and in said Butte county, and injured and destroyed the said bridge to plaintiff's damage in the sum of \$750.

The first point made by appellant for reversal is that the motion of defendant for a nonsuit should have been granted, for the reason that the bridge was shown to have been constructed across a navigable river, and in violation of law. The Sacramento river is a public way. Pol. Code, § 2349. The contention is that, by section 2872 of the Political Code, the board of supervisors had no authority to grant a franchise for the construction of the tollbridge. But it will be noticed that the power which was taken from boards of supervisors to license tollbridges over navigable streams by section 2872 of the Political Code is expressly conferred upon them by the later act of 1881. The latter act clearly repeals by implication so much of the Code as deprived the boards of supervisors of this power. It follows that the board of supervisors had jurisdiction to grant the franchise to plaintiff's assignor. Section 2874 of the Political Code authorized the plaintiff to use, and the board of supervisors to prescribe the manner of use of, so much of the public road or approach to the bridge as was necessary in the construction and maintenance of the bridge.

Another point was also made on the motion for a nonsuit, viz. that there is no evidence showing or tending to show negligence on the part of the defendant in the navigation of the Sacramento river. The complaint alleges that the "defendant negligently and carelessly, and without any fault or neglect of plaintiff, caused and suffered its said barge to run into and collide with that portion of said bridge," etc. Respondent contends that the action is in reality one of trespass; that whether the defendant was negligent is immaterial; and that plaintiff's allegations of negligence may be treated as surplusage, and

therefore proof of negligence would not be necessary. The respondent is manifestly in error in this contention, and the court below improperly adopted that theory. In this case negligence was sufficiently alleged; but it is contended by appellant that the plaintiff offered no evidence to sustain that allegation, and that its motion for a nonsuit should have been sustained upon that ground. The evidence on the part of the plaintiff, in chief, was, in brief, a description of the bridge, the width of the draw, the stage of the water, which was 10 feet above low water, the extreme being 20 feet; that the river was navigated by steamers with and without barges, trips being usually made once a week; that in 1889 and 1890 the west bank of the river above the bridge had been washed out to the extent of 300 or 400 feet, which produced a cross-current towards the east side when the water was 10 feet or more above low water; that it required more care in navigating during high than at low water; that the injury was not caused by any defect in the draw, or in opening it; that in different stages of water there is a great deal of difference in the velocity of the currents; "that it was perfectly safe to navigate at any stage of water"; that the steamer passed through without colliding, but, when the barge came along, it struck the upper side of the east pier of the bridge,—that is, the pier which supports the east end of the bridge,—and broke five or six piles; that there were no dolphins or fenders or cluster of piles above the bridge, though "such things would have a tendency to protect the bridge from collisions"; that the bridge was opened for travel December 11, 1890; that this accident occurred March 9, 1893; that prior to this accident the bridge had been hit but once so as to require repairs, on which occasion the repairs cost but \$30; that it was not true that on numerous occasions steamers and barges would rub against the pier going down the river; that they would sometimes rub against it going up; that, up to the time of the injury complained of, they had not hit the bridge, but "since that time they have hit against it a little, without damaging it materially." Upon this state of the evidence the plaintiff rested, and defendant moved for a nonsuit. No criticism was made by any witness of the manner in which the steamer and barge were handled, nor any suggestion made as to how the collision might have been avoided, or that those in charge of the vessels were incompetent. The burden of proof being upon the plaintiff to show that the injury was either intentionally or negligently committed, and there being no pretense that it was intentional, the question is presented whether the evidence made a *prima facie* case of negligence.

There is no absolute rule applicable to all cases as to what constitutes due or reasonable care, on the one hand, or negligence, on the other. The circumstances under which

accidents occur are well-nigh infinite, and liability or nonliability therefor must depend upon the circumstances under which they occur. There are, however, some general rules applicable in all cases as aids in determining the question of liability. One of these is stated in the Nitro-Glycerine Case, 15 Wall. 524, as follows: "The measure of care against accidents which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own." In this case it is clear that the navigation of the river by steamboats and barges was necessarily a source of some danger to the bridge, and the existence of the bridge, while not, in the eye of the law, an unreasonable obstruction to the navigation of the river, nevertheless increased its difficulties, and was a source of some danger to navigation. The bridge, however, was an immovable object. It could not be moved out of the course which the boat was taking, while the boat is supposed to be under the control of those navigating it, and capable of being controlled and guided in its movements. In *Shearm. & R. Neg.* § 60, it is said: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." This rule was quoted and approved in *Judson v. Powder Co.*, 107 Cal. 549, 556, 40 Pac. 1020. In that case every one who could have known the cause of the explosion was killed; but, in addition to the presumption arising from the fact that the business of manufacturing explosives is carried on for indefinite periods without accident,—that explosions are therefore the result of negligence,—there was expert evidence to the effect "that if the factory was properly conducted, and the employés careful during the process of manufacturing, an explosion would not occur." So, here, the evidence showed that for several years the river was navigated at all stages of water, passing the bridge once a week, with but a single slight injury to the bridge prior to the one in question, and a few times afterwards touching or rubbing it slightly; and, in addition, there was expert evidence that it could at all times be navigated safely. This, we think, was quite sufficient to justify the court in denying the motion for a nonsuit, and to throw the burden of showing due care upon the defendant.

The court found that the injury was caused by defendant's negligence, and appellant contends that said finding is not justified by the evidence. It is true the defendant's agents in charge of the boats, while showing that they had been for many years engaged in navigating the river, and regularly passing the bridge at all stages of water, testified that on

the occasion in question they encountered a cross-current that they had never met before or since, and attributed the accident to that current, and denied negligence. The credibility to be given these witnesses, and the weight to which their testimony was entitled, it was the province of the trial court to determine; and the finding, as well as the opinion of the court to which we have referred, shows that the court gave it no credence whatever. We cannot therefore set aside said finding.

Upon cross-examination the bridge tender was asked: "If there had been a dolphin or fender or cluster of piles placed above the bridge, the barge would not have collided with the bridge, would it?" It was objected that the question was irrelevant, immaterial, and not cross-examination. The objection was rightly sustained. There was no allegation in the answer that the bridge was improperly constructed, or left without proper protection of the character indicated; and there was nothing in the examination in chief which opened a door for the question. Whether it was the duty of the plaintiff to have thus protected its bridge is a question not presented by the record.

It is also contended that the court erred in permitting plaintiff's witness H. L. Demerit to give his opinion as an expert. Without consuming space to rehearse the testimony of this witness tending to show his qualifications, we think the profession of the witness,—that of a civil engineer,—taken in connection with his experience of eight years in charge of the government snag boat, and his observation and study of the currents of the river at similar places, as well as his knowledge of the locality in question, acquired by frequently passing it, though at a lower stage of water, qualified him to speak, and that the court did not err in overruling the objection.

In one of the reply briefs for appellant, the point is made that the plaintiff is not entitled to the whole of the damages, as it has only a temporary interest in the bridge, and the injury is to the inheritance, as Butte county may at any time resume possession and control. There is no merit in this contention. Butte county, through its board of supervisors, gave the use of the remaining parts of the old bridge to plaintiff's assignor, and the right to attach the draw thereto, "provided said party shall put and keep in good repair said approaches." Plaintiff, being bound to repair, and having repaired, the injury caused by the collision, is the only party entitled to recover.

Finding no error in the record which would justify a reversal of the judgment or order appealed from, we advise that they be affirmed.

We concur: SEARLS, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.



123 Cal. 146

**PORTER v. LEWIN. (L. A. 547.)**

(Supreme Court of California. Dec. 23, 1898.)

**ADMINISTRATORS—CLAIMS—PRESENTATION.**

A claim for funeral expenses need not be presented to the administrator for his approval; and hence, if it be submitted to him, suit may be brought thereon more than three months after he rejects it.

Department 1. Appeal from superior court, San Luis Obispo county.

Action by H. C. Porter against M. Lewin, as administrator of the estate of John M. Hughes, deceased. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

F. A. Dorn, for appellant. Graves & Graves and Louis Lamy, for respondent.

**PER CURIAM.** Plaintiff brought this action to recover the value of material and services furnished in the matter of the burial of one Hughes. He presented a claim for the amount to the administrator, which claim was allowed in part. Thereafter he brought this action against the administrator of the estate for the entire amount. It is first insisted that the action was not brought within three months after the claim was rejected, and that, therefore, it is barred. Sufficient answer to this contention is found in the fact that a claim for funeral expenses is not one of those claims which the statute requires to be presented to the administrator for his approval. Hence the presentation to the administrator in this case was useless labor, and accomplished nothing. Under the evidence, there is neither an accord and satisfaction nor an account stated. We find no merit in the appeal. Judgment and order affirmed.

123 Cal. 185

**QUAN WYE v. CHIN LIN HEE. (S. F. 821.)**

(Supreme Court of California. Dec. 29, 1898.)

**ASSIGNMENTS—PARTNERSHIP—FILING OF CERTIFICATE—RIGHT OF ASSIGNEE TO SUE—APPEAL—WAIVER.**

1. Under Code Civ. Proc. § 367, providing that every action must be prosecuted in the name of the real party in interest, an assignee can sue in his own name on an instrument assigned to him.

2. That an assignor of a claim could not maintain an action thereon does not preclude an action by his assignee.

3. An objection that plaintiff is incapacitated from maintaining the action cannot be urged for the first time on appeal.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Quan Wye against Chin Lin Hee. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

W. T. Baggett and D. J. Tuohy, for appellant. Lyman I. Mowry, for respondent.

**CHIPMAN, C.** Action upon an instrument in writing given by defendant to Quan On Wing in payment for certain goods, wares, and merchandise, and assigned to plaintiff before the commencement of the action. The trial was by a jury, and plaintiff had the verdict. Defendant appeals from the judgment and from the order denying a new trial. The judgment does not appear in the transcript, although the verdict does. No point is made upon this omission, and we will treat the record as containing the judgment appealed from.

1. The only error of law assigned as occurring at the trial is that the instrument sued upon was not shown to have been properly assigned, and that it was error to admit it in evidence over defendant's objection. We think the evidence was sufficient to establish the fact of assignment, and, that being so, the action was brought in the name of the party in interest, within the meaning of section 367, Code Civ. Proc.

2. It is objected that Quan On Wing was a fictitious name, not showing the persons interested as partners, and that Quan On Wing could not maintain an action upon the document set forth in the complaint, and therefore the assignee could not. There is nothing in the point. *Cheney v. Newberry*, 67 Cal. 126, 7 Pac. 445; *Wing Ho v. Baldwin*, 70 Cal. 194, 11 Pac. 565. Furthermore, defendant did not demur to the complaint on any ground, nor did he in his answer present the objection now urged, nor object at the trial to any of the evidence on the ground that plaintiff's assignor was incapacitated to sue on the obligation. The objection was therefore waived, and cannot now for the first time be urged. *Phillips v. Goldtree*, 74 Cal. 151, 13 Pac. 313, and 15 Pac. 451; *Cook v. Fowler*, 101 Cal. 89, 35 Pac. 431. The judgment and order should be affirmed.

We concur: HAYNES, C.; BRITT, C.

**PER CURIAM.** For the reasons given in the foregoing opinion the judgment and order are affirmed.

123 Cal. 187

**MINOR v. BALDRIDGE et al. (S. F. 853.)**

(Supreme Court of California. Dec. 29, 1898.)

**ASSUMPSIT—RECOVERY—PLEADING—EVIDENCE—ADMISSIBILITY—CONTRACT—RESCISSION.**

1. In the absence of evidence showing that a corporation's agent received money which plaintiff was fraudulently induced to pay to the corporation, a judgment in assumpsit for money had and received against the agent is erroneous.

2. While, under the Code, the facts constituting a cause of action must be pleaded, yet, in assumpsit for money had and received, evidence of plaintiff's claim may be admitted under a complaint containing the money counts only.

3. In assumpsit to recover money paid, evidence that plaintiff was induced to make the payment by reason of defendant's fraudulent representations is admissible under the money

counts, though the facts constituting the fraud were not pleaded, in the absence of a special demurrer to the complaint to compel plaintiff to make it more definite.

4. Where plaintiff, having contracted to pay certain money to a railroad company on its procuring a terminal at a certain place, was induced to pay it on the company's fraudulent representation that the terminal had been secured, he may recover the money in assumpsit under the money counts, without rescinding the contract.

Department 2. Appeal from superior court, Humboldt county.

Assumpsit by Isaac Minor against Cyrus Baldridge and the California, Oregon & Idaho Railway Company. From a judgment in favor of plaintiff, defendants appeal. Reversed as to William Baldridge and affirmed as to the railroad company.

S. M. Buck and F. A. Cutler, for appellants. L. F. Puter and J. N. Gillett, for respondent.

TEMPLE, J. This action is for money had and received. The only facts alleged in the complaint are that on the 2d day of November, 1895, defendants were indebted to plaintiff in the sum of \$1,000 for money had and received by them for the use of plaintiff, no part of which has been paid. The defendants did not demur, and their answer consists only of a general denial. At the trial the plaintiff introduced evidence which tended to prove that plaintiff and the corporation defendant entered into an agreement, in writing, by the terms of which plaintiff agreed to pay to the corporation \$20,000 in six installments, all dependent, as to the time of payment, upon the progress of the work in the construction of a railroad which the corporation was proposing to build. The first installment was to be paid as follows: "Five per cent. of said amount on call and after the terminal is secured on Humboldt Bay." The written contract was signed only by the plaintiff, but there was an indorsement upon it as follows: "This is secured on condition that the California, Oregon and Idaho Railway Company build up Mad river, and take material at market price for use of construction in said railroad for all we can use. California, Oregon and Idaho Railway Co. Cyrus Baldridge." All this evidence was received subject to the objection on the part of defendants that it was not relevant to any issue made in the proceedings. Plaintiff owned a sawmill near Mad river, and the agreement on the part of the corporation was understood to mean that the corporation would buy lumber from plaintiff, and this, he contends, was the consideration for his contract. Some time after the contract had been signed, Baldridge, acting for the corporation, represented to plaintiff that a terminal had been secured on Humboldt Bay, and therefore the first installment was due. Baldridge also promised plaintiff that if he would make the payment the corporation would at once order from him a large

amount of lumber. Believing these representations, and trusting in the promise, plaintiff paid to the Randall Banking Company at Eureka the sum of \$1,000 as and for the first installment due upon the contract. Evidence was introduced which tends to prove, and the jury found, that no terminal had been procured on Humboldt Bay, and the corporation has never purchased or offered to purchase lumber from plaintiff. The court charged the jury that, if Baldridge falsely represented that a suitable terminal had been secured on Humboldt Bay, and falsely promised that, if he paid the first installment, an order for a large amount of lumber would be immediately made, they must find for plaintiff. At the close of plaintiff's evidence defendants, and each of them, moved for a nonsuit. The motion was denied, and the refusal was duly excepted to, and the ruling is assigned as error on the appeal.

As to Baldridge, I think the motion should have been granted. There was no evidence which even tended to prove that Baldridge ever received the money, or any portion thereof. The bank was the agent of the corporation, and it was stipulated in the written agreement that the money was to be paid to the bank for it. If the action were for damages, the rule would be different, as both principal and agent are responsible for a tort committed by an agent within his authority, and adopted by the principal. But the basis of this action is that the defendant has money which, in equity and good conscience, it ought to pay to plaintiff. There was no evidence showing, or tending to show, that Baldridge had any money which he ought to pay to plaintiff. On behalf of the corporate defendant it is contended that the evidence, all of which was received over the objections of the defendants, was inadmissible under the complaint.

(1) No evidence could be received under such complaint, because, as required in the code system of pleading, it does not state a cause of action. It does not state the real facts which constitute the cause of action, but only certain conclusions of law which might result from various actual conditions. Implications of law from various circumstances which are not stated do not constitute the facts which, under our system, must be pleaded.

(2) Admitting that the common counts can be used in code pleading, yet where the reliance, as here, is upon proof of fraudulent representations, the facts constituting the fraud should be set out with some particularity; and where that is not done no proof of fraud can be received; and,

(3) This action is based upon an alleged breach of an express contract, and the question is whether, by the terms of the contract, the money was due when it was paid. It is contended that under such circumstances a complaint in the form of a common count



for money had and received cannot be maintained.'

1. That the common counts in assumpsit may be used in this state is too well established to be now called in question. The matter was discussed in *Abadie v. Carrillo*, 32 Cal. 172. Two justices expressed the opinion that the use of the common counts was inconsistent with the code provisions which require a party in his pleading to state the facts constituting his cause of action, but they were of the opinion that the practice was too well established to be then held improper. In several cases since then the use of the common counts has been upheld. In *Castagnino v. Balletta*, 82 Cal. 250, 23 Pac. 127, a discussion is had as to the circumstances which will justify its use for the recovery of money due upon express contracts; and section 1042, *Greenl. Ev.*, is cited, as applicable to our system. In *Pleasant v. Samuels*, 114 Cal. 34, 45 Pac. 998, it is said that the common count is good against a general demurrer. In *Shade v. Lumber Co.*, 115 Cal. 357, 47 Pac. 135, the same ruling is made, but it seems to be implied that such a pleading might be held insufficient as against a special demurrer that the pleading is ambiguous, uncertain, and unintelligible. There was no demurrer here, and the first point must be overruled.

2. In the absence of a special demurrer, is the common count sufficient to justify the court in receiving evidence, when the objection is made that the facts constituting the alleged fraud are not set out? In answer I think it must be held, under the authorities, that such a pleading is sufficient. At common law the common count for money had and received could be used to recover money obtained by false and fraudulent representations. 1 *Chit. Pl.* p. 364. In *Moses v. Macferlan*, 2 *Burrows*, 1005, Lord Mansfield said: "One great benefit which arises to suitors from the nature of this action is that plaintiff need not state the special circumstances from which he concludes that, *ex æquo et bono*, the money received by the defendant ought to be deemed to belong to him. He may declare generally that the money was received to his use, and make out his case at the trial. This kind of action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged. It lies for money paid by mistake, or upon a consideration which happens to fail, or extortion, or oppression, or an undue advantage of the plaintiff's situation contrary to the laws made for the protection of persons under those circumstances." The mode of pleading is inconsistent with our Code, and it may be a matter of regret that it was ever tolerated, but the innovation is not so great if it must fall before a special demurrer, which is like a motion to require a pleader to make his pleading more definite, which practice prevails in some states.

3. The action is not based upon a breach of

a contract, nor is it necessary to have a rescission of the contract to enable plaintiff to maintain his action. The theory is that the money was obtained upon a false representation that it had become due under the contract by the performance of the condition precedent by the corporation. This might all be, and the contract still remain in force. In such event the corporation may yet perform and become entitled to demand and enforce payment from plaintiff. I think the evidence was properly received, and that it was sufficient to sustain the judgment. As to the *California, Oregon & Idaho Railway Company*, the judgment is affirmed. As to the other defendant, the judgment is reversed.

We concur: McFARLAND, J.; HENSHAW, J.

123 Cal. 130

SLEVIN v. BOARD OF POLICE PENSION FUND COM'RS OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 843.)

(Supreme Court of California. Dec. 22, 1898.)

MUNICIPAL CORPORATIONS — POLICE PENSIONS — DEATH BENEFITS—NATURAL CAUSES—COMPLEMENTARY STATUTES—SUICIDE.

1. Act March 4, 1889, § 7, providing that the widow or children of a police officer who shall "die from natural causes" after having served 10 years shall be entitled to \$1,000 from the police pension fund, does not apply to a death caused by a railroad accident.

2. Act March 4, 1889, § 7, providing that the widow or children of a police officer who shall die from natural causes after having served 10 years shall be entitled to the sum of \$1,000 from the police pension fund, is not the complement of section 6, which provides for a pension to the widow of an officer killed in discharge of his duty; for it superadds the requirement of 10 years' service.

3. Act March 4, 1889, § 7, providing a death benefit for a widow of a policeman who, after serving 10 years, dies from natural causes, is not a provision against suicide only, for that is no more an unnatural death than any other death resulting from external violence.

Department 2. Appeal from superior court, city and county of San Francisco.

Mandamus by Catherine Slevin against the board of police pension fund commissioners of the city and county of San Francisco. From a judgment for plaintiff, defendants appeal. Reversed.

H. T. Cresswell, for appellants. W. W. Foote, for respondent.

TEMPLE, J. The superior court, by its judgment, awarded to plaintiff a writ of mandate to compel the defendant to audit and allow the claim of respondent, as the widow of Patrick Slevin, for \$1,000, as insurance upon the life of said Patrick Slevin. It is contended that the findings do not support the judgment. By the findings it is shown that Slevin became a member of the police department April 1, 1868, and served until September 23, 1889, when, at his own request, he was retired upon a pension under an act of the legislature

passed March 4, 1889. The act provides that a member of the department, after 20 years' service, and he has reached the age of 60 years, and his services in the police department shall have ceased, may be retired on a pension. It is found that Patrick Slevin died on the 6th day of March, 1895, and "that said death was the result of injuries received in a railroad accident two days previous thereto." Section 7 of the act under which the claim is made reads as follows: "Whenever any member of the police department of such county, city and county, city or town shall, after ten years of service, die from natural causes, then his widow or children, or, if there be no widow or children, then his mother or unmarried sisters, shall be entitled to the sum of one thousand dollars from such fund."

It is contended that Slevin did not die from natural causes, and therefore, under the terms of the act, his widow is not entitled to the insurance. What is meant by the phrase "shall die from natural causes"? It is not an uncommon colloquial expression, and I think uniformly means that the person who died from natural causes was not killed. To say that one died from natural causes is to say that he was not killed; that is, he did not die through external violence or through human agency. I do not think any persons who are proficient in the use of the English language would understand the expression differently. If, in response to the question, "Was he killed?" the reply was, "He died from natural causes," we would be at no loss for the meaning of the reply. So, if the statement were made in a military report that a certain number died from natural causes, the meaning would be clear. Nor are we without authority. In Bouvier's Dictionary (Rowles' Revision, verb "Death") it is said: "Natural death is the cessation of life. It is also used to denote a death which occurs by the unassisted operation of natural causes, as distinguished from a violent death, one caused or accelerated by the interference of human agency." Black's Law Dictionary (phrase "Natural Death"): "Death resulting from disease, or from natural forces, without the concurrence of man's agency, as distinguished from violent death." See, also, Webster's Dictionary, verb "Natural." But it is said that the usual and ordinary meaning of the words leads to absurd results, and the limitation is unreasonable. I confess it is difficult to understand why this particular limitation was imposed; but to give the language its ordinary meaning does not lead to absurd results, and I do not see how, without doing violence to the language, any other meaning than that well established by usage can be given it.

An attempt might be made to make this provision in section 7 the complement of section 6, which provides for a pension to the widow of the officer who loses his life while in the performance of his duty as an officer. This is, undoubtedly, a provision provided for the

case of a violent death. But one provision cannot be the complement of the other, for there is an additional requirement in section 7,—the officer must have served 10 years.

Nor can it be held to provide against the case of suicide. There is nothing in the law to indicate such intention, and it is absurd to say that one who dies from wounds inflicted by an assassin dies from natural causes, while, if the same fatal injuries had been inflicted by himself, his death would not have resulted from natural causes. Although unable to understand the reasons which induced the legislature to dispose of the funds in this mode, I see no way to avoid the conclusion that such is the law. The judgment is reversed.

We concur: MCFARLAND, J.; HENSHAW, J.

123 Cal. 157

HASKINS v. JORDAN (two cases; S. F. 862, 863).

(Supreme Court of California. Dec. 24, 1898.)

COMPLAINT FOR SLANDER—SUFFICIENCY—SET-OFF OF JUDGMENTS—RIGHTS OF ASSIGNEES—WHEN SET-OFF MAY BE EXERCISED—MOTION TO SET OFF PENDING APPEAL.

1. An averment in a complaint for slander that defendant spoke "the false and scandalous words," setting them out, sufficiently charges the words used to be false, where the objection is by general demurrer.

2. Under Code Civ. Proc. § 368, providing that assignments of things in action shall be without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment, an assignment of judgment to the judgment creditor's attorneys, in payment of services, is subject to the judgment debtor's right to set off against it a judgment against the creditor acquired by him before notice of the assignment to the attorneys.

3. A judgment by consent being unappealable, it may be set off against another judgment between the parties before the time for appealing from the former has expired.

4. A judgment on which execution has been issued, without being stayed, and from which no appeal has been taken, though the time therefor has not yet expired, may be set off against another judgment between the parties.

5. The pendency of an appeal from a judgment attempted to be set off against another does not warrant the court in refusing the set-off, but it should retain the motion until determination of the appeal.

Department 2. Appeals from superior court, city and county of San Francisco.

Action by Alfonzo Haskins against James C. Jordan. From a judgment for plaintiff, and from an order refusing to set off such judgment against another judgment against the plaintiff owned by defendant, defendant appeals. Judgment affirmed, and order denying set-off reversed.

Chas. F. Hanlon, for appellant. John R. Aitken and W. H. L. Barnes, for respondent.

HENSHAW, J. The action was for slander, and plaintiff recovered. Two appeals



are before this court, the one (S. F. No. 863) from the judgment, the other (S. F. No. 862) from an order given after judgment.

1. Upon appeal from the judgment the only contention argued is that the complaint fails to state a cause of action, in that it nowhere avers that the words uttered and published of plaintiff by defendant were false. The complaint alleged: "That heretofore, on the 26th day of December, A. D. 1894, the defendant spoke, in the hearing of C. C. Loomis, J. P. McElroy, Thomas Crossman, and sundry other persons, of and concerning the plaintiff, the false and scandalous words following, to wit: 'Did you know that Haskins was an embezzler?' 'Why, he is. He was arrested at San Diego, and tried by jury, and only escaped because the jury disagreed. The jury stood eight for conviction to four for acquittal.' 'He was arrested for stealing tools.' 'Haskins is a thief, and I will put him where he belongs,'"

"Slander is a false and unprivileged publication, other than libel, which charges any person with a crime," etc. Civ. Code, § 46. That the words the publication of which was charged against defendant were slanderous, if false, there can be no doubt. The averment that defendant spoke "the false and scandalous words following" was a sufficient allegation of their falsity to pass a general demurrer. *Amestoy v. Transit Co.*, 95 Cal. 311, 30 Pac. 550; *Alexander v. McDow*, 108 Cal. 25, 41 Pac. 24.

2. Judgment for plaintiff in this action was given upon May 15, 1896. Defendant moved for a new trial, and the court granted the motion, provided plaintiff did not within 10 days consent to a reduction of the judgment to \$300 and costs. Defendant accepted the reduction, and judgment was entered accordingly upon December 4, 1896. Meanwhile one Crossman had obtained a judgment against this plaintiff upon January 13, 1896, for the sum of \$730 and costs, and upon June 1, 1896, had assigned this judgment to the defendant, Jordan. Upon June 9, 1896, Jordan gave notice of the assignment to John R. Aitken, who was the attorney for Haskins in the Crossman suit, and one of his attorneys in the present action, and he likewise moved the substitution of himself as plaintiff in the place of Crossman in that litigation. On December 8, 1896, four days after the entry of the judgment in this action, Jordan served notice upon plaintiff's attorneys of his motion to set off the judgment in the Crossman suit against the judgment adverse to him in the present action. Upon the hearing of the motion, Haskins' attorneys showed that their client had assigned to them his judgment in payment of professional services rendered; that the formal assignments were executed, one upon December 4, 1896, the day of the entry of the judgment, and the other upon December 11, 1896, the day of the hearing of the motion. On behalf of Jordan were shown the

facts above set forth, and in addition proof was made that no notice until the hearing of his motion was given to him of the fact that Haskins had assigned his judgment to his attorneys. It was further shown that the Crossman judgment was unsatisfied; that an execution upon it had been returned *nulla bona*; and that Haskins was insolvent. The court denied the motion to offset.

Jordan having acquired the Crossman judgment, there can be no doubt that the procedure which he adopted—that of going into the court which had rendered a judgment against him, and there seeking to offset the judgment assigned to him against the judgment adverse to him—was a regular and well-authorized course to pursue. The power to set off one judgment against another exists independent of statute, and rests upon the general jurisdiction of courts over their suitors and processes. *Porter v. Liscom*, 22 Cal. 430. The regularity of such a proceeding was recognized in *Jones v. Chalfant*, 55 Cal. 505; and to the same proposition may be cited *Freem. Judgm.* (4th Ed.) § 467, et seq.; 22 Am. & Eng. Enc. Law, 445; and *Chandler v. Drew*, 6 N. H. 469. While the right to adjust the conflicting claims of its suitors in the mode indicated was originally exercised only by equity as an incident to its powers, courts of law later came to adopt the same procedure, and in this state, where, in the same forum, the litigant is entitled to such relief, legal or equitable, as his showing justifies, the particular distinction between the powers of courts of equity in this regard and courts of law ceases to be important. In every case the suitor has the right to ask for the set-off, and in every proper case, as of right, the motion should be granted.

Aside from the question of the sufficiency and finality of the Crossman judgment,—a matter hereafter to be considered,—appellant's right to urge that judgment as an offset in this action cannot be successfully combatted. The whole matter is in this state definitely set at rest by the requirements of the Code. Section 368, Code Civ. Proc., is as follows: "In case of an assignment of a thing in action, the action by the assignee is without prejudice to any set off, or other defense existing at the time of or before notice of the assignment." A thing in action is a right to recover money or other personal property by a judicial proceeding. Civ. Code, § 953. Inherent in an unsatisfied judgment is this right. An action may be brought upon it, or, if it be satisfied by execution levy and sale, the recovery of the money is still by a judicial proceeding. When the attorneys for Haskins accepted the assignment of his judgment, they took it *cum onere*, subject to all the rights affecting that judgment which Jordan had, or which he might acquire, before notice to him of the assignment. Of these rights is the valuable and universally recognized one,—the right to acquire an existing judgment against the judgment cred-

itor, and to urge it by motion in reduction or extinguishment of the judgment debt. This was precisely what Jordan did. He acquired the Crossman judgment long before he knew that Haskins had assigned the judgment against him. More than that, his motion to set off was served upon Haskins' attorneys before knowledge of any such assignment made. In *Porter v. Liscom*, 22 Cal. 430, it is said: "A purchaser and assignee of a judgment, even for a valuable consideration and without notice, takes subject to a right of set-off existing at the time of the assignment; for an assignee takes subject to all equitable as well as legal defenses which can be urged against the assignor. And the fifth section of the practice act recognizes the same principle." The fifth section of the practice act, to which reference is here made, is substantially identical with the present section of the Code of Civil Procedure, and both sections declare that the assignment shall be without prejudice to the right of set-off until notice of the assignment is given. In *McCabe v. Grey*, 20 Cal. 516, the same section is considered, and it is said to be merely an expression of the rule which has always prevailed in equity. In *Bank v. Gay*, 101 Cal. 286, 35 Pac. 876, the construction given is again approved. Whatever may be the rule as to notice in other states, however much or little the courts may have permitted themselves to be influenced by equitable considerations in favor of the assignee, the fact remains that in this state there is no room for the exercise of discretion upon the question. The rule is one rigidly fixed by statute, and under it the right of the assignees of the Haskins judgment was subject to the right of the appellant to set off the Crossman judgment against it.

All this presupposes that the Crossman judgment was one of a nature so to be presented by way of set-off, but respondent insists that neither the judgment in Crossman against Haskins nor the judgment in Haskins against Jordan was final; that the time for appeal in either case had not expired; that both actions were pending; and that, therefore, the court could not set off one judgment against another, nor satisfy one judgment so as to cut off the right of appeal. That the right of appeal could not be cut off by any such satisfaction is true. *Marble Co. v. Black* (S. F. 1,207, decided Dec. 19, 1898) 55 Pac. 599. But it does not follow that because of this fact the motion for a set-off should have been denied. As to Haskins, the judgment in this case was entered with his consent. His right to appeal from it was therefore gone, nor could he be heard to complain because his judgment debtor sought to pay it, and to this extent treated it as a finality and binding upon him.

From the Crossman judgment no appeal was pending, nor had the execution of it been stayed. It was not even urged at the hearing that an appeal from this judgment was

contemplated. Execution could have been issued upon it, and in fact had been issued. Under these circumstances, it was a judgment which could properly be presented for set-off upon this motion. "Ordinarily, judgments may be set off whenever the executions issued upon such judgments could be legally set off one against the other by the officer who may have them in his hands for service" (*Wat. Set-Off*, § 339); and, even if an appeal had actually been taken from the Crossman judgment, and was pending at the time of the motion, it would not be ground for denial of the same, but would be cause for the court's retaining the motion until final decision upon the appeal (*Irvine v. Myers*, 6 Minn. 562 [Gil. 398]; *Terry v. Roberts*, 15 How. Prac. 65).

The judgment appealed from is affirmed. The order appealed from is reversed, with directions to the trial court to grant the motion to set off.

We concur: TEMPLE, J.; McFARLAND, J.

123 Cal. 97

JACKSON v. PUGET SOUND LUMBER CO.  
et al. (S. F. 928.)

(Supreme Court of California. Dec. 20, 1898.)

ACCOUNT—COURT COMMISSIONERS' POWERS—REFERENCE—ORDER—EVIDENCE—APPEAL—REVIEW.

1. Under Code Civ. Proc. § 259, subd. 2, providing that a cause may be transferred to a court commissioner to inform the court on any issue other than that made by the pleadings, a court commissioner has no authority to settle an account, where that was the sole issue tendered by the pleadings.

2. An order, following the terms of an agreement between parties that the action be transferred to a named person, "court commissioner," for an accounting, said "court commissioner to report back \* \* \* the evidence taken and the balance found due on said accounting,"—the sole issue being a settlement of the account,—is an order for a reference to the person named, and not an assignment to a commissioner, who, under Code Civ. Proc. § 259, subd. 2, has no power to hear issues raised by the pleadings.

3. A referee's findings based on conflicting evidence will not be deemed unsupported, though the evidence be confused and unsatisfactory.

4. On a settlement by a referee of an account which had been running a long time, it was not error to admit evidence of transactions occurring more than two years before the commencement of the action, where defendant received more than the amount claimed within the two years.

In bank. Affirmed.

For opinion in department, see 52 Pac. 838.

BEATTY, C. J. This is an action for money had and received to the use of plaintiff. Defendants denied the allegations of the complaint, and pleaded a counterclaim for goods sold and delivered. Such being the issue, and the whole issue, made by the pleadings, the superior court, upon and in accordance with a stipulation of the parties, made and entered the following order in the case: "It is ordered that this action be, and it is here-



by, transferred to Stuart S. Wright, court commissioner, for an accounting; said court commissioner to report back to this court the evidence taken and the balance found due on said accounting." In pursuance of this order, the parties appeared before Mr. Wright, and submitted evidence as to their mutual demands. Various objections were made to offered evidence, but none were ruled upon by the commissioner, the evidence being admitted subject to the objections which were reserved for consideration of the court upon the final hearing. After the matters in controversy before the commissioner were submitted for decision, he resigned the office of court commissioner, and subsequently reported findings of fact and conclusions of law to the effect that the defendants had received to the use of plaintiff the sum of \$1,300, no part of which had been paid, and that plaintiff was entitled to a judgment for that sum, together with interest and costs. The superior court adopted this report, and, without notice to defendants, rendered and entered a judgment accordingly. The defendants thereupon filed exceptions to the report, upon the grounds that it was against the evidence, that errors had been committed by the commissioner in his rulings at the trial, and that he had ceased to be commissioner before he made or filed his findings. The defendants at the same time gave notice of a motion to set aside and annul the report and judgment, upon the grounds that Wright had ceased to be court commissioner before he made his report, and that the judgment had been prematurely and improvidently entered, without notice to them, and before they had any opportunity to file their objections or be heard in their support. At the hearing of this motion the principal controversy seems to have been upon the question as to the capacity in which Wright had dealt with the case,—whether as court commissioner, with only the powers conferred by section 259, Code Civ. Proc., or as a referee, appointed under section 638 of the same Code. The court held that he had acted as referee, and that his resignation of the office of court commissioner left his power to report upon the matters referred to him unaffected. But the court at the same time held that he had exceeded his powers in reporting findings and conclusions, and therefore vacated the judgment as being without findings to support it, and also set aside the report as to all matters except the finding of a balance due to plaintiff on the accounting of \$1,300 and interest, with a direction to the parties to take such further steps in the case as they might be advised. Thereupon plaintiff gave notice of a motion for a further hearing of the cause before the court, for the adoption of the findings of the referee, and for further findings covering all the issues in the case. This motion was regularly brought to a hearing upon the report of the referee, and upon all the papers, files, minutes, and proceedings in the action; and,

neither party having any further testimony to offer, the court made and filed its findings and conclusions of law, covering all the issues in the case, and, in accordance therewith, rendered a judgment in favor of the plaintiff for \$1,300 and costs, which was duly entered. From the judgment so entered, the defendants, within 60 days after its rendition, took this appeal.

The principal contention of the appellants here, as in the superior court, is that Mr. Wright acted in the case, not as referee, but simply as court commissioner, and consequently that his authority ceased on his resignation of that office. The mere language of the order of reference may give some countenance to this proposition; but the consequence of holding that no authority was conferred upon Mr. Wright by such order beyond that which he could exercise by virtue of his office of court commissioner is not that his authority to report ceased upon his resignation, but that it never existed,—in other words, that the order was from the beginning absolutely void, and the agreement of the parties upon which it was founded utterly vain and futile; for the settlement of the account of the parties in this case covered the entire issue made by the pleadings, and a court commissioner, as such, has no power to try any issue of fact raised by the pleadings. Code Civ. Proc. § 259, subd. 2. Therefore the order transferring this case to Mr. Wright for an accounting had the effect of constituting him a referee, or it had no effect at all; and since the order was made in the terms of the agreement of the parties, with a view to carry out the purpose of that agreement, and must consequently be construed as the agreement itself would be construed, the contention of appellants amounts simply to this: that the court must hold that they deliberately entered into a contract without meaning or effect. But such a construction of a contract is forbidden by fundamental rules. "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." Civ. Code, § 1643.

The intention of these parties clearly was to have their mutual claims determined and the balance ascertained by Mr. Wright. This is shown, not only by the terms of their agreement, but by their action under it. They introduced evidence covering the whole issue, and based their objections to evidence upon their construction of the pleadings as to the nature of the issue. In other words, they tried the case before Mr. Wright precisely as it should have been tried before a referee. It certainly is not doing violence to the intention of the parties, therefore, to hold that they intended a reference. The only argument by which the appellants seek to uphold a different conclusion is founded upon the literal terms of the order. It is conceded that the words "court commissioner," where

they first occur in the order, may be regarded as merely *descriptio personæ*, but the direction to "said court commissioner" to report, etc., is supposed to indicate an intention on the part of the court and parties to limit his powers to those conferred by the statute. Code Civ. Proc. § 259. But the language of a contract governs its interpretation only so far as it is clear and explicit and does not involve an absurdity. Civ. Code, § 1638. Language involving an absurdity is rejected, and so is any phrase or clause which is inconsistent with the object and intention of the parties. Id. §§ 1650, 1652, 1653. The cases in which repugnant and inconsistent clauses have been rejected in the construction of contracts and statutes are innumerable, and in many instances words have been supplied which were obviously necessary to give effect to the intention of parties or the legislature. There is no different rule for the interpretation of a court order, especially where it is made in pursuance of a stipulation; for in such case it would be absurd to construe the stipulation in one sense, and the order in another and inconsistent sense. Our conclusion is that in this case Mr. Wright acted as a referee, under section 638 of the Code of Civil Procedure, and that his authority being derived from the order appointing him, and not from the statute defining the duties and powers of court commissioner, his resignation of that office did not impair in any degree his authority to make a valid finding upon the issue referred to him. This conclusion renders it necessary that we should consider the errors assigned upon the rulings and findings of the referee.

As to the alleged insufficiency of the evidence to sustain the finding of a balance of \$1,300 due from the defendants to the plaintiff, it appears very clearly that the defendants collected for plaintiff many thousands of dollars on account of certain building contracts performed by him. Against these collections, they offered evidence—much of it undisputed—of large payments to subcontractors, employes, and other creditors of plaintiff, as well as the sale and delivery of a large quantity of lumber used by him in fulfilling his contracts. These were disputed, however, as to the amount of lumber delivered, and the price at which it was contracted, and also as to certain cash payments. The evidence is certainly not very satisfactory, for it is conflicting, confused, and uncertain, but we cannot say that it is insufficient to support the finding.

The only other point made by appellants is upon the alleged error of the referee in allowing evidence of transactions occurring more than two years prior to the commencement of the action. There was no error in this. The account between the parties had been running a long time. The defendants were shown to have received to the use of the plaintiff much more than the amount claimed within two years prior to the com-

mencement of the action, and some account of the earlier dealings between them may have been necessary to an adjustment of the counter charges. It does not appear that the evidence objected to could have done any injury or resulted in any error in the statement of the account. The judgment of the superior court is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.; McFARLAND, J.; GAROUTTE, J.; HARRISON, J.

123 Cal. 38

In re RALEY'S ESTATE. (S. F. 921.)

(Supreme Court of California. Dec. 19, 1898.)

INSOLVENCY—ACCOUNT OF ASSIGNEE—MISTAKE—COMMISSIONS—REFERENCE.

1. An insolvent made an arrangement with another person whereby the latter took his accounts to collect for the benefit of creditors, and paid certain attorney's fees in making such collections, and turned over the balance to an assignee in insolvency afterwards appointed. The assignee erroneously charged himself with the full face value of the accounts, and credited himself with the items expended in collecting them. *Held*, that the mistake did not render him liable for the amount of the attorney's fees.

2. Under Insolvent Act 1895, § 32, allowing receivers "to charge and receive for their services commissions upon all sums of money coming into their hands and accounted for by them," an assignee in insolvency is entitled to his commissions before the funds are used to pay creditors.

3. The court may require the assignee of an insolvent to more specifically itemize his account.

4. Under Code Civ. Proc. § 639, authorizing a referee to try issues requiring the examination of a long account, the court may refer an account of the assignee of an insolvent.

Department 1. Appeal from superior court, Santa Clara county.

In the matter of the estate of Wilbur Raley, an insolvent debtor, an order was made settling the account of the assignee and directing a dividend to creditors, and the assignee appeals. Reversed.

W. C. Kennedy, for appellant. C. D. Wright, for respondent.

VAN FLEET, J. Appeal by the assignee of the insolvent from an order settling his first quarterly account, and directing a dividend to the creditors.

1. Error is predicated of the action of the court below in disallowing a number of the items of the account. Among those disallowed were three charged by the assignee as having been paid out for attorney's fees,—\$200 to Jackson Hatch, \$25 to W. C. Kennedy, and \$50 to the Ratto collection agency. As to these items it appears that prior to going into insolvency Raley made an arrangement with Marcuse and Barbieri in the nature of an assignment for creditors, by which they were to take his property and out of the proceeds pay his debts. Under this arrangement certain outstanding accounts of Raley's came into the hands of Marcuse and Barbieri for



collection, and in making such collection the latter incurred and paid out the above items for attorney's services. Thereafter, when Raley went into insolvency, Marcuse and Barbieri surrendered the money collected on these accounts, together with the accounts uncollected then in their hands, to the assignee, less the amount so expended by them for attorney's fees. In his account the assignee adopted the method of charging himself with the full face value of the accounts that had been assigned by Raley to Marcuse and Barbieri, and against this credited himself with the items thus expended by them. In settling the account the court not only struck out and disallowed these payments as not having been incurred or made by the assignee, but charged him with their sum as so much money remaining in his hands. This method of settling the account was clearly erroneous, since the result was to charge the assignee with money which never came into his hands, and for which he was, under the evidence, in no way responsible. The only mistake on the part of the assignee was one of bookkeeping. He should have charged himself only with the net amount of money and property actually received by him, instead of pursuing the course he did; but this mistake did not render him liable for something which he never received. Whether the expenditures were legally or properly made by Marcuse and Barbieri was a question not raised in the court below, so far as the record shows, and therefore is not involved. The assignee could not be charged with money which never came into his hands, except it appeared that it was lost to the estate through his fraud or culpable negligence,—a fact which the evidence does not suggest. Other items disallowed were one of \$76.50 for salary and expenses of a man employed to go about collecting outstanding accounts, and \$41.25 for traveling expenses of the assignee (who lived in San Francisco) in going to and from San José, where the estate was in process of settlement, upon business of the estate. The evidence in the record with reference to these items is very meager and unsatisfactory, but what there is tends, without conflict, to show that the expenditures were incurred in good faith in and about the business of the estate. In view of the fact that the order must be reversed, it is sufficient to say generally, with reference to these items, that the insolvent act allows to the assignee "all necessary expenses in the care, management, and settlement of the estate." Insolvent Act 1895, § 32. Upon another hearing it will be incumbent upon the assignee to support his right to be reimbursed for these expenditures by a showing such as will bring them within the purview of this provision of the act. As to the item of loss on sale of melons, we cannot say, under the evidence presented, that it was improperly rejected.

2. We think it was error for the court, in making the order settling the account and

declaring a dividend to the creditors, to refuse to make an allowance to the assignee of his commissions upon the amount of money accounted for. Section 32 of the insolvent act allows receivers "to charge and receive for their services commissions upon all sums of money coming into their hands and accounted for by them," at certain rates therein specified. The evident contemplation of the statute is that this allowance shall be made, upon the settlement of each account presented, upon the amount of moneys accounted for in such account; and, as this charge is a preferred demand upon the funds in the hands of the assignee, it should be allowed and satisfied before the funds are used to pay creditors. In this respect the method of procedure differs from that in the settlement of estates of deceased persons, where the representative is usually not allowed his commissions until final settlement. Under this act the statute contemplates and requires that the assignee shall turn the property of the estate into money as speedily as may be, and that, whenever there is money in his hands, he may be required to file an account showing his receipts and disbursements up to that time, and the surplus moneys in his hands shall be prorated among the creditors.

3. It was clearly within the power of the court to require the assignee to more specifically itemize his account, and the action of the court in referring the account to a referee for hearing and report was as much within its discretion in this proceeding as in any other of like character. Code Civ. Proc. §§ 638, 639. For the reasons above pointed out, the order is reversed and cause remanded.

We concur: GAROUTTE, J.; HARRISON, J.

123 Cal. 208

LONGMAID v. COULTER et ux. (S. F. 848.)  
(Supreme Court of California. Dec. 30, 1898.)

VENDOR AND PURCHASER—RETENTION OF TITLE—  
ACTION FOR PRICE—PROCEDURE AGAINST LAND  
—COSTS—HOMESTEAD—PARTIES.

1. Where the vendor of land retains the legal title until the purchase price has been paid, an action at law on a note given therefor is not a waiver of his right to proceed against the land.

2. Where the vendor of land, who had retained the legal title until the purchase price was paid, sued on the note given therefor, without asking for a sale of the land, he cannot recover costs in a subsequent proceeding against the land.

3. That a vendor who has retained the legal title until the purchase price is paid sued on the note given therefor, without asking for a sale of the land, does not subordinate his claim against the land to the homestead interest of the vendee's wife.

4. That a vendor assigned the purchase-money note for collection does not deprive him of the right to proceed against the land in his own name, when the judgment obtained in the note has been reassigned to him.

Department 1. Appeal from superior court, Marin county.

Action by John Longmaid against William A. Coulter and wife to compel payment of purchase money on land, and to foreclose defendants' interest in such land. Judgment for plaintiff, and defendants appeal. Affirmed.

Otto Tum Suden, for appellants. C. H. Wilson, for respondent.

GAROUTTE, J. Upon the trial of this case in the superior court the trial judge rendered the following opinion:

"The defendants are husband and wife, and have been such ever since November 3, 1891. The default of the defendant William has been entered, and the cause was tried upon the amended complaint, and the answer of defendant Harriet A. Coulter thereto. There is no dispute as to the facts, which are substantially as follows: The plaintiff was, on the 5th day of November, 1890, the owner of and possessed of a lot of land in Sausalito, known as lot 46 in block A. On that day he entered into a verbal contract or agreement with defendant William, whereby he sold said lot to said defendant for fifteen hundred dollars, of which defendant then paid to plaintiff one hundred dollars, and at the same time agreed to pay the balance, viz. fourteen hundred dollars, on or before five years from said November 5, 1890, and, in evidence thereof, gave to plaintiff his promissory note for the same, payable 'on or before five years from date,' with interest at eight per cent. per annum until paid. It was verbally agreed between the plaintiff and said defendant that the legal title to the land should remain in plaintiff as security for the payment of the unpaid portion of the purchase price and interest, and the legal title has never been transferred by plaintiff. It was further agreed, in consideration of said sale and as a part of the same transaction, that said defendant should pay all taxes and assessments that might become due and payable upon said land; but he has neglected so to do, and plaintiff has been compelled to pay all the same, amounting to one hundred and ten dollars and fifty cents. The said defendant immediately entered into possession of said property under this verbal agreement, and has ever since been in possession thereof, and has erected a dwelling house thereon. No part of the fourteen hundred dollars has ever been paid, nor any of the interest thereon, except the sum of sixty-five dollars, paid as follows, viz.: January 13, 1892, twenty-five dollars; February 5, 1892, twenty dollars; and April 28, 1892, twenty dollars. On December 16, 1895, the plaintiff, for the purpose of collecting the unpaid portion of the purchase price of said lot, and without any consideration whatever, and without any intention of waiving or abandoning his lien, if it may be called a lien, indorsed the note to one Tyndall Bishop, with directions to collect the same; and said Bishop, on the same

day, brought action against said defendant William in this court on said note, to recover the said sum of fourteen hundred dollars, with the interest due, the complaint alleging the execution of the note, and 'that the said John Longmaid thereafter indorsed the said note to the plaintiff.' The said defendant suffered default in the action, and on January 9, 1896, judgment was entered therein against him for the sum of \$1,947.26 principal, and \$7.50 costs; and on the same day Bishop duly assigned such judgment to plaintiff, the assignment being on that day filed in the office of the clerk of this court; and the plaintiff has ever since owned said judgment. The defendant William A. Coulter, on September 4, 1896, filed his waiver of right to appeal in said action. On December 18, 1895, defendant Harriet A. Coulter filed for record her declaration of homestead covering such property, thus barring levy of execution on the same. Defendant William has no property other than his interest in this property. Execution has been returned unsatisfied, and the judgment has never been paid in whole or in part. On May 30, 1896, plaintiff tendered to said defendant a sufficient deed, and offered to perform his agreement; but said defendant refused to accept the same, and refused to pay the unpaid portion of the purchase price. This action was commenced June 1, 1896, to compel payment of the amounts due to plaintiff under said agreement, and, in default of such payment, that the declaration of homestead be declared void, and that the defendants be foreclosed of all interest, lien, and equity whatsoever in said land, and that the same be sold, and the proceeds applied to the payment of such note, with interest thereon at the rate of seven per cent. per annum from date, less the partial payments thereon, and also to the payment of all other sums that may be found to be due under the agreement, and for personal judgment against defendant William A. Coulter for any deficiency.

"The main question presented upon the foregoing undisputed facts is as to whether the plaintiff, by the indorsement of the note to Bishop for collection, and the prosecution by Bishop to judgment of an action upon such note, has waived the right he would otherwise undoubtedly have had to proceed against the defendants' interest in the land for the satisfaction of his claim. Such procedure would in this state admittedly be a waiver of the ordinary vendor's lien referred to in our Civil Code (section 3046 et seq.) existing after conveyance. *Fitzell v. Leaky*, 72 Cal. 477, 14 Pac. 198. But, as has universally been held, there is a great distinction between the lien of the vendor after a conveyance, and the interest of the vendor who has not conveyed, but has retained the legal title as security for the payment of the purchase price. In view of the uniformity of the decisions on this point, it seems hardly necessary to devote any time to a considera-



tion of the authorities. As was said in *Fitzell v. Leaky*, supra: 'The lien which the vendor of real property retains after an actual conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the land, but a mere equitable right to resort to it upon failure of payment by the vendee. It is in its nature a personal privilege, unassignable, which the vendor can assert only in a suit brought for the purpose of having it decreed and enforced.' See, also, *Fitzell v. Leaky*, 72 Cal. 477-484, 14 Pac. 198; Civ. Code, §§ 3046, 3047; *Gessner v. Palmateer*, 89 Cal. 89, 24 Pac. 608, and 26 Pac. 789; *Clairborne v. Castle*, 98 Cal. 30, 32 Pac. 807; *Avery v. Clark*, 87 Cal. 619, 25 Pac. 919. In such a case the fee is in the purchaser, and he may defeat the lien by a conveyance to a bona fide purchaser for value. On the other hand, where the legal title is retained by the vendor under an unexecuted contract for the conveyance of the same upon the payment of the purchase price, the vendee has acquired only an equitable estate in the land. He has acquired the right to have the legal title conveyed to him upon the performance of his part of the agreement. Professor Pomeroy says, in his *Equity Jurisprudence* (section 1260): 'To call this complete legal title [of the vendor] a "lien" is certainly a misnomer. In case of a conveyance the grantor has a lien, but no title. In case of a contract for sale before conveyance, the vendor has the legal title, and has no need of any lien. His title is a more efficient security, since the vendee cannot defeat it by any act or transfer even to or with a bona fide purchaser.' And in section 1261 he says that 'so far as it [the so-called "lien"] has any distinctive signification, it simply means his right of enforcing his claim for the purchase money against or out of the vendee's equitable estate by means of a suit in equity.' In *Gessner v. Palmateer*, 89 Cal. 89, 26 Pac. 789, our supreme court, in speaking of such a contract, say: 'The vendee cannot prejudice that title, or in any way divest it, except by performance of the act for which the vendor holds it. The vendor's security is something stronger than a mortgage, because the legal title is retained as security. It has been called an imperfect or equitable mortgage, which is a more appropriate term than vendor's lien. The land is, by express contract, held in pledge for such payment.' Such an interest is assignable, and the assignee of notes given for the purchase money is entitled to the benefit of the security. *Gessner v. Palmateer*, supra; *Avery v. Clark*, supra; *Pom. Eq. Jur.* § 1202; 28 Am. & Eng. Enc. Law, p. 190.

'The question presented by this case, as to whether, in a case where the vendor holds the legal title, a proceeding at law for the purchase price is a waiver of the vendor's right to proceed against the property, has not, so far as I have been able to find, ever been passed upon by our supreme court, but it is a question upon which authority from

other states is not wanting. The sum of the decisions upon the question is that the vendor may sue at law on the debt or in equity to enforce the contract, or he may pursue both remedies concurrently; that the right to pursue the property is not waived by taking independent security, or by other acts which would operate as a waiver of the implied lien; and that, so long as he retains the title, the vendor clearly manifests an intention to rely upon it as security for his debt, and equity will not compel him to part with his title until his debt has been paid; and that the institution of proceedings at law for the purchase price, whether evidenced by notes or not, and the recovery of judgment, and the issuance of execution thereon, do not affect the right of the vendor to satisfy his claim for the purchase price out of the property except so far as such judgment may have been satisfied. See *Jones, Liens*, §§ 1116, 1126; 28 Am. & Eng. Enc. Law, pp. 190, 195, 197; *Graves v. Coutant*, 31 N. J. Eq. 763; *Dickason v. Eby*, 73 Mo. 133; *Bank v. Bradley*, 15 Lea, 279; *Micou v. Ashurst*, 55 Ala. 607. \* \* \* Several decisions of the supreme court of this state, wherein it is held that an action brought on the note alone, where the note is secured by mortgage, is a waiver of the mortgage security, are relied upon by counsel for defendants as being applicable to the case at bar; but it must be remembered that in this state there is a statute regarding the procedure in case of debts secured by mortgage. \* \* \*

'But it cannot be held that the relation of mortgagor and mortgagee existed between Coulter and Longmaid. If there had been a conveyance, and a lien for the purchase price expressly reserved in the deed, the case would have perhaps presented a different aspect. There is some conflict in the opinions of writers and courts as to the exact nature of the relationship existing between the vendor and vendee in a case such as this. It has been said that the relation bears a strong similitude to that of mortgagor and mortgagee, but, as must clearly appear, there are many points of difference. In the case of *Samuel v. Allen*, 98 Cal. 406, 33 Pac. 273, the question was squarely passed upon by the supreme court. That was an action at law to recover money due on a contract for the sale of land. It was contended that the action should be for specific performance or foreclosure of lien, inasmuch as plaintiff, by his contract, retained the title to the land. This contention must have been sustained if the relation of mortgagor and mortgagee existed, under section 726, Code Civ. Proc., and the decisions in *Barbieri v. Ramelli*, 84 Cal. 154, 23 Pac. 1086, and *Powell v. Patison*, 100 Cal. 236, 34 Pac. 677. But the court, through Mr. Justice Temple, said: '\* \* \* It is true that in some sense the vendor has a lien on the land for the portion of the purchase money which remains unpaid, and

that it has been held that, until a conveyance has been made, the lien constitutes such security as will prevent the creditor from suing out an attachment. *Gessner v. Palmateer*, 89 Cal. 89, 26 Pac. 789. It has also been uniformly held that such contract does not establish the relation of mortgagor and mortgagee. There is therefore no statutory prohibition upon the right to a personal action to enforce the debt when it becomes due.' In *Gessner v. Palmateer*, 89 Cal. 89, 26 Pac. 789, a similar case, the court said, speaking of the vendor's interest: 'The vendor's security is something stronger than a mortgage, because the legal title is retained as security.' The case of *Dingley v. Bank*, 57 Cal. 467, where the court said it is really a mortgage, and governed by the same rules, was a case where a conveyance had been executed, the deed reserving a lien to the vendor for the unpaid portion of the purchase price.

"In the case at bar the vendor had something more than a lien upon the property; he had the complete legal title thereto,—something that the mortgagee never has. It is true that he held it as the trustee of the vendee, but he could not be compelled to convey it except upon full payment by the vendee of the purchase price. None of the decisions cited by counsel for defendants are applicable to such a case. The plaintiff, retaining the legal title, has shown no intention of waiving the security afforded thereby. The fact that he, through his agent, prosecuted to judgment an action on the note, without asking for a sale of the land to satisfy his claim, does not show an intention on his part to abandon the security afforded by the legal title before the payment of the purchase price, any more than would the taking of independent security or other acts which would operate as a waiver of the ordinary vendor's lien show such intention. See *Kent v. Williams* (Cal.) 46 Pac. 462. So long as he holds the legal title, he cannot be said to have shown an intention of waiving the right given him by the contract, under which he holds such title, to hold the same until the payment of the purchase price. Here the plaintiff has not parted with the legal title, and cannot be compelled to so do until payment of the purchase price. According to the decisions heretofore cited, if the homestead declaration had not been filed, and the interest of the defendant had been sold under the execution, the purchaser would have acquired only the defendant's interest in the property, namely, the right to pay up and obtain a conveyance, and the plaintiff would still have retained the legal title until full payment of the purchase price. The fact that a judgment has been obtained certainly has not extinguished the indebtedness. At most, it has been changed only in form.

"It would therefore seem that, in the absence of statutory prohibition, the plaintiff ought to be permitted to proceed against the land held by him in trust as security, unless

there be something in his acts that would operate as an estoppel. But I do not see how, under the circumstances of this case, the doctrine of estoppel can have any application. The proceeding on the note, so far as I can see, has not operated to the injury of the vendee in any way, except perhaps so far as the costs of this action are concerned; and, inasmuch as plaintiff could have obtained full relief in one action, I do not consider that he should recover his costs herein. The most serious objection in my mind to the maintenance of this action is that under our system of practice two suits were unnecessary, and the plaintiff could have obtained all the relief to which he was entitled in one action. But in absence of express prohibition of such second action in a case of this character, and in view of the fact that no injury can possibly be occasioned defendant thereby beyond the costs of this action, which can be remedied here, I am not inclined to hold plaintiff to be without remedy. Of course, plaintiff will never be allowed to collect more than is due him, if he recovers here. If, under decree rendered in this action, the property is sold, defendant will be entitled to have the amount realized applied in satisfaction of the former judgment. Defendant cannot be compelled to pay the debt more than once.

"There was nothing in the plaintiff's complaint in the action on the note to justify defendant in the conclusion that he could not interpose his contract as a defense, if a defense was afforded thereby, nor to estop plaintiff from this proceeding. Counsel for defendants seeks to attribute altogether too limited a definition to the word 'indorsed,' used in such complaint. Civ. Code, § 3108. Counsel for defendants proposes to see in the indorsement, and the bringing of the action on the note, an attempt to defraud defendant William A. Coulter, and deprive him of all opportunity to make such defenses as he might have under the contract. I can see no evidence of any such intent on the part of plaintiff. To me all the equities appear to be on plaintiff's side, and the only conclusion possible from the uncontradicted facts is that the defendants are endeavoring to procure title to plaintiff's lot without paying therefor, and that the bringing of the action on the note was most gladly welcomed, as offering an opportunity for a technical defense to a claim against which no defense on the merits existed. But it does seem to me that under all the circumstances of this case, looking to the substance, and not the mere form, of the transaction, this defense will not aid defendants.

"There is no great difficulty as to any of the other questions involved. So far as the declaration of homestead by the defendant wife is concerned, it cannot, of course, be declared void as having been made in fraud of creditors. But no such decree is necessary to protect the plaintiff's rights. While the equitable estate in the land held by the vendee was



subject to be impressed with the lien of a homestead as fully as an estate in fee, the declaration of homestead was subordinate to the right and claim of the vendor who held the legal title (Alexander v. Jackson, 92 Cal. 514, 28 Pac. 593), and could not prevent the vendor from enforcing his claim against the land. This, admittedly, would have been so if it had not been for the suit on the note and the judgment thereon; but, in view of what has already been said on that point, the condition of affairs has not been altered thereby.

\* \* \*

"There can be no question as to the right of the plaintiff to maintain this action, notwithstanding the indorsement of the note to Bishop for collection. While the indorsement made Bishop the proper party to maintain the action, the assignment of the judgment by Bishop to plaintiff, on the day of the recovery thereof, was a sufficient reassignment to make plaintiff the only party who could maintain this action. Such reassignment again invested him with the legal title to the indebtedness.

"It is contended that the verbal agreement that defendant should pay all the taxes and assessments that might become due and payable upon the land is in violation of the provisions of section 5, art. 13, of the constitution, which make any contract by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust or other lien, null and void as to any interest specified therein, and also as to any assessment. Substantially similar language in a mortgage was considered in the case of Marye v. Hart, 76 Cal. 291, 18 Pac. 325, and held not to be violative of the provision invoked. But I do not think that plaintiff is in this action entitled to recover the amounts paid by him as taxes. Under the allegations of the complaint, the plaintiff would be compelled to convey the legal title upon the payment to him of the purchase price with interest, regardless of the amounts paid by him for taxes.

"As to the relief that should be granted: Defendant William A. Coulter not having answered, such relief cannot exceed that demanded in the complaint. Plaintiff's demand is for interest at the rate of seven per cent. per annum. Plaintiff is entitled to be paid, under the terms of his contract, the sum of fourteen hundred dollars, with interest thereon from November 5, 1890, at the rate of seven per cent. per annum, less the payments made, amounting to sixty-five dollars. A decree should be entered directing the payment of this amount, and further directing that, in the event that such amount be not paid within sixty days after the entry of judgment, the property be sold, and the proceeds applied—First, to the payment of the costs of sale, and; second, to the payment of the amount due plaintiff, as aforesaid. Plaintiff is not entitled to judgment for any deficiency, and he should pay his own costs."

We are entirely satisfied with the law as herein declared, and adopt the foregoing opinion as the opinion of the court. Judgment and order affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

6 Cal. Unrep. 208

MEGGINSON v. TURNER. (S. F. 808.)

(Supreme Court of California. Dec. 20, 1898.)

APPEAL—ACTION ON NOTE—DEFENSES—ACCOUNTING.

1. A finding on conflicting evidence cannot be disturbed.

2. Where defendant in an action on notes alleges the conveyance to plaintiff of property as security, and asks for an accounting, it is not error to render judgment dismissing the cross complaint, where the evidence shows that plaintiff holds the property, not as security, but as a naked trustee, and is ready to surrender the same.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Lawrence Megginson against J. F. Turner. From a judgment for plaintiff, and an order denying a motion for new trial, defendant appeals. Affirmed.

G. Gunzendorfer (Naphtaly, Freidenrich & Ackerman, of counsel), for appellant. S. C. Denson, for respondent.

CHIPMAN, C. Action to recover the amount due on certain promissory notes. Plaintiff had judgment, from which, and from an order denying motion for new trial, defendant appeals.

Defendant, in his answer, by way of cross complaint claimed that he had conveyed to plaintiff certain real and personal property as security for these notes, and asked for an accounting, and that he be allowed to redeem. He does not allege that plaintiff has sold any of this property, or converted it. Plaintiff denied that he held any of defendant's property as security, and averred that whatever title he held was as trustee and in trust for defendant, which he stood ready to reconvey. The court found the due execution of the notes by defendant, and the amount due thereon, as to which the evidence is sufficient to justify the finding. It also found that the notes were not secured by any of the real or personal property conveyed by defendant to plaintiff as claimed by defendant, "but such properties as were conveyed to plaintiff were transferred to and held by him as trustee for the defendant." In its judgment the court dismissed defendant's cross complaint.

Appellant contends that the court should have found as to the value of the properties conveyed to plaintiff by defendant, and should have adjusted the rights of the parties as to all the matters put in issue. The evidence as to the character in which plaintiff held the title to the property of defend-

ant was conflicting. There was evidence tending to show that plaintiff did not hold the title as security for the debt, and the finding upon that issue cannot be disturbed. When the court found that plaintiff held none of defendant's property as security for the debt, it became immaterial, under the pleadings, for the court to find the value of this property. There was no occasion for an accounting, as defendant did not allege or claim that plaintiff had disposed of any of the property or converted any of it to his own use or benefit. There was no right of redemption involved, because the court found, upon sufficient evidence, that the property was not held as security. The case simply stated is this: Defendant owes plaintiff money on certain promissory notes. Plaintiff holds certain property belonging to defendant, not as security, but as a naked trustee, which he avows a willingness to surrender to defendant. We cannot see that the court could have done otherwise than to give plaintiff judgment, and dismiss defendant's cross complaint, leaving defendant to such remedy as he may elect to pursue should plaintiff refuse to surrender defendant's property. Neither the pleadings nor the facts warranted any other judgment than that rendered. The judgment and order should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(123 Cal. 147)

POWER v. MAY, County Treasurer. (Sac. 355.)

(Supreme Court of California. Dec. 23, 1898.)

COUNTIES—HOSPITAL FUND—SUPERVISORS—CONTRACTS FOR ATTORNEYS' SERVICES—MANDAMUS—COSTS.

1. St. 1855, p. 67, prohibiting an appropriation of the hospital fund for any purpose other than the care and protection of the indigent sick, refers to the fund raised by taxation by the county, and does not apply to the hospital fund coming from the state under Const. art. 4, § 22. St. 1880, p. 13, and St. 1883, p. 380.

2. Where an attorney had been employed by a county to collect a hospital fund due from the state, he to receive a certain per cent. of the fund as compensation, the county treasurer, on receipt of the fund, should credit the entire amount to the hospital fund and thereafter pay therefrom the amount due to the attorney.

3. A person who has performed important services for a county under the direction of the majority of the supervisors, who approved his claim for the services, is entitled to compensation, though no formal resolution to employ him was spread on the supervisors' minutes.

4. Code Civ. Proc. § 1095, providing that an applicant for mandamus may recover costs, applies where defendants are public officers, though such officers are not required to file undertakings on appeal.

Commissioners' decision. Department 2. Appeal from superior court, Tulare county.

Action by Maurice E. Power against E. A. May, as treasurer of Tulare county. From

a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

F. B. Howard, for appellant. Lamberson & Middlecoff, for respondent.

CHIPMAN, C. Action to compel defendant, as treasurer of Tulare county to pay to plaintiff out of the hospital fund of said county \$588.94, the amount of a warrant, for commissions on money collected by plaintiff from the state for the care of aged and indigent persons and orphans and half-orphans. The court directed the writ of mandate to issue as prayed for, with costs. This appeal is from the judgment and from the order denying motion for a new trial. It appears from the findings that the board of supervisors made a contract in December, 1894, with one John Broder, while he was the qualified clerk of the board, to collect the money due from the state on account of indigents supported by the county. Plaintiff knew nothing of this contract until in March, 1895, at which time Broder informed plaintiff that he (Broder) could not perform the service, as it required a lawyer, of which profession plaintiff was a member. Plaintiff thereupon applied to the board for permission to perform these services on the terms stated in Broder's contract and for the compensation agreed to be paid him, and a majority of said board informed plaintiff that he might do the work on these terms. Acting upon the statement of the majority of the board, plaintiff prepared and presented to the state board of examiners the claim of said county, which aggregated a sum in excess of \$4,000, and was allowed for \$3,925.25, and afterwards paid to the county and placed to the credit of the hospital fund. Plaintiff presented his claim for said services to the board of supervisors in due form, and on July 1, 1895, it was allowed and "ordered to be paid, to the amount of five hundred and eighty-eight dollars and ninety-four cents, out of the hospital fund of said county" (being 15 per cent. of the collection). The claim as presented contained the statement, "As per contract with John Broder, made by order of board of supervisors on the 8th day of December, 1894, five hundred and eighty-eight dollars and ninety-four cents;" but these words "were inserted in said claim by plaintiff solely and entirely for the purpose of referring to said contract for the purpose of determining the rate of compensation which he was to receive for the collection of said money, \* \* \* and were not inserted therein for the purpose of claiming any commissions or compensation of any kind whatever under or by virtue of said contract or resolution of the board of supervisors of December 8, 1896." Broder was not asked to and never did assign this contract to plaintiff, but plaintiff asked Broder to make a release of



said order of employment to avoid his making any claim, and that plaintiff never agreed to pay Broder any portion of the sum received by plaintiff for such services. The auditor of the county duly issued his warrant to plaintiff for the said amount, which plaintiff duly presented to the treasurer for payment, which was refused. At the time there was "sufficient money in the hospital fund of said county properly applicable to the payment thereof to pay the said sum of five hundred and eighty-eight dollars and ninety-four cents, after paying all other sums legally chargeable against said fund."

1. This case was here on a former appeal from a judgment on the pleadings, and is reported in 114 Cal. 207, 46 Pac. 6. It was then held, on the authority of *Lassen Co. v. Shinn*, 88 Cal. 510, 26 Pac. 365, in a similar case, that the board of supervisors had the power to make such a contract as is here in question. Appellant renews the objection to the legality of the claim, placing it upon the ground that the hospital fund "cannot be subjected to the payment of claims for ministerial services rendered upon contracts for the collection of debts due the county." In *Lassen Co. v. Shinn*, supra, the contract provided for the payment of the commissions out of the fund collected. Whether this collected fund was placed to the credit of the hospital fund of the county before the commissions were paid does not appear. It does appear that the money collected was paid to the county treasurer, and that the commissions were paid by a warrant drawn on that officer. It was the duty of the treasurer to place this money to the credit of the fund to which it belonged (the hospital fund), and to pay the warrant out of that fund, and the fact found is that he did so. We see no reason why he could not pay the warrant for the commissions out of the money collected as well after it was placed to the credit of the hospital fund as before it reached that fund; indeed, it would have been improper to have paid the commissions out of the money collected, and then to have placed only the balance to the credit of the hospital fund. Appellant cites section 8 of the act of April 11, 1855 (St. 1855, p. 67), which, as to this hospital fund, provides that it is to "be used for the care and protection of the indigent sick, and shall be appropriated for no other object." Respondent claims that this act was repealed by section 25 of the county government act of 1893. We think the provisions of section 8, Act 1855, are superseded by section 25 of the county government act. But, if this be not so, we do not think section 8 applies to the fund here in question, which comes to the county by operation of section 22, art. 4, of the constitution, the act of March 25, 1880 (St. 1880, p. 13), and the act of March 15, 1883 (St. 1883, p. 380); whereas the fund referred to in the act of 1855 is raised by taxation by the county. Appellant claims that the pow-

ers of boards of supervisors to employ counsel have been greatly restricted by the decision in *Merriam v. Barnum*, 116 Cal. 619, 48 Pac. 727. In that case the former decisions were re-examined and distinguished; and, while it was there said that the language used in *Lassen Co. v. Shinn*, supra, is somewhat broader than the authorities cited in support of it would justify, the law as announced in that case was not doubted or overruled.

2. Appellant claims that the evidence does not sustain the findings. The answer alleges a collusive agreement between Broder, while he was clerk of the board, and plaintiff, who was then district attorney of the county, to obtain the Broder contract and divide the compensation. Broder and plaintiff both went out of office on the first Monday of January, 1895. This defense was held to be a good one in the former appeal, if proven. The question, then, is, does the evidence sustain the finding that plaintiff claims under a different agreement, and one made when plaintiff was not in office? The finding is that the contract was made with plaintiff alone, and that Broder had no interest in it and was not promised any part of the compensation by plaintiff. The finding is also against any collusive understanding between them when the Broder contract was made, or at any time while they were in office. We think the evidence sufficient to sustain these findings. But, if this be conceded, appellant contends that there was no lawful contract made with the board by plaintiff, because no resolution was passed by the board authorizing plaintiff to perform the service. The evidence tends to show that plaintiff represented to the different members of the board that Broder could not perform his contract and was willing that plaintiff should do the work for the board, and plaintiff offered to do it upon the same terms as were stipulated in the Broder contract. There was no resolution of authority passed by the board, but the members told plaintiff to go ahead and make the collection and he would be paid at the rate agreed upon with Broder. Plaintiff did the work, collected the money, and turned it over to the county, and presented his bill for services to the board. In the bill reference was made to the Broder contract, but the evidence tends to show, and the court found, that this reference was made to fix the amount of compensation, and not to show that he claimed under the Broder contract. We think the evidence justifies the view of the matter taken by the learned judge who tried the case. It is true that there was no previous formal resolution of the board authorizing plaintiff to perform the service. There was an understanding to that effect, which for some unexplained reason was not entered upon the minutes of the board. While in all matters of such importance we think the board should act formally, by resolution spread upon the minutes, still, as they had the power to act, and

the services were performed, and the board did in fact subsequently approve the bill for the services and order it paid, we know of no reason why the subsequent ratification and order of payment should not be treated as equivalent to previous authority regularly given.

3. It is claimed that the judgment against defendants for costs was error. Appellant cites several California cases where, the defendants being public officers, it was held that undertakings are dispensed with on appeal. Such was the case of *Lamberson v. Jeffers*, 116 Cal. 492, 48 Pac. 485. But it was there said, "Dispensing with the undertaking does not necessarily imply that a personal judgment for costs or damages may not be rendered." Section 1095, Code Civ. Proc., provides that the applicant for mandamus may recover "the damages which he has sustained, \* \* \* together with costs." Section 1022, Id., provides as follows: "Costs are allowed, of course, to the plaintiff, upon a judgment in his favor, in the following cases: \* \* \* 4. In a special proceeding." These provisions of the Code we think are applicable to this case. Appellant cites *McDougal v. Roman*, 2 Cal. 80, where the defendant in mandamus was state treasurer, and the lower court awarded a peremptory mandamus and gave judgment against him for costs. This court affirmed the award for the writ, but reversed the judgment for costs. The ground for this reversal is not stated. It could not have been because costs could not be awarded to plaintiff, for the provisions of the Practice Act (section 477) were the same as the Code (section 1095, supra); and the court affirmed the judgment for the writ, with costs, i. e. the costs of the appeal, as we assume. The case is meagerly reported, and cannot, we think, be taken as authority to support appellant in his contention that costs cannot be awarded in a mandamus proceeding such as this. In *Tuolumne Co. v. Stanislaus Co.*, 6 Cal. 440, which was mandamus, appellant was taxed with costs by this court. Mr. Merrill in his work on Mandamus (section 310) says that costs are awarded, or divided, or refused, as under the circumstances seems proper to the court; and that it has been considered to be such a matter of course to grant costs to the party ultimately succeeding that very strong grounds will be required to induce the court to depart from the general rule. In *U. S. v. Schurz*, 102 U. S. 378, which was mandamus to compel defendant, as secretary of the interior, to issue a patent, he was charged with costs upon a motion specially directed to that question. See note to the case (page 407), where Mr. Justice Miller delivered the opinion of the court, in which he said that a careful examination of the authorities "leaves us no option but to follow the rule that the prevailing party shall recover of the unsuccessful one the legal costs which he has expended in obtaining his rights." See 5 Enc. Pl. &

Prac. pp. 151, 152. The judgment and order should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(123 Cal. 118)

TILLEY v. BONNEY et al. (Sac. 433.)

(Supreme Court of California. Dec. 22, 1898.)  
ACTION TO QUIET TITLE—JUDGMENTS—PRIORITY—TENDER—REDEMPTION—DECREE.

1. Where property was sold under a judgment, the amount of which was subsequently reduced on appeal, such modification does not affect the certificate of sale, nor require the judgment creditor to again sell the property under the judgment as modified.

2. Where a prior judgment creditor was not entitled to a lien on property sold to the whole amount of his judgment, a subsequent judgment creditor must tender the amount for which the prior judgment was a lien before the expiration of the period of redemption, in order to preserve his rights in the property sold.

3. Where a judgment creditor sued to have a prior judgment declared subsequent to his, but did not ask to have a certificate of sale under such judgment set aside, and did not tender to such judgment creditor the amount for which the judgment was ultimately held to be a prior lien, he cannot acquire a right to the property sold thereunder by tendering such amount after the redemption period has expired.

4. In an action to quiet title to land sold under various judgments, some of which had been partly satisfied from other property, a decree determining the relative interests of the judgment creditors, which did not show the value of such other property nor the amount for which it sold, is erroneous.

Commissioners' decision. Department 1. Appeal from superior court, Nevada county.

Action by Edwin Tilley against John Bonney and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

P. F. Simonds and Thos. S. Ford, for appellant. J. M. Walling, for respondents.

CHIPMAN, C. Action to quiet title. The court gave judgment that of the property in controversy plaintiff is the owner of 1027½-1619, and defendants of 591¼-1619, undivided. Plaintiff appeals on the judgment roll from that part of the judgment awarding an interest to defendants, and quieting defendants' title thereto. The findings set forth the sources of title of plaintiff and defendants as follows: In May, 1893, one Gray and others brought an action to foreclose a vendor's lien for \$1,300 on the property in question against one Conly and the Midnight Gold & Silver Mining Company, a corporation, the latter being the owner of the property. Pending the action, Tilley (present plaintiff), who was a director of the corporation, in good faith, bought the claim for \$775, and continued the action in the name of Gray and others, and on September 18, 1893, obtained judgment for \$1,519.90, foreclosing the lien. An order of sale was issued September 27, 1893, and on October 19, 1893,



the sheriff sold the whole of the premises for \$1,619, being the full amount due, and this plaintiff became the purchaser. The property sold included all the property described in the complaint, known as the "Wisconsin Quartz Mine," but said property constituted only a part of the property of said corporation. No redemption was made, and after six months from the delivery of the certificate of sale the sheriff delivered a deed to plaintiff, which was duly recorded. Plaintiff claims title under this deed. Reference will be made to this as the Tilley-Gray judgment. On March 16, 1893, plaintiff purchased from said Conly a promissory note executed by the corporation for the sum of \$14,188.80, paying Conly therefor \$1,000. Plaintiff was then a stockholder and director in the corporation. May 13, 1893, plaintiff brought suit on the note against the corporation, and obtained judgment, May 24, 1893, for \$14,363.79; and on October 20, 1893, the sheriff sold all the interest of the corporation in the property, the subject of this action, as well as certain other real property, and issued his certificate of sale therefor; and on September 24, 1896, delivered to plaintiff a sheriff's deed to all said property. This will be referred to as the Tilley-Conly judgment. On November 24, 1893, defendant Bonney obtained a judgment against the corporation for \$1,194.30, which was that day duly entered in the records of said court, and remaining wholly unpaid. On February 20, 1896, Bonney caused execution to issue thereon, and on December 18, 1895, caused all of the real property of the corporation to be sold, including that in question, and Bonney became the purchaser for the amount of his judgment, which was fully satisfied upon the records of the court. No redemption being made, a deed was issued on July 11, 1896, to Bonney, which was duly recorded. This will be referred to as Bonney judgment No. 1. From the findings it appears that the execution issued after the sale. It is probable the execution issued December 18, 1895, and the sale was February 20, 1896, which was the fact as to the Bonney judgment No. 2, *infra*. On November 24, 1893, Bonney obtained another judgment against said corporation for the sum of \$1,144.80, on which execution issued December 18, 1895, followed by sheriff's sale of all the property of said corporation, including that in question, and Bonney became the purchaser and took certificate of sale. No redemption being made, the sheriff made a deed to Bonney July 11, 1896, which was duly recorded, and the execution was returned fully satisfied, as was the judgment also satisfied. This will be referred to as Bonney judgment No. 2. On September 22, 1896, Bonney conveyed an undivided half interest in said premises to defendant Cox. On January 26, 1894, Bonney brought an action against plaintiff in this action, alleging that both of the Tilley judgments were fraudulent, and praying that the Bonney judgments be declared superior to Tilley's. At the trial Bonney had judgment April 13, 1894, adjudging

that, as against the property now in question, the Tilley-Gray judgment "was only a valid lien for the sum of seven hundred and seventy-five dollars, with interest at seven per cent. from September 18, 1893, and as to that amount it was a prior lien, upon the property described in the complaint herein, to the judgments of Bonney (No. 1 and No. 2) hereinbefore referred to, and that as to the remainder of said judgment, over and above seven hundred and seventy-five dollars and interest, the said judgment of April 13, 1894, was silent." It was further decreed that "the judgment dated May 24, 1893, in the case of Tilley vs. Said Corporation (the Tilley-Conly judgment), was valid, and that Tilley was entitled to have his judgment on the Conly note enforced against the property of the corporation on an equality with said Bonney." The findings then show that Bonney appealed to this court from that judgment, and it was here adjudged that the Tilley-Conly judgment "could only be enforced against the property of the corporation on an equality with Bonney for the amount of one thousand dollars, interest and costs, being the amount which Tilley paid for the note, and in other respects the said judgment of April 13, 1894, in Bonney vs. Tilley, was affirmed, but it was ordered modified in the manner stated." There is nothing to show that the certificate of sale to Tilley, under which he now claims, was set aside in that judgment. On February 8, 1896, "for the purpose and with the intent of redeeming from said plaintiff the property in said complaint described herein from the lien of the judgment in the case of Gray et al. vs. Said Corporation (Tilley-Gray judgment), Bonney tendered to plaintiff, in writing, the sum of nine hundred and ten dollars gold coin, being the full amount then claimed by him (Bonney) to be due upon the judgment of September 18, 1893 (the Tilley-Gray judgment), for principal and interest at said date, but the plaintiff refused, and still refuses, to accept the same. More than six months had elapsed after the sale of October 19, 1893 (in fact two years and six months), and prior to the time of tender, before said offer was made, and the said person so claiming to redeem did not produce, nor serve with his notice, any copy of the docket of the judgment under which he claimed the right to redeem, or any affidavit showing the amount then actually due on the lien." Defendants in their answer allege that the sales under the Tilley-Conly judgment of May 24, 1893, and the Tilley-Gray judgment of September 18, 1893, were and are invalid, because they were subsequently modified by decree of this court on appeal; and defendants pray that these judgments be vacated, and that all certificates of sale and deeds executed by virtue of such judgments be canceled and declared invalid. There were no findings or decree relative to these allegations. The conclusions of law found relate only to the proportion, as first above stated, to which each party is entitled to the property in ques-

tion, and the decree merely quiets the title of each in the proportion named.

Appellant disclaims all knowledge as to how the trial judge arrived at the denominator, to wit, 1,619, or as to the source whence the two numerators were derived. Respondents do not undertake to enlighten us upon that question. The denominator corresponds in amount with the bid by plaintiff at the sale under the Tilley-Gray judgment. We are unable to discover the source of the two numerators. The denominator apparently represents the entire property in dispute, and the two numerators the respective interests of plaintiff and defendants therein, but we are unable to discover from the findings how these numerators were ascertained, or why the denominator was taken to be 1,619.

Plaintiff, as we have seen, claims under the sale of the property upon the Tilley-Gray judgment of September 18, 1893. This sale was made October 19, 1893, and the sheriff issued his certificate of sale. There was no redemption, and after six months the sheriff made his deed to Tilley. Bonney brought his action January 26, 1894, to have this Tilley-Gray judgment and the Tilley-Conly judgment declared void, and his (Bonney's) superior thereto. This action was brought within the six-months period of redemption, but without any offer to redeem, and resulted in a judgment given April 13, 1894, that the Tilley-Gray judgment was a valid prior lien for the sum of \$775, with interest, upon the property described, but the judgment was silent as to the balance of the Tilley-Gray judgment. At this time there was outstanding a certificate of sale, on which the time for redemption had not elapsed, showing that Tilley had purchased the property for \$1,619, being the full amount of the Tilley-Gray judgment, with interest and costs. Bonney appealed to this court, and on October 4, 1895, the decision of the court was filed. *Bonney v. Tilley*, 109 Cal. 346, 42 Pac. 439.

The point was raised in *Bonney v. Tilley*, supra, at the argument here, that a vendor's lien is not assignable, and therefore Tilley's right to the vendor's lien which was held by Gray and others was destroyed by the assignment to Tilley. Upon the question this court did not distinctly decide that the vendor's lien was lost by assignment, but the court said: "If, therefore, that part of the judgment foreclosing the vendor's lien were eliminated, there would still be left a valid judgment which was a lien on all the real property of the corporation, and was prior and superior to the lien of plaintiff's judgments." All that we can find decided by this court, as to the Tilley-Gray judgment, was that it became a prior lien for the sum of \$775, whether there was a vendor's lien or not, and this was an affirmation of the judgment below so far as the Tilley-Gray judgment was concerned. The effect, we think, was to leave in the hands of Tilley a certificate of sale of the premises in question which

could not be avoided by statutory redemption, because the time for redemption had expired. Respondents urge that the effect of the judgment here on appeal was to set aside the certificate of sale, and leave Tilley with a judgment lien for \$775, on which he would have to take out execution and sell again, and that the first sale under the judgment foreclosing the vendor's lien became ineffectual for any purpose. We cannot agree with this view of the matter. Tilley had a valid judgment for \$775, which became a valid lien on the property when docketed, and it is immaterial whether it be called a vendor's lien or a judgment lien. When Bonney brought his action he did not ask to have Tilley's certificate of sale set aside. He asked to have his judgment declared to be superior to Tilley's, but made no offer to redeem, pending his action and the appeal. Failing to redeem, his right of redemption was cut off by the running of the statute. Respondents ask: "Was Bonney required to redeem from an erroneous judgment, and pay Tilley double the amount to which he was entitled?" He was not required to pay the full amount of the judgment, as the case turned out, but, to protect himself against a possible failure in his suit, Bonney was required to offer to redeem by paying the amount which was in fact found to be a valid lien. He did not do this, but relied upon defeating the entire judgment, in which he failed; and we do not know of any statute allowing him to redeem now, nor can we see upon what principle of equity he should be permitted to do so. Indeed, he admits that his tender now made is not under any statute, but claims that he "took this method of paying off the prior lien of the Gray judgment, as modified by the supreme court, thus rendering it unnecessary for Tilley to enforce his prior lien by sale of the premises"; and he adds: "This we had the right to do, as we were creditors holding judgment liens against the property." This is a mistaken view of Bonney's rights, as we have seen, for Tilley was not required to take out execution, and again sell the property, in order to enforce his prior lien. He had sold under an order of sale upon a valid judgment, which was not reversed, and that sale gave him title, which could only be defeated by redemption. It is true Tilley bid \$1,619 for the property, and presumably it was of that value; and hence it may be said that he holds under his certificate of sale property worth \$844 in excess of his prior lien of \$775. Still, Bonney could then have redeemed, had he so desired, by paying Tilley this latter amount, and, not having done so, we cannot see that he should now be heard to complain because Tilley has in effect obtained title by his purchase for less than the value of the property. Besides, Tilley satisfied his judgment for the full amount of \$1,619.

We find nothing in *Southern California Lumber Co. v. Ocean Beach Hotel Co.*, 94



Cal. 217, 29 Pac. 627, cited by respondents, in conflict with this view of the sale. The sheriff proceeded regularly, as the findings show, under an order of sale, to enforce the Tilley-Gray judgment. The purpose was to enforce a valid prior lien. The function of the order was to subject the property in question to sale to pay the judgment, and it was equally efficacious to accomplish that object whether the judgment gave a vendor's lien or a general lien prior to Bonney's. To hold that Tilley's certificate of sale was vacated on the assumption that he did not have a vendor's lien, but did have a prior judgment lien, would result in just what seems to have happened here, namely, to place all the judgments of both Tilley and Bonney on an equality, and take from Tilley his right of priority of lien on the property purchased by him, to which this court held he was entitled.

There is another feature of the case deserving attention. Besides the Tilley-Gray judgment, there were three others,—one, the Tilley-Conly judgment, for \$1,000, in favor of Tilley; and two in favor of Bonney, one for \$1,194.30, and one for \$1,144.80. As to these, they were held to be of equal rank between themselves upon all the assets of the corporation. Both Tilley and Bonney obtained certificates of sale under these judgments of all the property of the corporation, including the property in question. There were three separate mining claims purchased at these sales besides the premises in question. There are no findings as to the value of this outside property, or what proportion of each of the judgments was paid by it. Bonney bid the full amount of his judgments, and the executions were returned and the judgments fully satisfied. There must have been some value in the property other than the premises in question. Even if the property involved here could be sold to pay these judgments, there should have been findings as to the value of the different pieces of real estate, or, at least, of the amounts for which they were sold, before the proportion to which each party is entitled in the property in question could be ascertained, and before it could be seen that Tilley's prior lien of \$775 was preserved. We are unable to determine from the facts found upon what theory the learned trial judge deduced his fractions, either as to the numerators or the denominator. It is quite clear, however, that he treated the Tilley-Gray judgment sale as ineffectual to convey title to Tilley; but the process by which the equities of the parties under the several judgments were worked out we are unable to discover. Whatever the process, the conclusion was erroneous, because it apparently dealt with property to which Tilley had title under the Tilley-Gray judgment, to redeem which Bonney had lost all right. That part of the judgment appealed from should be reversed; and, as plaintiff from the findings appears to be entitled to the re-

lief prayed for, the lower court should be directed to enter judgment quieting plaintiff's title to the whole of the property involved in this action.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion that part of the judgment appealed from is reversed, and the trial court is directed to enter judgment quieting plaintiff's title to the whole of the property.

123 Cal. 126

BONNEY et al. v. TILLEY. (Sac. 481.)

(Supreme Court of California. Dec. 22, 1898.)

JUDGMENTS—MODIFICATION—CERTIFICATE OF SALE  
—MOTION TO VACATE—SUPREME COURT  
—POWERS—STIPULATION.

1. Where, in an action to determine the priority of certain judgments, one of them, which was never appealed from, was modified, a subsequent judgment creditor cannot have such judgment set aside, nor a certificate of sale of property thereunder vacated, on motion; especially where he did not offer to redeem, by payment of the amount for which the judgment was a lien, within the statutory period, and did not move until 15 months after the modified judgment was entered.

2. The supreme court cannot use the facts in two cases between the same parties interchangeably, in the absence of a stipulation authorizing it.

Commissioners' decision. Department 1. Appeal from superior court, Nevada county.

Motion by Catherine Bonney, administratrix, etc., and another, against Edwin Tilley, to set aside certain certificates of sale under judgments subsequently modified. From an order denying a motion, plaintiffs appeal. Affirmed.

J. M. Walling, for appellants. P. F. Simonds and Thos. S. Ford, for respondent.

CHIPMAN, C. This is an appeal by plaintiffs from an order in the above-entitled action denying plaintiffs' motion to set aside certain certificates of sales and deeds executed to defendant in certain other actions, on the ground that the judgments therein have been modified by this court. This case was here on a former appeal, and is reported in 109 Cal. 346, 42 Pac. 439. The facts out of which the controversy originally arose are somewhat lengthy, and not a little complicated. They will be found stated in that case, and in a case entitled Tilley v. Bonney, Sacramento No. 433, opinion in which was this day filed (55 Pac. 798). To recapitulate briefly, this case of Bonney v. Tilley was an action to have the lien of certain two judgments obtained by Bonney against the Midnight Gold & Silver Mining Company declared superior to the lien of certain two judgments of Tilley against the same company, to wit, "Tilley vs. Midnight Gold & Silver Min. Co.," and "Gray et al. vs. Midnight Gold & Silver Min. Co." One of Tilley's judgments, to wit, the Gray judgment, was held to be a prior

lien to the extent of \$775 on a certain parcel of the company's mining property; and, as to the other judgments of both Bonney and Tilley, they were of equal priority. On the first appeal of this case, the judgment of the lower court was affirmed as to Tilley's prior lien, in the Gray judgment, for \$775; and the court reduced the lien of his judgment in the other case to \$1,000, and directed the judgment in Bonney against Tilley to be modified accordingly. The judgment was entered as modified November 30, 1895. Tilley held a sheriff's deed under an order of sale in the Gray judgment, executed about April 19, 1894, and before this modified judgment was entered, and he also had a deed delivered to him by the sheriff September 24, 1896, on his other judgment. On February 26, 1897, plaintiffs gave notice of the motion in this present case to set aside Tilley's judgments, and certificates of sale and deeds in the two other cases above referred to, to wit, Gray against the corporation and Tilley against the corporation, the ground of the motion being the modification of the judgment in Bonney against Tilley. The lower court denied the motion; hence this appeal.

Appellants cite numerous cases to the point that the lower court may, on motion, set aside sales under the original judgment after it has been modified by this court. The cases referred to are instances where the restitution sought was of some right accruing to the appealing party in the action in which the motion is made. In the present case the motion is to set aside certificates of sale and deeds thereunder issuing out of and pursuant to judgments in two other separate and distinct actions, to wit, Gray and others against the corporation, and Tilley against the corporation. The judgments in these cases were never appealed from. In the action of Bonney against Tilley it was not sought to set aside the sales ordered under the Tilley judgments. The object of that action was to have Bonney's judgments declared to be superior as liens on the corporation property. It seems to us that plaintiffs could not, by motion, in this case, have greater relief than they asked for in their complaint in the action. But, aside from this objection, plaintiffs did not move in the matter until 15 months after the modified judgment was entered. Plaintiffs did not offer within the statutory period, nor in compliance with the statute at any time, to redeem from the sale under the Gray judgment, which was declared to be prior in right for \$775 to all other liens. There is not only no equity in plaintiffs' motion, but positive inequity, in this: that to set aside defendant's deeds would leave plaintiffs the sole owners of the property, as to part of which defendant has a valid prior lien, and as to the rest he holds liens equal in priority to plaintiffs'.

There is still another reason why it would seem improper to grant the relief on motion, even if plaintiffs could show on a general bill

in equity that they are entitled to it. They issued execution on their judgments, purchased the property, and caused their judgments to be satisfied, and they so stand now. We know of no proceedings by motion supplemental to the satisfaction and extinguishment of the judgment to accomplish the object sought here. Plaintiffs have their action to quiet title, or other appropriate proceeding to determine the relative rights of all claimants to the property. But after sales on execution and deeds have issued, and the judgments have been satisfied, we see no way by which these relative rights could be determined in the summary manner here resorted to.

We have been asked by plaintiffs in this case, who are also defendants in *Tilley v. Bonney* (Sacramento No. 433), to consider the two cases together, on account of their alleged intimate relations. We are not permitted to use the facts in these cases interchangeably, for there is no stipulation that we may do so; but, after an examination of both transcripts, we discover nothing in either one to change our opinion as to the other. We think the motion was properly denied, and that the order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

123 Cal. 83

CALIFORNIA IMP. CO. v. REYNOLDS et al.  
(S. F. 864.)

(Supreme Court of California. Dec. 20, 1898.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS  
— ACTION ON ASSESSMENT — PLEADING — EVIDENCE — NOTICE — PUBLICATION — CONTRACTS.

1. An allegation that the council "directed its clerk to publish and post said resolution of intention [to make certain street improvements] for two days in the manner prescribed by law," and that "said resolution was published and posted for two days in the manner and form above described," is, after verdict, in the absence of a special demurrer, a sufficient averment of compliance with Street Improvement Act, § 3 (St. 1891, p. 196), providing that the resolution shall be posted "conspicuously" for two days on or near the door of the council chamber.

2. A notice of intention to make street improvements was published on the 10th and 11th days of the month. The publication of the notice of work to which the former publication was a condition precedent was begun on the 11th and ended on the 17th. *Held*, that the latter publication might, in order that the prerequisite publication of the former notice should be regarded as first completed, be deemed to have been begun on the 12th, since it would still be a publication for six days within Street Improvement Act, § 3 (St. 1891, p. 196).

3. Street Improvement Act, §§ 3, 34 (St. 1891, pp. 196, 206), providing that the street superintendent shall cause to be published for six days, in one or more daily newspapers, a notice of work, and requiring the publication to be in a daily newspaper only "as often as the same is



issued," do not require a publication on six separate days, and hence a publication for six days, including an intervening Sunday when no paper was issued, is sufficient.

4. In an action on a street assessment, an allegation that plaintiff did all the work mentioned in the contract, and duly performed it in every respect according to the specifications of the contract, sufficiently avers performance without pleading in extenso the contract or specifications, the allegation not being one of a performance of conditions precedent.

5. Under Street Improvement Act, § 7, subd. 12 (St. 1891, p. 204), making the assessment, diagram, and warrant, with the certificate of the engineer, prima facie evidence of the regularity and correctness of the prior proceedings, the assessment, diagram, warrant, and certificate are sufficient proof that the resolution of intention to do the work was properly published, there being no evidence to the contrary, and the affidavit of publication of such resolution having been improperly verified.

6. A contract for street paving at a certain price per square foot which reserved to the street superintendent the power to require a greater or less amount of certain material in the work, thereby affecting the profits on the work, is invalid, as discouraging competition in bidding.

Department 1. Appeal from superior court, Alameda county.

Action by the California Improvement Company against one Reynolds and others. From a judgment for plaintiff and an order denying a new trial, defendants appealed. Reversed.

C. Harding Tebbs, for appellants. John T. Thornton (James D. Thornton, of counsel), for respondent.

HARRISON, J. Action upon a street assessment. The defendants filed a general demurrer to the complaint, which was overruled, and the cause was thereafter tried and judgment rendered in favor of the plaintiff, from which the defendants have appealed.

1. Section 3 of the street improvement act (St. 1891, p. 196) declares that, after the passage of the resolution of intention to order the improvement, the resolution "shall be posted conspicuously for two days on or near the chamber door of the council." The complaint herein alleges that the council "directed its clerk to publish and post said resolution of intention for two days in the manner prescribed by law," and that "said resolution was published and posted for two days in the form and manner above described." It is objected that the complaint is defective in not averring that the resolution was posted "conspicuously." This objection was not raised by special demurrer, and, as the averment was sufficient to authorize evidence of the character of the posting, if controverted, it must be held, "after verdict," that the averment was sufficient.

2. The resolution was passed September 7, 1891, and was published and posted by the clerk for two days, the publication being on the 10th and 11th of September, and the posting is alleged to have been made "on the 10th to the 12th of September." The super-

intendent of streets caused a notice of the work sufficient in form to be posted and kept posted for six days along the line of said work, and also caused a similar notice to be published for six days, "which publication commenced on the 11th day of September, A. D. 1891, and ended on the 17th day of September, 1891, and was made meanwhile as often as said newspaper was issued." Section 3 of the above statute, after providing for the posting and publishing of the resolution of intention, declares that "the street superintendent shall thereupon cause to be conspicuously posted along the line of said contemplated work or improvement notices of the passage of said resolution. He shall also cause a notice similar in substance to be published for six days in one or more daily newspapers published and circulated in said city," etc. In *Paving Co. v. Anker*, 104 Cal. 340, 37 Pac. 1050, it was held that the publication and posting of the resolution by the clerk for the time named in this section is a condition precedent to the authority of the superintendent to post and publish the notices thus required, and it is contended by the appellants that, as the publication was commenced on the 11th of September, it was premature, and insufficient to give the notice required by the statute. But, admitting this to be so, the publication was continuous, and may be regarded as commencing on the 12th of September; and, as the complaint alleges that it ended on the 17th, and was meanwhile published as often as said newspaper was issued, it shows a sufficient compliance with the statute. The fact subsequently shown that it was not published on the 13th, that day being a Sunday, and the newspaper not being issued on that day, does not impair its sufficiency. Section 34 of the statute requires the publication of the notice in a daily newspaper only "as often as the same is issued," and the requirement in section 3 that the notice shall be published for six days does not require a publication upon six separate days. *Taylor v. Palmer*, 31 Cal. 240.

3. It was not necessary to set out the specifications for the work in the complaint at length, any more than to set out the contract in extenso. The specifications are but a part of the contract, and the averment that the plaintiff entered into a contract with the superintendent of streets for doing the work according to the specifications therein sufficiently alleged that step in the proceedings to show its right to receive an assessment upon the due performance of the contract. See *Byrne v. Luning Co.* (Cal.) 38 Pac. 454. The averment in the complaint "that the plaintiff did all the work in said contract mentioned, and duly performed on its part in every respect said work according to the specifications and the terms of the contract," sufficiently avers its performance. This is not a statutory averment of the per-

formance of conditions precedent referred to in section 457, Code Civ. Proc., as is suggested by counsel for appellants.

4. It is next urged that the evidence is insufficient to show that the resolution of intention was posted for two days, and in support of this contention appellants rely upon the fact that the affidavit of such posting was made out of the jurisdiction of this state, and was therefore unauthorized. There was no evidence, however, that the resolution was not posted for two days, and, if the affidavit be disregarded, the assessment, diagram, and warrant, with the engineer's certificate, were introduced in evidence, and by section 12 of the statute they are made prima facie evidence of the regularity and correctness of the prior proceedings.

5. The specifications for doing the work provided that "the rock to be used on the surface of the roadway shall be of such size as to pass through a one-inch mesh, a smaller percentage of fine material consequent upon the crushing of the rock being allowable, the amount of the same to be governed by the superintendent of streets." Under this specification the superintendent was at liberty after the contract had been entered into to determine or vary the amount of fine material to be used, and it was therefore impossible for bidders to determine in advance the cost for doing the work, and competition in bidding was therefore restrained, and after the contract had been awarded the owners were unable to determine whether it would be to their advantage to elect to take the contract. The fact that the contract was awarded at a fixed sum per square foot fixes the amount which the contractor would receive, but the profit or cost of the work would depend upon the will of the superintendent. The vice of the contract is the same in character as existed in *Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 881, and under the principles declared in that case the contract must be held invalid. The validity of the contract is to be determined by its terms, irrespective of the amount involved. Unless there is a valid contract for the work, the assessment therefor will not create a lien upon the adjacent land. The judgment and order are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

123 Cal. 240

ROSENTHAL et al. v. PERKINS et al.  
(Sac. 348.)

(Supreme Court of California. Dec. 31, 1898.)

ATTACHMENT—FORTHCOMING BOND—AVOIDANCE—  
LIEN—APPEAL—RECORD—PRESUMPTION—  
RIGHT OF ACTION—DEFENSE.

1. The obligation of an attachment bond, made under Code Civ. Proc. §§ 554, 555, to pay the value of released property if plaintiff recovers

judgment, and there is default in its delivery, is not destroyed by an assignment by defendant, under the insolvent act of 1880, though, under section 17 thereof, the attachment was thereby dissolved, and demand for the property could not be enforced against the assignee.

2. Where attached property is released on giving a bond, as provided by Code Civ. Proc. § 555, the attachment lien is destroyed.

3. Where the record shows that property attached in a justice court was released, under Code Civ. Proc. § 555, and the bond recites that it was given under an order of the court to release the attached property, it will be inferred that an order was made discharging the attachment, and that the constable regularly released the property, though the record does not show such an order made.

4. The condition of Code Civ. Proc. § 552, that, after an execution against defendant in attachment is returned unsatisfied, plaintiff may sue the bond made for the release of the attached property, under Code Civ. Proc. § 555, does require issue of execution against defendant, who has made an assignment under the insolvent act of 1880, before suit on the bond.

In bank. Affirmed.

For opinion in division, see 53 Pac. 444.

BRITT, C. The plaintiffs here sued one Brusie in a justice's court, and procured a writ of attachment to be issued, which was levied by the township constable on 100 tons of hay, the property of Brusie. Afterwards the defendants in the present case executed an undertaking, in which was recited that Brusie had appeared in such action in the justice's court, and applied for an order to discharge the attachment "upon the execution of an undertaking, in accordance with the provisions of section 554 and 555 of the Code of Civil Procedure," and that said court had fixed the amount of such undertaking at \$500. The instrument proceeded that, in consideration of the release of the property and the discharge of the attachment, the obligors undertook "that, in case the said plaintiffs recover judgment in said action, the said defendant will, on demand, redeliver such attached property so released to the proper officer, \* \* \* or that, in default thereof, the said defendant and sureties will, on demand, pay to the said plaintiff the value of the property released, not exceeding the sum of five hundred dollars." Upon the execution of said bond, the officer released the hay to Brusie. A few days later, and in less than a month from the time of the levy of the writ, said Brusie filed his voluntary petition in insolvency, under the insolvent act of 1880; and in the usual course of such proceedings an assignee was appointed, to whom was conveyed all his estate. By permission of the court entertaining the matter in insolvency, the plaintiffs prosecuted their action in the justice's court "for the purpose of fixing the liability of the sureties upon such undertaking" (section 45 of said act), and obtained judgment against Brusie for the sum of \$317, which has not been paid. Demand was made on Brusie and his said assignee for the return of the property released as aforesaid, but without effect. The defendants also refused on demand to pay the



value of the property or the amount of plaintiffs' judgment; hence the present action on the said bond.

Section 17 of said insolvent act provides that the assignment shall vest the title to the estate of the insolvent in the assignee, "although the same is then attached on mesne process, and shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings." Defendants contend that the effect of this provision was to dissolve the attachment in *Rosenthal et al. against Brusie*, and render impossible the return of the released property to the attaching officer, and hence to destroy the obligation of their undertaking. The investigator is impressed at the outset that this bond embodied a contract that, in the event of plaintiffs' recovery against Brusie, one of two alternative promises should be performed, viz. the released property would be redelivered for application to the payment of the judgment, or the sureties would pay the value thereof, not exceeding the amount of the judgment. The first of these became impossible through the act of the law set in motion by the default (failure to pay his debts, and resort to insolvency) of the principal in the bond. Why should defendants not perform the other alternative, which remains possible? "If an agreement is in the alternative, and one branch of the alternative cannot, by law, be performed, the party is bound to perform the other." *Stevens v. Webb*, 7 Car. & P. 60,—a case in some essential features very like the present. And see *Drake v. White*, 117 Mass. 10; *State v. Worthington*, 7 Ohio, 171; *Barkworth v. Young*, 4 Drew, 1, 18, et seq.; 2 Pars. Cont. (8th Ed.) marg. p. 673, and notes. As succinctly stated in our Code: "If one of the alternative acts required by an obligation is such as the law will not enforce, or becomes unlawful, or impossible of performance, the obligation is to be interpreted as though the other stood alone." Civ. Code, § 1451. Consequences which might follow destruction of the released property itself do not at present concern us.

The force of the impression produced by the aspect of the case in outline is not diminished on minuter examination of the ground of the defense. It is clear, for reasons which need not be enlarged upon, that if, at the time the proceeding in bankruptcy is instituted, there is no attachment in force on which the proceeding can operate, if the attachment lien has already been discharged by a bond for that purpose, then the liability of sureties on the bond is not affected by the subsequent bankruptcy of their principal. *McCombs v. Allen*, 82 N. Y. 114, and cases cited; *Easton v. Ormsby*, 18 R. I. 309, 27 Atl. 216; section 45 of the insolvent act, last proviso. The mistake of defendants lies in supposing that the lien of the attachment in *Rosenthal against Brusie* continued on the attached goods after they had been released to Brusie in consequence of the delivery bond. Our

statute and the inferences which follow from the decisions of this court seem to put that question at rest. Upon the execution of the bond, such as was given by defendants, "an order may be made releasing from the operation of the attachment any or all of the attached property." Code Civ. Proc. § 554. It is impossible that property can be "released from the operation of the attachment" if it yet remains subject to the attachment lien. It was assumed in *Mullally v. Townsend*, 119 Cal. 47, 50 Pac. 1066, that the debtor who had obtained the release of property under this section could, by mortgaging it, create a lien which would be superior to the execution in the attachment suit; and in *Metrovich v. Jovovich*, 58 Cal. 341, that he could sell it. And in *Risdon Iron & Locomotive Works v. Citizens' Traction Co., of San Diego* (Cal.) 54 Pac. 529, it was held that, when property is released by order of court as exempt from levy, a dissolution of the attachment is, as to that property, accomplished. The decisions in other states where the practice allows a just analogy to be drawn with the case at bar confirm this view. Thus, it was held, where property was attached and delivered to a receptor, the officer taking the engagement of the receptor to redeliver the property or pay a sum of money, the attachment is thereby dissolved (*Waterman v. Treat*, 49 Me. 309); and that the property is liable to be attached at the suit of another creditor of the owner (*Waterhouse v. Bird*, 37 Me. 326); also, that under a practice allowing the officer to commit the goods to a surety who undertakes for their return, if the latter deliver them to the debtor the officer's lien is gone, and the goods may be attached by another creditor (*Robinson v. Mansfield*, 13 Pick. 139; *Lawrence v. Rice*, 12 Mete. [Mass.] 538; *Drake, Attachm.* §§ 344, 357). See, also, *Schuyler v. Sylvester*, 28 N. J. Law, 487; *Bunneman v. Wagner*, 16 Or. 433, 18 Pac. 841. In some jurisdictions the action in which chattels are attached has been regarded as one in rem as to those goods; as in *Gass v. Williams*, 46 Ind. 253, one of the cases most relied on by defendants; and in *Bell v. Pearce*, 1 B. Mon. 73. In that view of the nature of the action, there may be ground for holding that the property continues in the custody of the court by virtue of the action against it, even though the debtor lawfully regains possession. The theory of the remedy of attachment with us is different; the property does not become a reus. *Low v. Adams*, 6 Cal. 277. We are satisfied that no lien of the attachment persisted on the goods in this case after the release to the owner.

It is said that no order of the justice's court for the release of the attached property is shown to have been made. The goods were in fact released as a consequence of the bond given by defendants, and it is not quite clear to us that they are in position to urge this objection. *Palmer v. Vance*, 13 Cal. 553. It is sufficient, however, to say that the record

does not show that an order directing the release of the property was not made. The recitals of defendant's undertaking show that it was given pursuant to an order of the court requiring the same for the purpose of releasing the attached goods in the manner prescribed by sections 554 and 555, Code Civ. Proc. The constable accepted the bond, and surrendered the goods. In this state of the case, it ought to be inferred that Brusie obtained what the bond shows he applied for, viz. an order discharging the attachment under said sections of the Code, and that the constable regularly performed his duty when he released the goods.

Section 552, Code Civ. Proc., is to the effect that if an execution against the defendant in the attachment be returned unsatisfied, in whole or part, the plaintiff may prosecute any undertaking given pursuant to section 540 or section 555, or he may proceed as in other cases upon return of an execution. Appellants contend that thereby the issuance and return of an execution against Brusie was made a condition precedent to the present action on the bond (*Brownlee v. Riffenburg*, 95 Cal. 447, 30 Pac. 587); and that, as the issuance of any execution on the judgment against Brusie was forbidden by section 45 of the insolvent act, the condition of defendants' liability on the bond can never transpire. The argument proves too much. It would equally destroy the liability of sureties on a bond given under section 540 to prevent an attachment, as to which we suppose argument hardly lies that it is affected by subsequent insolvency of the debtor. Looking to the several provisions referred to, and to the clause of said section 45 allowing the prosecution to judgment of the action against the attachment defendant "for the purpose of fixing the liability of the sureties" on bonds such as this, we conclude that the legislature did not mean in the same breath to destroy the liability of the sureties by forbidding an execution against the insolvent, but rather to preserve such liability, and dispense with the issuance of an execution preliminary to an action against them. An execution against the insolvent would be a futility in the face of the title to the insolvent's property taken by his assignee.

It is contended that no valid demand was or could be made on Brusie or his assignee for the return of the property, because the assignee was the lawful owner thereof for the purposes of his trust, and neither the plaintiffs nor the constable had the right to receive it from him. At bottom this is not materially different from the objections that the restoration of the goods according to the first alternative of the bond has become impossible, and that the action is not maintainable because no execution can issue on the judgment taken against Brusie. For reasons advanced in considering those objections severally, this must also be overruled. One or two minor points are made, but they do not seem

meritorious. The judgment and order denying a new trial should be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

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denying a motion for a new trial, plaintiff appeals. Affirmed.

Smith & Murasky, for appellant. Reddy, Campbell & Metson, for respondents.

PER CURIAM. The judgment went, in the court below, for defendants, and plaintiff appeals from an order denying his motion for a new trial. The defendants are some associated corporations, who may be designated, for convenience, as the Hume Packing Company. On the 29th day of January, 1891, one John Quinn, as party of the first part, and the defendants, as parties of the second part, entered into a certain written contract, by which Quinn agreed to employ a large number of Chinamen and proceed from San Francisco to Alaska and engage for defendants in the business of packing salmon, and for the work done the defendants were to pay certain sums of money. There were many details in the contract which are not important here, and need not be mentioned. It was stipulated that Quinn was to give a bond, in the sum of \$7,500, for the faithful fulfillment of his part of the contract, and also that the money to become due under it should be paid to Sun Wah Hing & Co. Quinn and the defendants were the parties to the contract, but at the bottom of the instrument, after the signatures of said parties, was the following: "We accept the terms and conditions of the foregoing contract. [Signed] Sun Wah Hing & Co." At the same time, a bond, in the sum of \$7,500, was given by said Sun Wah Hing & Co., conditioned for the fulfillment by Quinn of his covenants in said contract, and the contract is referred to in the bond as one made by the defendants "with John Quinn, bearing date herewith." After the return of Quinn and the Chinamen, at the end of the packing season, to San Francisco, it appeared that there was a balance owing by defendants on the contract of \$14,801.61. Defendants claimed, however, that certain work on some of the cans, such as labeling, etc., had not been done, and they held back \$1,500 for the payment of laborers to finish the work. Colonel Bee, the Chinese vice consul, was present, for the purpose of protecting the interests of the Chinese laborers, and a check for \$13,301.61 was drawn by the defendants, payable to Sun Wah Hing & Co., which was immediately indorsed by the latter, and delivered to Colonel Bee. A number of Chinamen were then employed to complete the unfinished work on the cans. Afterwards Sun Wah Hing & Co. made an assignment of the \$1,500 due on the contract to the plaintiff in this case, Lee San, and this action is brought upon said assignment to recover of the defendants the \$1,500. The Chinamen, 28 in number, who performed the last work on the cans, have not yet been paid. The court below found that the contract was made by defendants with Quinn, and with no other person; that the money

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LEE SAN v. HUME PACKING CO. et al.  
(No. 16,008.)

(Supreme Court of California. Jan. 13, 1899.)

ASSIGNMENTS—INTEREST OF ASSIGNOR—EVIDENCE.

Q. contracted to furnish defendant a number of laborers, and gave a bond, with S. as surety, for the performance of such contract, and defendant agreed to pay the money due thereunder to such surety for Q. After full performance on the part of Q., and the release of S. from obligation on the bond, the balance due from defendant on the contract was assigned by S., without the consent of Q., to plaintiff, who had knowledge of all the facts. *Held*, that plaintiff was not entitled to recover the money in question, as his assignor had no interest therein.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Lee San against the Hume Packing Company and others. Judgment was rendered for defendants, and, from an order

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was to be paid to Sun Wah Hing & Co. merely as trustees for Quinn, and for their protection on the bond; that Sun Wah Hing & Co. could not assign their trusteeship to the plaintiff; that the assignment was made without the consent, and against the will, of Quinn; that plaintiff knew all the facts at the time he took the assignment, and knew that the \$1,500 was money due Quinn, and not the money of Sun Wah Hing & Co.; that Quinn performed the labor of labeling, etc., of the cans, and duly performed all the obligations and conditions of the contract, and that defendant, before the alleged assignment, had released Sun Wah Hing & Co. from their obligation upon the bond; and that at the time of the assignment the \$1,500 was not the money of Sun Wah Hing & Co., and that the latter had no interest therein; and that therefore the plaintiffs are not entitled to recover in this action. There are no assignments of errors of law in the record, and the contention of the appellant for a new trial is based entirely upon specifications of the insufficiency of the evidence to justify the decision. Upon this point it is sufficient to say that the findings of the court below are supported by the evidence, and that it is not necessary to restate that evidence here. The order appealed from is affirmed.

(123 Cal. 166)

BERGIN v. HINCKLEY et al. (S. F. 777.)  
(Supreme Court of California. Dec. 27, 1898.)  
CONTRACT — FINAL DETERMINATION OF PROCEEDINGS.

Proceedings under Code Civ. Proc. § 1664, for determining heirship to B., pending at time of execution of, and referred to by, agreement of F. to pay certain money after determination of her right to estate of B. in the legal proceedings then pending, are finally determined when all but one of the appeals from judgment therein in her favor are affirmed, and the appellant in the other appeal which had been perfected has lost his right by failing to file within 4 years the transcript which he should have filed in 40 days; though there had been no formal order of dismissal, and F. could have consented to filing of the transcript after the time limited; it not being claimed that she gave such consent, and the fact of her thereafter filing petition for distribution showing that she considered the appeals disposed of; and such petition not being part of the proceedings pending at the time of the agreement.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Bergin against Hinckley and others. Judgment for plaintiff. Defendants appeal. Affirmed.

W. H. H. Hart (Aylett R. Cotton, of counsel), for appellants. Thomas L. Bergin, for respondent.

HARRISON, J. The appellant Florence Blythe Hinckley, then Florence Blythe, on the 19th of January, 1892, executed to the plaintiff two instruments in writing, by which she promised to pay to him the moneys there-

in named within one year after the determination of her right and title to the estate of Thomas H. Blythe, deceased, in the legal proceedings then pending for the determination of the same in the superior court of the city and county of San Francisco. This action was brought by the plaintiff upon these obligations April 16, 1896, the complaint alleging that there had been a final determination of said legal proceedings more than one year prior thereto, and that they had not been paid. In their answer the defendants alleged that the determination of said legal proceedings did not become final until less than a year prior to the commencement of the action, and defended upon this ground. The court found that the allegations in the complaint were true, and rendered judgment in favor of the plaintiff. The defendants moved for a new trial, and, their motion having been denied, they have appealed therefrom, and also from the judgment.

The appeal is urged upon the ground that the evidence was insufficient to justify the decision of the court. The legal proceeding referred to in the instruments was an action entitled "Blythe v. Ayres," instituted under section 1664 of the Code of Civil Procedure, for the purpose of determining the heirship to Thomas H. Blythe. In that proceeding the superior court had rendered its judgment, October 22, 1890, to the effect that the appellant Florence was the sole heir of Thomas, and the only person entitled to a distribution of his estate. Appeals had been taken from this judgment, and were pending in the supreme court at the date of the instruments, and, with the exception of the appeal of Adam Blythe et al., hereinafter referred to, were determined by an affirmance of the judgment appealed from, prior to June 18, 1894. On that day, Florence filed a petition in the superior court for a distribution to her of all of the estate of Thomas H. Blythe, with the exception of certain moneys in the hands of the administrator, averring therein the rendition of the judgment, and that appeals had been taken therefrom, and that the said appeals had all been heard, and the judgment appealed from affirmed; and on October 26, 1894, a decree of distribution of the estate, in accordance with her petition, was made to her. December 22, 1890, Adam Blythe et al. had appealed from the judgment in Blythe v. Ayres, by filing and serving a notice of appeal, and filing an undertaking on appeal in the sum of \$300. No further steps were taken by them in the prosecution of their appeal, and a motion to dismiss their appeal was made in the supreme court June 3, 1895, and was granted on the following day. December 27, 1894, Henry T. Blythe et al., defendants in the case of Blythe v. Ayres, moved the superior court to dismiss the proceeding, upon the ground that more than six months had expired since the decision, and that the judgment had not been entered in the judgment book. This



motion was denied September 27, 1894, and an appeal therefrom was taken October 17th, and the order affirmed November 30, 1895, 42 Pac. 641. Certain appeals were also taken from the decree of distribution, and this decree was affirmed by the supreme court November 30, 1895. *Id.* 642, 643. It is upon these facts that the appellants herein claim that the superior court erred. We are of the opinion, however, that the evidence before the court justified it in holding that the obligations named in the instruments sued on had matured more than a year prior to the commencement of the action. The judgment of October 22, 1890, had been affirmed by the supreme court in each of the appeals therefrom which were prosecuted by the several appellants (31 Pac. 915),—the last affirmation being April 24, 1894 (36 Pac. 522, 588),—and as to these appellants there was thus a final determination of the validity of that judgment. The superior court was fully authorized to find that the appeal of Adam Blythe et al. had been abandoned, and that the said appellants made no further question of the correctness and validity of the judgment, or of the rights of Florence as therein defined. Although they had perfected an appeal from the judgment, they failed to prosecute the appeal until they had lost the right to have their appeal considered. By their failure to file the transcript to be used on the appeal within the period prescribed by the rules of the supreme court, the respondent acquired the right to have the appeal dismissed. *Shain v. Lumber Co.*, 98 Cal. 120, 32 Pac. 878. And, for the purposes of the present action, the right thus acquired was equivalent to a formal dismissal. By losing their right to prosecute the appeal, or to have it considered by the supreme court, the judgment appealed from became, in effect, a final judgment of the controversy, even though a formal order of dismissal had not been entered; and, although the respondent could have consented that the transcript might be filed after the time limited by the rules, it is not claimed that such consent was given, and it is very evident, from the petition for distribution thereafter filed by her, not only that no such consent was given, but that she deemed that all the appeals had been disposed of, and that the judgment had become final. The court was, therefore, justified in finding that the appeal of Adam Blythe et al. had been abandoned, and that her rights had been finally determined. When a party fails to take the steps towards prosecuting an appeal for more than four years which he is required to take within forty days, it is reasonable to infer that he has abandoned his appeal. The affirmance of the judgment upon the appeal of Henry T. Blythe et al. on the 24th of April, 1894, was a final determination, so far as those appeals were concerned, of the legal proceeding referred to in the instruments, and did not cease to be final by reason of their subsequent motion to

dismiss the proceeding. It was held, upon the appeal from the order denying their motion, that there was no foundation for making the motion (110 Cal. 226, 42 Pac. 641), and that it had been previously so determined. The petition for distribution which was filed in June, 1894, was not included in the legal proceeding which was pending at the date of the instruments, and, consequently, the maturity of the obligation did not depend upon any delay in the final disposition of the petition. The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAROUTTE, J.

(6 Cal. Unrep. 219)

LEONIS v. LEFFINGWELL. (L. A. 641.)

LEONIS' ESTATE v. SAME. (L. A. 642.)

(Supreme Court of California. Jan. 3, 1899.)

#### APPEAL—DISMISSAL.

Motion to dismiss appeal, involving an examination of the entire record, and incidentally a consideration of the merits, will be continued till the hearing on the merits.

Department 1. Appeals from superior court Los Angeles county.

Actions by Leonis, executrix, and by the estate of Leonis, against Leffingwell. From judgments for plaintiffs, defendant appeals. Plaintiffs move to dismiss the appeals. Continued.

Wells & Lee, for appellant. H. H. Appell, R. Dunnigan, and Reynurt & Orfelio, for respondents.

PER CURIAM. The motion to dismiss the appeals in these cases involves an examination of the entire record, and incidentally a consideration of the merits of the appeals. The motions are for that reason continued until the hearing of the appeals upon their merits.

(123 Cal. 256)

DUDLEY'S ESTATE v. VARIAN. (S. F. 852.)

(Supreme Court of California. Jan. 12, 1899.)

CO-ADMINISTRATORS—COMMISSIONS—ALLOWANCE—DISCRETION—ATTORNEY'S FEES.

1. Two administrators were appointed at the same time. They were sole heirs, and there were no creditors. One of them obtained letters before the other, and took possession of the property, and prevented the other, to a great extent, from participating in the administration. *Held* not an abuse of discretion to divide equally the commissions for administering the estate, and to allow a fee to the latter's attorney.

2. Where one of two administrators takes possession of all of intestate's property, the other, being anxious to participate in the administration, is not precluded from an allowance for his share of the commissions by his failure to make a formal demand for the property, where such demand would be useless.

3. An administrator is entitled to have the amount of his attorney's fee determined before he has paid him anything.

Department 2. Appeal from superior court, Humboldt county.

In the matter of the estate of Greengrove Dudley, deceased, Flora M. Varian, administratrix, was allowed certain commissions and attorney fees, and Serena G. Hicks, her co-administratrix, appeals. Affirmed.

A. M. Buck and F. A. Cutler, for appellant.  
George D. Murray, for respondent.

PER CURIAM. This is a contest between two sisters, on unfriendly terms with each other, about amounts due them as administratrixes of the estate of their deceased father, Greengrove Dudley, and about some attorneys' fees. The amount of the commissions is \$308.08, all of which is claimed by appellant, as well as a fee for her attorney of \$250. The court below divided the commissions between the two, and allowed to each \$152.54. It also deducted \$50 from the amount of the attorney's fee claimed by appellant, and allowed as such fee the sum of \$200. It also allowed to the respondent, for her attorney's fee, \$150. This matter was largely within the discretion of the court below, and, as we see no errors of law committed by the court, there is no ground for disturbing its action. The parties were appointed administratrixes at the same time; but the appellant qualified and got her letters two days before the respondent, and immediately took into possession all the property of the estate, which, in addition to certain live stock and farming utensils, which by agreement between the parties went to the respondent, was personal property, consisting of money in bank and notes and mortgages. The respondent was willing and anxious to take part in the administration, and we think there was sufficient evidence to warrant the court in finding that the appellant excluded her from the possession of the property of the estate, and to a great extent from participating in the administration. It is contended by appellant that respondent did not make any formal demand for the possession of the property, but the testimony of the appellant shows that such demand would have been useless. It is contended, also, that the allowance of \$150 to respondent's attorney was erroneous, because it did not appear that respondent had actually paid that amount to her attorney; but respondent had the right to have the court determine in the first instance what amount should be allowed. In *re Couts' Estate*, 87 Cal. 480, 25 Pac. 685; *Pennie v. Roach*, 94 Cal. 515, 29 Pac. 956, and 30 Pac. 106. It is also contended that the respondent did not file any final account, and that, therefore, she was not entitled to any allowance; but the report of her administration which she did file stated all the matters necessary to be stated, and was, under the circumstances, sufficient. The respondent gave her bond, and assumed the responsibility of an administratrix, and performed some acts

of administration. The case is different from one where a co-administratrix pays no attention whatever to the administration of the estate, and does not do or seek to do any act as administratrix. The two sisters are the only heirs of the deceased, and there are no creditors or other persons having any interest in the matter; and, as the court below is supposed to have known all the circumstances of the case, we see no reason for holding that it abused its discretion in disposing as it did of these small commissions and attorney's fees. The orders and judgment appealed from are affirmed.

123 Cal. 269

PEOPLE v. CUMMINGS. (Cr. 426.)

(Supreme Court of California. Jan. 13, 1899.)

APPEAL—FALSE PRETENSES—INDICTMENT—VENUE  
—CAVEAT EMTOR—FORMER JEOPARDY  
—DIRECTION OF FINDING.

1. The weight and credibility of evidence showing defendant guilty of the offense charged is for the jury, and their conclusions thereon cannot be disturbed on appeal.

2. The doctrine of caveat emtor cannot be invoked as a defense to a charge of obtaining a note under false pretenses as the consideration of a sale induced by fraud.

3. The venue of an indictment for obtaining property under false pretenses is properly laid in the county where the representations had final effect, although they were made in another county.

4. Where there is no evidence to support a plea of former jeopardy, it is not error to direct a finding for the prosecution on that issue.

5. The pendency of an indictment for obtaining a note executed by S. under false pretenses is no obstacle to the finding and trial of another indictment charging defendant with obtaining a joint note executed by S. and another under false pretenses.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

James H. Cummings was convicted of procuring a promissory note by false representations, and he appeals. Affirmed.

C. H. Hubbs, for appellant. Atty. Gen. Fitzgerald, for the People.

BRITT, C. There was a former prosecution of Cummings, the defendant here, resulting in a judgment of conviction, which was reversed in this court on the ground (among others appearing) of variance between the indictment and proof; it being held that the charge in that action of procuring by means of fraudulent representations the promissory note of one C. Schnelle was not sustained by proof of obtaining by such means the joint note of C. Schnelle and L. W. Schnelle. *People v. Cummings*, 117 Cal. 497, 49 Pac. 576. After that decision the indictment in the present case was found, charging defendant with procuring by false and fraudulent representations, particularly set forth, the promissory note of said C. and L. W. Schnelle. He was again convicted; hence the present appeal.



It is contended that there was no evidence to justify the verdict of guilty. The trial court instructed the jury—properly it would seem—to disregard certain portions of the evidence submitted by the prosecution; and the matters left for their consideration related mainly to the character and consequences of divers representations made by defendant concerning a tract of land owned by him, containing 16½ acres, situated in the county of Butte, which representations occurred in the course of a transaction wherein defendant conveyed the said tract of land, besides other property, to said C. Schnelle, and received in exchange therefor certain land of the latter situated in Lake county, and also the promissory note aforesaid, executed by both the Schnelles. Said note was for the sum of \$175, and was afterwards paid by the makers. L. W. Schnelle is the son of C. Schnelle, and acted as a broker for both his father and defendant, it seems, in the said transactions. Without descending to unnecessary details, it may be said that there was evidence that defendant stated to the Schnelles that his said tract of 16½ acres cost him \$2,500 cash, and that the soil thereof was a dark, rich loam, and all cultivated, and that it adjoined a certain famous orchard; also, that the statements were believed by the Schnelles, and were part of the inducement to the execution of said note. There was further evidence that in fact the land of defendant did not adjoin said orchard; that nearly all of it was rocky, covered with boulders, uncultivated, and not susceptible of cultivation; and that defendant had paid no cash for it at all, but obtained the same as a bonus for releasing certain parties from a contract he had with them. These matters, with other evidence in the case, made a question for the jury, whether defendant uttered such representations, knowing them to be false, or (which is tantamount to knowledge of falsity) recklessly, and without information justifying a belief that they were true. In our opinion, there was some evidence tending to prove all the elements of the offense charged. See *People v. Millan*, 106 Cal. 320, 39 Pac. 605; *People v. Jordan*, 66 Cal. 10, 14, 4 Pac. 773; *People v. Bryant*, 119 Cal. 595, 51 Pac. 960. Its weight and credibility were matters for the jury, and their conclusion thereon cannot be disturbed in this court.

Defendant claims that the doctrine of caveat emptor, as known in civil cases, should have effect here. In determining in cases like the present whether the defrauded party really believed and acted upon the representations of the accused, it is proper to consider whether they were of a character to probably induce belief in his mind, or in the mind of any person of ordinary intelligence; but the law, as it is at this day understood, does not go further. The guilt of the accused does

not depend on the degree of folly or credulity of the person defrauded. The rule invoked affords no defense against a criminal charge. *People v. Martin*, 102 Cal. 558, 566, 36 Pac. 952; *People v. Jordan*, 66 Cal. 14, 4 Pac. 773; *Oxx v. State*, 59 N. J. Law, 99, 35 Atl. 646; 1 Bish. Cr. Law, § 874; 2 Bish. Cr. Law (8th Ed.) §§ 433, 434.

It is contended that the superior court in and for the city and county of San Francisco, where defendant was indicted and tried, had no jurisdiction of the case, for the alleged reason that the false representations charged appeared by the evidence to have been made in Alameda county, where C. Schnelle resided. It is undisputed, however, that the note was delivered by the Schnelles to defendant in the city and county of San Francisco. It was here, therefore, that defendant's representations had final effect and the offense became complete. The venue was properly laid by the indictment in San Francisco. *People v. Adams*, 3 Denio, 206; *State v. Shaeffer*, 89 Mo. 271, 1 S. W. 293.

There appears in the record matter which for present purposes may be treated as a plea of once in jeopardy for the offense charged. The court instructed the jury to find for the prosecution on this issue, which was done accordingly. Such instruction is assigned for error. There was no evidence to support the plea, and the instruction was right. The evidence offered in that behalf, and admitted by consent, included the record of the former case, wherein defendant was tried for defrauding C. Schnelle, and the decision of this court reported in 117 Cal. 497, 49 Pac. 576. Other considerations aside, the charge in that action—of fraudulently obtaining the note of C. Schnelle—was not the charge for which he has been prosecuted here, viz. the fraudulent procurement of the joint note of the two Schnelles. The decision just mentioned makes this apparent. He was therefore not on trial or in jeopardy in that action for the offense of which he has been convicted in the present. *People v. Reed*, 70 Cal. 529, 533, 11 Pac. 676. The pendency, undetermined, of the said former action, was, of course, no obstacle to the finding and trial of the indictment in this. See *Kalloch v. Superior Court*, 56 Cal. 236.

We have carefully considered all the points made by appellant, though some of them, because of manifest lack of merit, or slight importance, have not been specially discussed. We find no legal ground for reversal, and recommend that the judgment and orders appealed from be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

6 Cal. Unrep. 216

**HITE v. HITE. (S. F. 1,489.)**

(Supreme Court of California. Dec. 31, 1898.)

**DIVORCE — ALIMONY — EVIDENCE OF MARRIAGE — WITNESSES — IMPEACHMENT.**

1. Plaintiff and defendant in an action for divorce had never been regularly married. There was evidence that defendant furnished plaintiff a house for her residence, and lived with her there for about 25 years, and supplied her with necessities of life, and that a child was born to them; that they were known as husband and wife, and held themselves out as such; and that he treated her son by another man as his stepson. These facts were corroborated by the stepson's affidavit. Counter affidavits by neighbors denied them, and attacked the reputation for veracity and credibility of the affiants to those facts. Held a sufficient prima facie showing of marriage to support an order of the court below for payment of alimony and counsel fees.

2. Where the court below has made a finding in conformity with a witness' testimony, it is only in exceptional instances that such witness' testimony will on appeal be held to have been impeached by the testimony of others.

Department 1. Appeal from superior court, Mariposa county.

Action by Lucy Hite against John R. Hite. From an order granting plaintiff alimony and counsel fees, defendant appeals. Affirmed.

F. J. Castelhun, W. W. Foote, and Congdon & Congdon, for appellant. Rodgers & Paterson, for respondent.

**GAROUTTE, J.** In the pending action for divorce the trial court made an order for alimony and counsel fees. This appeal is now prosecuted by defendant from that order. The answer of defendant denies the fact of marriage, and it is now insisted upon his part that the evidence taken at the hearing does not justify the order. It is thus apparent that the question directly confronts us, what amount of evidence is necessary to justify the trial court in awarding alimony and counsel fees in a pending action for divorce, where the existence of the marriage relation is denied? Yet, in view of the future trial of this case upon its merits, where this question will undoubtedly be the all-important question to be tried and decided, we feel that the discussion of the matter upon an appeal from the preliminary order should be circumscribed within small limits. Any other course might result in embarrassment to both parties at the trial of the cause, and therefore its discussion will serve no good purpose at the present time.

There must be some evidence tending to show a marriage relation between the parties before an order similar to the one at bar should be made. It is perfectly evident that the requirements of the law demand this, or else the doors are spread wide open for the perpetration of the greatest frauds. At the same time, that degree of evidence required to establish the marriage relation at the trial is not demanded; for, if such were the law, then the material issue arising

at the trial would be litigated in advance, and this in face of the fact that the money to be obtained by the order is largely to be applied in making preparation for the trial of that identical question. In *Sharon v. Sharon*, 75 Cal. 43, 16 Pac. 345, it is declared that the marriage should be established "by satisfactory evidence showing at least prima facie a marriage in fact." We deem the foregoing statement fairly illustrative of the true rule for the guidance of trial courts. There should be evidence establishing prima facie the fact of marriage. The evidence of plaintiff upon the hearing should be such that the trial court may be able to say that a fair presumption of the fact of marriage arises from the showing. Does the evidence bring this case within the foregoing rule? There is no claim that a marriage between these parties was ever regularly solemnized. The evidence tends to show that defendant furnished plaintiff a house in which to live, and that she resided there for the greater portion of 25 years; that he supplied her during this time with the necessities of life; that he lived with her during a great portion of this time, and a child was born to them. One Westfall testifies that plaintiff and defendant were known in that neighborhood and adjoining counties as husband and wife; that plaintiff was everywhere called "Mrs. Hite, and Lucy Hite, wife of John R. Hite," and that plaintiff and defendant "held themselves out to the world, and were always treated, as husband and wife"; that defendant always treated Thomas Gibbs, a son of plaintiff, as a son in every way, and "said Gibbs has always been considered and reputed amongst those who knew him and the plaintiff and defendant herein as the stepson of defendant John R. Hite." A stronger affidavit than the one from which we have just quoted, and upon the same general lines, was made by Thomas Gibbs, son of plaintiff by another man. If the facts stated in these two affidavits be true, then the marriage relation between these parties, for the purposes of this appeal, at least, may well be presumed to exist. Defendant offered affidavits from various residents of the community where plaintiff resided, in direct contradiction to the evidence of Westfall and Gibbs. He also attacked Gibbs' veracity by producing affidavits of various residents of that community to the effect that his general reputation in this regard was bad. But, as to this impeaching evidence, we are clear that it was essentially a matter for the trial court to weigh and estimate; and it would only be in a most exceptional case that this court, in the face of a contrary finding of the trial court, would hold the evidence of a witness impeached by testimony of other witnesses as to his general bad reputation for truth, honesty, and integrity. Such a case is not presented here.



Upon all the evidence before us, taken together, we will not disturb the order of the trial court. At the same time, by so holding we do not intimate that a finding of fact that the marriage relation existed between these parties, based upon the showing disclosed by this record, would be sustained by this court if attacked upon appeal from the final judgment. Suffice it to say, upon the showing here made this court will not hold the testimony of Gibbs and Westfall, taken in connection with other facts which are substantially admitted by defendant, insufficient to support the order. Notwithstanding the hearing was had upon affidavits, the trial court is entitled to take a somewhat broader view of the case than is allowed to this court upon appeal; and, notwithstanding it may be conceded that the showing here discloses a preponderance of evidence against the fact of the existence of the marriage relation between these parties, still such preponderance does not necessarily take the case out of the rule by which we should be governed. Weighing the evidence favorable to the support of the order of the trial court which we have quoted in a general way from the record, we are not prepared to say that a *prima facie* case of marriage, sufficient to support a preliminary order for alimony and counsel fees, was not made out. There are bad spots in plaintiff's case, which no doubt will be given due consideration when squarely presented before the trial court upon the merits. We refrain from touching upon them at this preliminary hearing. There is no merit in the remaining contentions raised by appellant. For the foregoing reasons, the order is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

123 Cal. 264

COYLE v. LAMB et al. (S. F. 1,042.)

(Supreme Court of California. Jan. 12, 1899.)

LANDLORD AND TENANT—TRUSTS—ACCOUNTING—LACHES.

Where a lessee, who had become indebted to the lessor, turned over the premises to him, with authority to collect rents due under subleases, apply them on the debt, and pay the surplus to the lessee, an action for an accounting under the trust, brought by the lessee over nine years after expiration of the lease, and over a year after the lessor's death,—the property in the meantime having been conveyed to a third person,—was properly dismissed for laches.

Department 2. Appeal from superior court, city and county of San Francisco.

This motion is brought by the plaintiff, Mary Coyle, as administratrix of the estate of her deceased husband, John Coyle, against J. T. Lamb and others, as executors of the last will of J. C. Wilmerding, deceased. Judgment went for the defendants, and plaintiff appeals from an order denying her motion for a new trial. Affirmed.

D. G. Mahoney and T. P. Ryan, for appellant. E. J. McCutchen, for respondents.

McFARLAND, J. The substantial averments of the complaint are that said Wilmerding and one Fargo on April 15, 1876, leased to the deceased, John Coyle, for a term of 10 years then next ensuing, a certain lot of land at Boardman Place; that Coyle was to have the right to build a house upon the lot, and to remove it at the expiration of the term of the lease; that Coyle did build thereon a house; that in November, 1876, the appellant herein, Mary Coyle, acquired from her husband, through mesne conveyances, an undivided half of his interest in the lease and house; that in November, 1881, the said John Coyle, deceased, became indebted to Wilmerding in the sum of \$200, and that to secure the payment of the same the Coyles "turned over" all their right to the land and improvements to Wilmerding, with authority to collect the rents, deduct from the same the said \$200, and pay the balance of the rent to the Coyles,—Fargo, in the meantime, having conveyed all his interest in the lot to Wilmerding; and that Wilmerding has retained possession of the property ever since, collected the rents from November, 1881, to the commencement of the suit, and has failed to pay over or account for the same. Separate parts of the house had been leased to two or three different tenants. It is averred that the rents amounted to \$45 a month, and this suit is brought to recover \$22.50 a month,—upon the theory, we suppose, that one-half thereof is due to the estate of John Coyle. This claim was presented to the defendants, as executors, and by them rejected. The complaint was not verified, and the answer consists of a general denial of all the averments in the complaint, and, as a separate defense, that the cause of action is barred by sections 337 and 339 of the Code of Civil Procedure.

The rulings of the court, and some of its findings, are to a considerable extent confusing. The plaintiff offered herself as a witness, and an objection by respondents, based on section 1880 of the Code of Civil Procedure, that she was not a competent witness as to any matter of fact occurring before the death of Wilmerding, was overruled, and she was allowed to testify quite fully as to matters occurring before Wilmerding died. Considering her testimony in connection with other evidence introduced, it is difficult to see how the court could have properly found "that said John Coyle did not thereafter build upon said lot any dwelling house or improvement of the value of fourteen hundred dollars, or of any value," or that the Coyles did not turn over their right, etc., to the lot and improvements to Wilmerding, with authority to collect the rents of the same. It seems, from an opinion of the court attached to the brief of respondents, that the testimony of Mrs. Coyle was admit-

ted upon the theory that this action is in the nature of an action to enforce a trust, but there is nothing in the record to show that her testimony was stricken out or disregarded; and, even upon the theory of a trust, we cannot see how the finding that no house was ever built, or that it was not turned over to Wilmerding, as averred in the complaint, can be sustained. There is no finding that, upon the theory that the action is one at law, the cause of action was barred by the statute of limitations; and the defendants, being respondents, are not in a position to contend, as they undertake to do in their brief, that the court erred in admitting the testimony of Mrs. Coyle. But, notwithstanding the incongruities above noticed, the court finds "that plaintiff has been guilty of laches in the prosecution of this claim, and that the claim is stale"; and upon this finding the judgment must be affirmed. The term of the lease ended April, 1886, and Wilmerding lived for nearly eight years thereafter, having died on February 20, 1894; in 1887 he conveyed all the property to one Selby; and this action was not commenced until June 25, 1895, more than nine years after the expiration of the lease. Under these circumstances, there is no warrant for disturbing the finding of the court upon the subject of laches. The order appealed from is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

123 Cal. 273

PEOPLE v. WALBRIDGE et al. (Cr. 476.)  
(Supreme Court of California. Jan. 13, 1899.)

ROBBERY—POSSESSION—INFORMATION.

Under Pen. Code, § 211, defining robbery as the felonious taking of personal property "in possession of another from his person or immediate presence," an information alleging that money was taken "from the person and immediate presence of" prosecutor sufficiently shows that the money when taken was in prosecutor's possession.

Department 1. Appeal from superior court, Orange county.

A demurrer was sustained to an information against Byron Walbridge and Frank Shaw for robbery, and the people appeal. Reversed.

Atty. Gen. Fitzgerald, for the State. McKelvey & Bowes, for respondents.

GAROUTTE, J. This appeal is prosecuted from an order sustaining a demurrer to the information. The material part of the information alleges that the defendants "did willfully, unlawfully, and feloniously, and by means of force and fear, and against the will of one Victor Finster, take from the person and immediate presence of him, the said Victor Finster, thirty (30) cents in lawful money of the United States." The counsel of defendants attempt to support the ruling of the trial

court in sustaining the demurrer by the claim that the information contains no allegation that the money when taken was in the possession of Victor Finster, the alleged victim of the robbery. Robbery is defined by the Penal Code (section 211), in this respect, as "the felonious taking of personal property in the possession of another from his person or immediate presence." Comparing this definition with the allegation of the information, we are clear there is nothing in counsel's contention. It is too technical to possess merit. The information alleges that the money was taken "from the person and immediate presence of Victor Finster." If it was taken from the person of Victor Finster, it must be assumed that it was in his possession at the time it was taken. It is so held in *People v. Shuler*, 28 Cal. 490. If the information had only alleged that the money was taken from the immediate presence of Victor Finster, then an additional allegation would have been necessary, to the effect that it was at that time in the possession of Finster; but the allegation that it was taken from his person renders the allegation as to possession in him not absolutely necessary. It may be conceded that it would have been better pleading to have directly alleged the possession of the money to have been in Finster, but, under the circumstances here disclosed, we deem the information sufficient in the absence of such allegation. For the foregoing reasons, the judgment is reversed, and the cause remanded.

We concur: HARRISON, J.; VAN DYKE, J.

123 Cal. 196

SUN INS. CO. v. WHITE et al. (S. F. 1,111.)  
(Supreme Court of California. Dec. 30, 1898.)

LIS PENDENS—ACTION FOR DIVORCE—MORTGAGE—ORDERS—ATTORNEY'S FEES.

1. A cross bill by a wife in an action by her husband for divorce does not have the effect of a lis pendens, so as to make a mortgage taken prior to any order of court, by one with knowledge thereof, on separate property of the husband, subject to the lien of the alimony afterwards decreed her,—the transaction between the husband and mortgagee being bona fide,—though the cross bill asked for alimony and the assignment to her of the community property, and described the property afterwards mortgaged; it not appearing that the cross bill asked to have it charged with payment of alimony, or alleged that it was community property, or described no other lands.

2. Receipt from plaintiff in a divorce suit, after a decree therein restraining him from disposing of or encumbering his property, except that he is permitted to carry on and pursue his usual and ordinary business, of money remaining unpaid on a note previously given by him and secured on his land, will, in the absence of evidence to the contrary, be held within the exception.

3. A mortgage by its terms given "for the better securing the payment of the \* \* \* money secured \* \* \* by note, and the other moneys hereinafter mentioned," authorizes the attorney's fees provided for to be made a lien on the land by judgment of foreclosure.



Department 1. Appeal from superior court, city and county of San Francisco.

Action by the Sun Insurance Company against George E. White and others. Judgment for plaintiff. Defendant Frankie White appeals. Modified.

For former opinion, see 50 Pac. 546.

Rhodes & Rhodes, for appellant. W. T. Baggett, Dunne & McPike, and Walter H. Linforth (Johnson, Linforth & Whitaker, of counsel), for respondent.

HARRISON, J. Action for the foreclosure of a mortgage executed to the plaintiff by the defendant George E. White. The appellant, Frankie White, was made a defendant, under the allegation that she claims an interest in the property which is subordinate to the lien of the plaintiff's mortgage. Judgment was rendered in favor of the plaintiff, and the defendant Frankie White has appealed directly therefrom.

The note and mortgage upon which the action is brought were executed November 1, 1888, and the action was commenced May 19, 1894. In 1885 White commenced an action against the appellant for divorce, in which, in February, 1886, she filed a cross complaint, wherein she asked for permanent alimony and maintenance, and that such portion of the common property as should be proper should be assigned and set apart to her; describing, also, the lands which are described in the mortgage. It does not appear whether these lands were described as community or separate property; nor does it appear whether the complaint contained a description of any other lands than those described in the mortgage. She also filed in the offices of the recorders in the counties in which the lands are situated notices of the pendency of the action, and the object of her cross complaint. The court finds that the plaintiff had actual notice before the execution of the note and mortgage of the pendency of the action for divorce, and of the filing and contents of the cross complaint, and also finds that all of the lands described in the mortgage were the separate property of the husband. In May, 1889, a judgment of divorce was rendered between the parties, and the whole of the community property was awarded to the defendant therein; and at the same time there was reserved for her the right to apply, in case the community property should be insufficient for her support, for a supplemental decree assigning to her a sufficient amount for her support out of the separate property of her husband, and, until such supplemental decree was made, she was to receive for her support and maintenance \$200 per calendar month. By the decree the husband was restrained, until such supplemental decree should be entered, from disposing of or encumbering his property, except that he was permitted to carry on and pursue his usual and ordinary business. A certified copy of this interlocutory decree was

served upon the plaintiff May 16, 1889. February 9, 1895, a final decree was rendered in the divorce suit, wherein the court adjudged that the defendant, Frankie White, should have and recover from the plaintiff, George E. White, the sum of \$100,000, and that said sum should include all allowances for future maintenance and support, and all allowances for alimony theretofore made, except such as was then in arrears. A receiver had been appointed in the action in June, 1894, and, after the entry of the final decree, he sold the interest of George E. White in the lands described in the mortgage to Frankie White for the sum of \$70,000, and in August, 1896, after the confirmation of this sale, executed to her a deed therefor. Upon these facts the appellant contends that she acquired a title to the land superior to that of the plaintiff by reason of its mortgage thereon, and that, upon the findings of the court, judgment should have been entered in her favor.

We need not consider the effect of filing with the county recorders a notice of the pendency of the action, inasmuch as the court finds that before the execution of the note and mortgage the plaintiff had actual notice of the pendency of the action, and of the contents of the cross complaint. The proposition contended for by the appellant is that her cross complaint, by virtue of the allegations therein contained, constituted a *lis pendens*, which so affected the property therein described that any person dealing with the same would be bound by whatever judgment or order might be made in reference to the property. Stated in another form, the proposition is that, in an action for a divorce by a wife against her husband, she can, by mere allegations in her complaint, without any order of the court in reference thereto, impress upon the community property, and also upon the separate property of the husband, a charge for the amount of alimony that may eventually be awarded her, which will constitute a lien thereon as of the date of filing her complaint, and that a person thereafter dealing with the husband in good faith, and in the ordinary course of business, who acquires an interest in the property, takes such interest subject to this lien. It is not claimed that there is any statutory provision in support of this proposition, but it is rested upon the legal effect of a *lis pendens*,—that a person dealing with property which is at the time the subject of judicial investigation takes it subject to the result of such investigation, and that the claim of the wife to enforce alimony out of specific property brings that property before the court with the same effect. In *Lord v. Hough*, 43 Cal. 581, it was said: "The pendency of proceedings for divorce does not of itself interrupt the exercise of the husband's powers. The property does not come into the custody of the court by the institution of the suit. The husband has still the control of it and full power of disposition of it. He is held to equal good faith in all

transactions relating to it as before the commencement of the suit. He is subject to the same restrictions in its disposal. He cannot make a voluntary conveyance of any portion of the property, with the intent to deprive the wife of her claim in anticipation of divorce, any more than he could make such fraudulent disposition in anticipation of her widowhood." After an action for divorce has been commenced, the court in which the action is pending has the power to set apart a portion of the community property, or of the separate property of the husband, as a security or fund for the payment of alimony, or to charge the same with its payment; and it may, under proper circumstances, enjoin the husband from alienating or incumbering the property. So, too, a conveyance or incumbrance made by the husband with the intent to deprive the wife of the means of obtaining alimony may be set aside, at her instance, as fraudulent and void. In the present case, however, the court finds that the transaction between the plaintiff and the husband was bona fide, and that the money was loaned by the plaintiff and received by the husband without any purpose or intention to hinder, delay, or prevent her from enforcing any claim she might have, or any order the court might make, against him. Section 140, Civ. Code, provides: "The court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case." This is the only statutory power given upon this subject, and, as the Civil Code "establishes the law of this state upon the subjects to which it relates" (section 4), it must be held that it is exclusive, and that the wife can have the property of the husband set apart as security for the payment of alimony, or burdened with the charge for her maintenance, only by an order of the court therefor. In the present case no action was taken by the court until after the execution of the note and mortgage, and, as the court finds that the mortgage was executed in good faith and for a valid consideration, it must prevail over any title or interest in the land subsequently acquired.

Certain authorities are cited by the appellant in support of her contention, and language is found in some of the opinions therein tending to support her claim. Mr. Freeman, also, in his treatise on Judgments (section 196), after stating that the doctrine of *lis pendens* is applicable only when the object of the action is to affect specific property, and that the rules pertaining thereto have no application in a suit for divorce and alimony, unless the wife designates in her complaint certain specific property which she seeks to subject to her claim, says: "If the pleadings in a suit for divorce describe specific property, in respect to which relief is sought, either by making it chargeable

with the payment of alimony, or setting it apart for the use of, or as the property of, one of the parties, or of partitioning or dividing it between them, the doctrines of *lis pendens* apply,"—citing in support thereof some of the same authorities. But the decisions in the cases cited by the appellant, as well as those cited by Mr. Freeman in support of his statement, will be found, upon examination, to have been made either by virtue of some statutory provision, or upon the peculiar circumstances of the case before the court. In some of the cases the decision was rendered upon the ground that the complaint alleged that the property therein described constituted all the property out of which alimony could be recovered. In others the husband had been enjoined by the court from disposing of the property pending the action. In *Wilkinson v. Elliott*, 43 Kan. 590, 23 Pac. 614, and in *Sapp v. Wightman*, 103 Ill. 150, the court expressed similar views, but held that they were not applicable to the facts in the case. In *Tolerton v. Williard*, 30 Ohio St. 579, the decision was placed upon the ground that the wife, in addition to her claim for alimony, had claimed an equitable estate in the land. In *Powell v. Campbell*, 20 Nev. 232, 20 Pac. 156, the husband suffered default to the wife's claim for the property, and had conveyed it for less than half its value a few days before the hearing of the case. In *Daniel v. Hodges*, 87 N. C. 95, the property had been assigned to the wife pending the suit, by an order of the court, and she was in possession at the time it was conveyed by the husband. But, without further considering the weight to be given to these authorities, it is enough to say that the appellant has not brought her case within the principles which, under the authorities she cites, would entitle her to a reversal of the judgment. In the jurisdictions where these cases arose, she could not claim a priority of right in the land, unless she had asked to have certain property which she had specifically described appropriated for the payment of the judgment which she might obtain. In her cross complaint in the divorce suit she asked judgment for permanent alimony, and assigning and setting apart to her "such portion of the common property of the said George E. White and this defendant as should be just and proper"; and, although it appears that she specifically described therein the lands mentioned in the mortgage, it does not appear that she asked to have these lands, or any part thereof, set apart as security for her maintenance. Neither does it appear that these are the only lands which were described in her cross complaint, or that she alleged that they were community property. Her prayer was that the court would set apart "such portion of the community property" as should be just and proper, but the court finds that the lands described in the



mortgage were the separate property of the husband, and it does not appear that it was alleged in her cross complaint that they were community property. The evidence upon which the findings in this respect were made is not before us, and, as all intendments are in support of the judgment of the court below, it may be assumed that the appellant did not specifically describe in her cross complaint any property which she asked to have charged with the payment of alimony, and that the description of the property which she gave was merely for the purpose of aiding the court in determining the amount of alimony which she should receive. In this connection the language of the court in *Sapp v. Wightman*, supra, is very apt: "Although the lands are named in the bill, no right is asserted in respect to them; nor are they, or any part of them, asked to be assigned for alimony, or any other relief asked in regard to them. They are mentioned for the apparent purpose of showing the amount of defendant's property, as bearing upon the sum to be allowed for alimony."

By an agreement between the plaintiff and George E. White at the date of the note and mortgage, the amount thereof was to be paid to him at such times and in such sums as might be agreeable to both. Of the principal sum named in the note, about \$8,000 was paid after the entry of the interlocutory decree in the divorce suit, and it is contended by the appellant that for this amount the plaintiff's lien should be postponed to hers. By the interlocutory decree, however, the plaintiff was permitted to pursue and carry on his usual and ordinary business, and, in the absence of any evidence to the contrary, it must be held that the receipt by him from the company of the amount remaining unpaid upon the note that he had previously executed, and the payment thereof by the company, were within the terms of this exception. The contention of the appellant that the loan by the plaintiff was ultra vires, by reason of the fact that it was not made out of its "capital and accumulations," as required by section 427, Civ. Code, is met by the finding of the court that the moneys loaned by the plaintiff "constituted parts of its capital and accumulations."

The court found that certain taxes upon the lands described in the mortgage were not paid by the mortgagor, and that thereupon the plaintiff paid the same, and the amount thus paid by the plaintiff was included in the judgment. It is contended by the appellant that there was no evidence before the court that the plaintiff paid any part of the taxes, and, as this assignment of error is admitted by the respondent, the judgment must be reversed. The court was authorized by the terms of the mortgage to allow counsel fees for its foreclosure, and to make the amount a lien upon the land. The

mortgage, by express terms, is given "for the better securing the payment of the said sum of money secured to be paid by the said promissory note, and the other moneys hereinafter mentioned." The judgment is reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(January 6, 1899.)

PER CURIAM. Respondent has filed herein a remission of its claim for taxes alleged in the complaint to have been paid by it for the mortgagor upon the lands described in the mortgage, and a consent that the judgment of the superior court be modified by striking out of and deducting therefrom the amounts found by the court to have been paid by the respondent for said taxes, with interest thereon, at the rate mentioned in the mortgage, from the times of payment until the rendition of the judgment. See *Fox v. Mining Co. (Cal.)* 54 Pac. 731. The judgment heretofore rendered herein is therefore modified by striking therefrom the words "the judgment is reversed," and inserting the following: "The cause is therefore remanded to the superior court, and that court is directed to modify its judgment by deducting from the amount of \$88,864.47—the amount which the plaintiff is thereby adjudged to have and recover from the defendant George E. White—that portion thereof which was rendered for the several sums found by the court to have been paid by the plaintiff as taxes upon said lands, together with the interest allowed upon said sums; and, as so modified, the judgment shall stand affirmed. The costs of this appeal are to be borne by the respondent."

123 Cal. 222  
PHOENIX INS. CO. v. HANCOCK. (S. F. 854.)

(Supreme Court of California. Dec. 31, 1898.)

INSURANCE—LIABILITY FOR PREMIUM.

Insurance policies "on the estate" of deceased, procured by one of the heirs as covering his interest in the property, and his liability for the premium, are not affected by the administratrix, the other heir, repudiating any concern in them.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by the Phoenix Insurance Company against Robert J. Hancock. Judgment for plaintiff. Defendant appeals. Affirmed.

William F. Gibson, for appellant. E. W. McGraw, for respondent.

BRITT, C. Action to recover the unpaid premium on several policies of fire insurance issued by plaintiff on certain buildings which are part of the estate of one Samuel Hancock, deceased. Said estate is in process of administration, and the administratrix thereof

and the defendant in this action, Robert J. Hancock, are the sole heirs of said deceased. The policies purported, respectively, to insure "the estate of Samuel Hancock, deceased," against loss on the several buildings described. There was evidence that they were issued on the procurement of defendant, and were delivered to him. Neither himself nor the administratrix was named personally in the instruments, and she repudiated any concern therein. Defendant claims that the policies are not contracts of his, that they do not insure his interest in the property, and, hence, that he ought not to be liable for the premium. There was a verdict and judgment for plaintiff.

We see no difficulty in the case. The phrase, "estate of Samuel Hancock, deceased," used in the policies to describe the party or parties insured, was sufficient to extend the protection of the insurance to the interest of defendant as well as that of the administratrix in the property. *Clinton v. Insurance Co.*, 45 N. Y. 454; *Weed v. Insurance Co.*, 133 N. Y. 401, 31 N. E. 231; *Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co.*, 66 Md. 339, 7 Atl. 905; *The Sydney*, 27 Fed. 125. Compare Civ. Code, § 2591. Although defendant had no authority to procure insurance for the administratrix, yet she could have ratified his act, even after the occurrence of a loss. *Hooper v. Robinson*, 98 U. S. 528. That she did not do so, but declined any interest in the policies, could not impair their effect as insurance upon defendant's interest in the property, nor affect his liability for the premium. *Finney v. Insurance Co.*, 5 Metc. (Mass.) 192, 196. The judgment and order denying a new trial should be affirmed.

I concur: SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

(123 Cal. 285)

O'DONNELL v. SLACK, Judge. (S. F. 1,120.) (Supreme Court of California. Jan. 13, 1899.)

DEAD BODIES—REMOVAL—EXPENSES—ALLOWANCE—SUPERIOR COURTS.

1. The superior court has no jurisdiction to award the custody of a body of a decedent to a stranger to his blood, to the exclusion of the surviving wife, with directions to such stranger to transport the body to another place for interment.

2. Neither the probate court nor the personal representative of a decedent has any right to his body, nor any right to control the manner of disposing of the same, as against the wife of decedent.

3. Proper expenses of the disposition of the body of the decedent may be made a charge against his estate.

In bank. Appeal from superior court, city and county of San Francisco.

In the matter of the estate of Roger O'Donnell, deceased, an order was made by Charles W. Slack, judge of the superior court of the

city and county of San Francisco, giving Matthew Martin authority to remove deceased's body to Ireland, and Annie O'Donnell applies for a writ of review. Order annulled.

Stafford & Stafford, for petitioner. John A. Percy, for respondent.

HENSHAW, J. This is an application for a writ of review. Roger O'Donnell, husband of petitioner, died testate. His will was admitted to probate in the city and county of San Francisco. It contained no provision or direction for the disposition of his body. During the course of administration the widow filed a petition setting forth that the deceased had expressed a last wish that his remains should be buried beside those of his father and mother, at Finn Town, Ireland, and praying for an order enabling her to fulfill this request. The court made its order, authorizing and directing the executor "to pay over to Annie O'Donnell, the widow of the deceased, the sum of seven hundred dollars, out of the funds of the estate, to be used and expended by Annie O'Donnell in defraying the expense of removing from the city and county of San Francisco to Finn Town, Ireland, and there suitably interring, the body of Roger O'Donnell, deceased." The final account subsequently filed by the executor showed payment to Annie O'Donnell of the seven hundred dollars for the purposes named. The account was allowed and settled, and a decree of distribution was entered; but on the same day the court made the following order: "Good cause appearing therefor, it is hereby ordered that the fund of seven hundred dollars heretofore, by order herein dated February 1, 1897, allowed out of said estate for the purpose of defraying the expense of the removal of the body of deceased to Ireland, and there interring the same, and which fund, less the sum of fifty-five dollars already expended in preliminary preparations for the removal of said body, is now in the possession of John A. Percy, Esq., be retained by said John A. Percy, Esq., in his possession, subject to the further order of the court." On April 26th the court made its decree finally discharging the executor. On August 13th John A. Percy, who had been the attorney for Annie O'Donnell, filed a petition stating that he still retained in his possession the funds set apart for the transportation and burial of the body of the deceased, and prayed an order appointing some suitable person to execute the order of court. The court fixed a date for the hearing of this petition, and ordered service of notice upon all interested parties. The widow appeared, and by verified pleading set up that she had been sick, and therefore unable to take the body to Ireland; that she had recovered, and was willing, and would be ready within three weeks, to remove the body,—and asked that Percy be directed to pay to her the moneys in his hands. She objected to the payment of the money to any one else, objected to any other



person being empowered to remove the body, denied the jurisdiction of the court to modify its original order, and "respectfully informs the court that she does not and will not consent to the removal of the body of her deceased husband to Ireland or elsewhere by any other person than petitioner herself." After the hearing the court made its order commanding that the body be immediately removed to Fynn Town, Ireland, and giving Matthew Martin authority, and directing him, to execute the order, and further directing Percy to pay over to Martin the money in his hands, or so much thereof as might be necessary for the indicated purposes. Martin is a stranger in blood to the deceased.

By this writ there is sought to be annulled the order last above mentioned, directing Martin to transport the body of the deceased to Ireland, and there supervise its interment. The validity of the original order, by which the \$700 was ordered set apart to and paid over to Annie O'Donnell, the widow, for the same purpose, is not called in question. The single proposition which is seriously argued is whether the court in probate did or did not exceed its jurisdiction in attempting to deliver to one not of kin to the deceased his body, and in directing a particular disposition to be made of that body by this stranger. It is also further contended that the order is in excess of jurisdiction, because the moneys directed to be paid under the original order had in fact been paid; that the executor had complied with the directions of the court as to payment, and had entered the payment as a credit to himself in his final account; that his final account had been allowed, and final distribution of the estate decreed, and the control of the property had therefore passed from the court. *Ex parte Smith*, 53 Cal. 204; *Wheeler v. Bolton*, 54 Cal. 302. The last proposition, which involves a consideration of the court's jurisdiction and control of the burial fund after entry of the decree of distribution, we do not think it necessary to consider, for the reason that the court exceeded its jurisdiction in attempting to award the custody of the body of the deceased to a stranger to his blood, to the exclusion of the next of kin; indeed, that it exceeded its jurisdiction in attempting to make any award of the custody, or to direct any disposition to be made of the body.

The body of one whose estate is in probate unquestionably forms no part of the property of that estate. It is recognized that the individual has a sufficient proprietary interest in his own body after his death to be able to make valid and binding testamentary disposition of it. The court in probate and the personal representative acquire jurisdiction from the last testament to see that its provisions in this regard, as in all others, are duly executed; but where, as in this case, the will is silent, the court in probate has no such power. The duty of the burial of the dead is made an express legal obligation (Pen. Code,

§ 292); but, aside from the obligation, there is a right, well defined and universally recognized, that in disposing of the body of deceased the last sad offices belong of right to the next of kin, within which phrase, as here employed, is included the surviving husband or wife. This right had its origin in sentiment, in affection for the dead, in religious belief in some form of future life. It therefore early became a subject of cognizance by the ecclesiastical courts. But, while thus having its origin in affection and religious sentiment, it soon came to be recognized as a strictly legal right; and the next of kin, while not, in the full proprietary sense, "owning" the body of the deceased, have property rights in the body which will be protected, and for a violation of which they are entitled to indemnification. Thus, if the right is interfered with, damages will be awarded. *Smiley v. Bartlett*, 6 Ohio Cir. Ct. R. 234. "That there is no right of 'property' in a dead body, using the word in its ordinary sense, may well be admitted, yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty, imposed by the universal feelings of mankind, to be discharged by some one towards the dead, a duty, and we may also say a right, to protect from violation, and a duty on the part of others to abstain from violation; and it may therefore be considered as a sort of quasi property, and it would be discreditable in any system of law not to provide a remedy in such a case." *Pierce v. Proprietors*, 10 R. I. 227. The whole question is learnedly considered in *Ruggles' Report*, 4 Bradf. Sur. 503. The conclusions there reached are those which have been generally adopted by the courts of the land. One of those conclusions is "that the right to bury a corpse and to preserve its remains is a legal right, which the courts of law will recognize and protect." Another is that "such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin." And another, that "the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure." In employing the phrase "next of kin," Mr. Ruggles explains that it was not used for the purpose of denying or even questioning the legal right of a surviving husband to bury his wife's remains. *Hackett v. Hackett*, 18 R. I. 155, 26 Atl. 42. The same right belongs to the surviving wife. *Hackett v. Hackett*, supra; *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238; *Perley*, Mortuary Law, 27; *Hadsell v. Hadsell*, 7 Ohio Cir. Ct. R. 196; *Durell v. Hayward*, 9 Gray, 248. Therefore, in a case such as this, neither the court in probate nor the personal representative has any right to the body of the deceased, nor any right to control the manner of disposing of the remains, nor to dictate the place of interment. The proper expenses of such disposition may well be a charge against the estate, but the

duty and right of burial are quite different things from the duty and right of auditing and paying the expenses of such burial. It is concluded, therefore, that the court exceeded its jurisdiction in intrusting the body of the deceased to Matthew Martin, and in directing that by him the body should be taken to Finn Town, Ireland, and there interred. The order is therefore annulled.

We concur: BEATTY, C. J.; GAROUTTE, J.; TEMPLE, J.; HARRISON, J.

123 Cal. 275

**CLARK v. BENNETT. (S. F. 792.)**

(Supreme Court of California. Jan. 13, 1899.)

**COLLISION WITH STREET CAR—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—INSTRUCTIONS.**

1. Evidence for plaintiff showed that, just before driving his wagon across defendant's street-car track, he looked and listened, but did not see an approaching car until he was nearly on the track. The car was then about 50 yards away, and he could have crossed, if those in charge, after he called to them, and after they saw him, had lessened its speed, as they could have done. Owing to obstructions, he could not see the car, or be seen by those in charge of it, until he reached the street from an adjoining lot. *Held*, that the question of contributory negligence was for the jury.

2. Evidence showed that defendant's street car was traveling faster than the prescribed limit, and there was evidence that those in charge, after they discovered plaintiff on the track with a wagon, could, with ordinary diligence, have stopped the car before it reached him; and plaintiff testified that the car was 50 yards distant from the crossing at the time he was discovered by those in charge of the car. *Held*, that the question of defendant's negligence was for the jury.

3. An instruction, in an action for injury to a person crossing the track, that a street railroad has only an equal right with the traveling public to the use of the street whereon its track is built, was not improper because omitting some few exceptions not material in the case, such as that, when an ordinary vehicle meets a car on its track, it must give way to the car.

4. There is no error in refusing an instruction sufficiently included in instructions given.

Department 2. Appeal from superior court, city and county of San Francisco; Hunt, Judge.

Action by Frank Clark against Sanford Bennett, receiver of the San Francisco & San Mateo Railway Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Reddy, Campbell & Metson, for appellant. Sullivan & Sullivan, for respondent.

McFARLAND, J. While plaintiff was driving a wagon across the railroad track of the defendant he was struck by a car and severely injured, and he brings this action to recover damages for personal injuries occasioned by the collision. The verdict and judgment were for plaintiff, and from the judgment, and from an order denying a new trial, the defendant appeals. The place where the injury occurred is within the city

and county of San Francisco, and the road in question is a street railroad operated by electricity. Appellant's main contentions for a reversal are (1) that respondent was guilty of contributory negligence which should have prevented his recovery; (2) that there was not sufficient evidence to show that there was negligence at the time of the accident on the part of the employes who were running the car which caused the injury; and (3) that the court committed errors prejudicial to appellant in giving and refusing instructions to the jury.

1. We cannot say that as a matter of law the respondent was guilty of contributory negligence; that is, that "all the facts plainly and inevitably point to such negligence, leaving no room for argument or doubt." *Bailey v. Railway Co.*, 110 Cal. 328, 42 Pac. 914. The railroad track was on a public street called the "San José Road," and ran easterly and westerly. At the place of the accident there are some vegetable gardens on the south line of the road. The gardens are fenced, and there is a gate in the fence, through which people travel in going from the public street into the gardens, and in coming from the gardens out into the street. The railroad track lies on the southerly side of the street, and is about 15 feet from the fence and gate. From the gate to the southerly rail of the track there is an up grade of four or five feet, and a road is made from the gate to the railroad track by a fill which is somewhat narrow. The portion of the street which is on the southerly side of the track is uneven, and cannot be traveled over with vehicles; and, in order to get from the vegetable gardens to the traveled part of the street, the railroad track has to be crossed upon the filled-in, narrow road above mentioned. This way from the railroad track into the gardens is not a public road, but it was frequently traveled by the owners of the gardens and others having business with them. The respondent was in the habit of traveling this way nearly every day. At the time of the accident the respondent drove his wagon up over this filled way onto the railroad track, and while on the track was struck by the car; and it is contended by appellant that he was guilty of contributory negligence, because he drove upon the track without due caution. We cannot say, however, that this was so as a matter of law. He testified that when coming out of the gardens he got off his wagon and opened the gate, and then looked up the track, and could neither hear nor see an approaching car; that, in coming towards the track with his wagon, he did not see an approaching car until he was nearly or about on the track; that the car was then about 50 yards away, and that he believed he could cross the track before the car reached him; that he could have done so, if those in charge of the car, after he had hollered to them and after they had seen him, had



lessened the speed of the car, as they could and should have done. It is true that before the respondent drove out of the gate, owing to obstruction of view by buildings, trees, etc., he could not see up the track, and those on the car could not see him until he came upon the road; still, he did look up the road when he first came onto it after opening the gate, and we cannot say that the jury were bound to find that his subsequent acts constituted contributory negligence. The case is certainly somewhat different from one involving the approach of a heavy train and locomotive of a steam railway passing through the country at a high rate of speed, and at long intervals, as in *Herbert v. Southern Pac. Co.*, 121 Cal. 227, 53 Pac. 651. See *Driscoll v. Railway Co.*, 97 Cal. 566, 32 Pac. 591. It cannot be said that a person is guilty of contributory negligence merely because he attempts to cross a street railway when a car is approaching. If that were so, he could never attempt to cross such a track in the crowded parts of a city, where there is practically always an approaching car; and in such case, as street cars go at a comparatively slow rate of speed, and are quickly stopped, the question of negligence would depend upon the proximity or remoteness of the car, and upon all the other circumstances surrounding the occurrence. In such a situation the traveler cannot be held to exercise the very highest prudence and judgment; it is sufficient if he exercises that degree of care and prudence and good sense which men who possess those qualities in an ordinary or average degree exercise.

2. Neither can we hold that there was not sufficient evidence to justify the jury in finding that the employes on the car were guilty of negligence. There was certainly some evidence to the point that the car was traveling faster than the prescribed limit,—eight miles an hour. And there was evidence tending to show that those in charge of the car, after they discovered the position of the respondent, could, with ordinary diligence, have stopped the car before it reached the crossing. The evidence as to the distance of the car from the crossing at the time the respondent was discovered by the employes on the car was somewhat conflicting; but the respondent testified that the distance was 50 yards, and we cannot say that the whole evidence on that point did not warrant the jury in finding that with reasonable diligence the car might have been prevented from striking the respondent.

3. We see no good reason for reversing the judgment on account of any alleged prejudicial errors of the court in the matter of instructing the jury. Appellant's principal contentions on this subject are that the court erred in giving instruction No. 9 asked by respondent, and in refusing to give proposed instruction No. 2 asked by appellant; and that for these errors the judgment should be reversed. The attack on No. 9 is directed

against its second clause, which is as follows: "A street railroad has only an equal right with the traveling public to the use of the street whereon its track is built." The court might properly have added to this the exceptions referred to in *Shea v. Railroad Co.*, 44 Cal. 414, and in *Bailey v. Railway Co.*, 110 Cal. 320, 42 Pac. 914. In the *Shea* Case the court say: "The company, however, as we understand the law, has only an equal right with the traveling public to the use of the street, with some few exceptions, not material to the question, which arise entirely from the fact that the cars are designed to run only on the railroad track,—such as that, when an ordinary vehicle meets a car on its track, it must give way to the car." The *Bailey* Case is not seriously in conflict with the *Shea* Case. In the *Bailey* Case the court below had granted a nonsuit, and this court held that the nonsuit was properly granted, because the plaintiff was guilty of contributory negligence; and the commissioner who wrote the opinion, in discussing generally the whole question of negligence as applicable to a case where there has been a collision between a street-railroad car and an ordinary traveler on foot or in a vehicle, used general language as follows: "The street car has, and from the necessities of the case must have, a right of way upon that portion of the street upon which alone it can travel, and which it cannot leave, paramount to that of persons in ordinary vehicles;" but he immediately adds "that this superior right is not exclusive, and does not prevent others from driving or passing across or along its tracks at any place or time, when by so doing it will not materially interfere with the progress of its cars. In other words, the better right is not an exclusive right, and can only be enforced against those who needlessly impose obstacles to its free and unrestricted exercise,"—citing the *Shea* Case, among others. And further on he says that this principle is founded upon two reasons: "(1) That the car cannot turn out or leave the track, while the vehicle or passenger can; (2) these companies are chartered, nominally, at least, for the convenience of the public." There was no question in that case about instructions to the jury, and the main significance of what was there said was that the railroad cars had a superior right of way over that portion of the street on which the track was laid, as against travelers on foot or in vehicles, and that, as the latter could easily go elsewhere on the street, they had no right to obstruct the passage of the car by needlessly remaining on the track. But, as a traveler has the right to cross the track if he does so with proper care, we do not see how the proposition stated in the opinion in the *Bailey* Case is material in determining the quantum of care or negligence exhibited either by the traveler or the manager of the car, in a case of collision. Therefore, even admitting that the instruction complained of should not have been quite so broad, yet we do not see that

its defect in this respect was material in this particular case, or important enough to warrant a reversal of the judgment.

The proposed instruction No. 2 asked by appellant and refused by the court is as follows: "A person about to cross a street-railroad track is obliged to use due care to keep out of the way of moving cars. On approaching a track he is bound to look for approaching cars, and, if his sight be obstructed by any objects, to listen or take other satisfactory means to assure himself that no car is approaching that will injure him. The failure to take such precautions is negligence." The alleged propriety of this instruction is based principally upon language used in the opinion in the case of *Everett v. Railway Co.*, 115 Cal. 106, 43 Pac. 207, and 46 Pac. 889. That case also came here upon an exception to a denial of the court below of a motion for a nonsuit, and no question was presented touching the giving or refusal of instructions. Conceding that in the case at bar the instruction refused might have been properly given, yet we do not think that its refusal warrants the reversal of the judgment, because in other instructions given by the court the principle contained in the refused instruction was sufficiently stated. The court, among other instructions asked by appellant, gave the following: "If the plaintiff approached and attempted to cross the track of the railway operated by the defendant without exercising due care in ascertaining if any car was approaching which might injure him, your verdict should be for the defendant, unless you find from the evidence," etc. (the rest of the instruction is upon another subject). Also: "If, when plaintiff first saw the approaching car, it became apparent to him, or should have been apparent to him (after it became apparent), that a collision between the car operated by defendant and plaintiff's wagon (if it did so become apparent) was inevitable, if he attempted to cross the track, then the plaintiff was bound to exercise prudence to prevent injury to himself, if possible; and if he was negligent in this respect, and such negligence contributed directly to the injury, your verdict should be for the defendant." There were other instructions touching this point also given at the request of appellant. In its charge to the jury, of its own motion, the court, among other things, said: "It is the duty of the railroad company to endeavor to avoid injuring a party traversing the street. It is the duty of the party traversing the street to look out for himself, and to exercise ordinary care for his own protection. To authorize a recovery by plaintiff, it must appear that he exercised ordinary care to avoid the injury complained of; that is, that he acted with ordinary prudence under the circumstances." Considering these instructions, and that all the instructions given, as a whole, stated the law correctly, and fairly to both sides, we do not think that the re-

fusal to use the precise language contained in the offered instruction refused could have prejudiced the rights of the appellant.

Appellant contends that the verdict was against law, because it was contrary to some of the instructions given, and particularly that it was inconsistent with the instruction No. 7 given at the request of appellant; but this contention cannot be maintained. The instruction No. 7, as well as the other instructions alluded to, left open questions of fact which could be decided either way without a violation of the instructions.

There are no other points necessary to be specially noticed. It may be said of the case that the evidence left it very doubtful whether the plaintiff was not guilty of contributory negligence, and whether the employes of the appellant were guilty of negligence; but it is also true that the evidence was such as to leave those questions within the province of the jury. The judgment and order appealed from are affirmed.

HENSHAW, J. I concur in the judgment, and generally in the opinion; but, as to proposed instruction No. 2, I think it was properly refused as being an incorrect exposition of the law. The proposed instruction makes identical the duty of one who is about to cross the right of way of a steam railroad with that of one who is about to cross the track of a street-car line. From the nature of the business of steam railroads; from the character of the conveyances and of the motor power; from the necessity for swift transportation; from the fact that they carry the mails of the country; from the additional facts that the trains are of immense weight, that rapidity in locomotion is a high desideratum, that they cannot be easily and readily stopped, that they move upon their own right of way, that the number of them passing a given point is comparatively few,—the rule of conduct made necessary to one who is about to cross their right of way, even upon the line of a public highway, has become crystalized into a single phrase. It is a well-recognized rule which requires the traveler, if necessary for his own protection, "to stop and look and listen," and imputes negligence to him if he does not; but this rule of the *Flemming Case*, 49 Cal. 257, of the *Glascock Case*, 73 Cal. 138, 14 Pac. 518, and of many other like cases, was by the proposed instruction sought to be extended and made applicable to one who is about to cross the track of a street railroad operating upon a public highway. The distinction between the two kinds of public vehicles is too broad, the differences between their characters too substantial, to justify their obliteration, and to impose upon the citizen occupying a highway, where his right is the same as that of the street-car company, a duty identical with that which is his when he attempts to cross the right of way of a steam-railroad company. The proposed instruction



was a clear attempt to place street-railroad companies and steam-railroad companies, in this regard, upon exactly the same footing, and for this additional reason it was properly refused.

I concur: TEMPLE, J.

123 Cal. 224

PEOPLE v. KEHOE. (Cr. 448.)

(Supreme Court of California. Dec. 31, 1898.)  
SEDUCTION—PROMISE OF MARRIAGE—CHASTITY—  
EVIDENCE.

1. Promise to marry, and reliance on it, is proved by the girl's testimony that she submitted to defendant's embraces under his promise to marry her when they got old enough.

2. Though one is under 18 years old, so that he cannot obtain a marriage license without consent of his parents, he may be convicted of seduction under promise of marriage.

3. Unchaste character previous to the alleged seduction is not shown by mere improprieties, or by intercourse subsequent thereto.

Department 2. Appeal from superior court, Humboldt county.

Leslie Kehoe was convicted of seduction, and appeals. Affirmed.

S. M. Buck, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. The defendant was convicted of the crime of seduction under promise of marriage, and appeals from the judgment, and from the order denying him a new trial. The sections of the Penal Code bearing upon the offense are the following:

"Sec. 268. Every person who under a promise of marriage seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment in the state prison for not more than five years, or by a fine of not more than five thousand dollars, or by both such fine and imprisonment.

"Sec. 269. The intermarriage of the parties subsequent to the commission of the offense is a bar to a prosecution for a violation of the last section, provided such marriage take place prior to the finding of an indictment or the filing of an information charging such offense."

Defendant and the girl with whose seduction he was charged were both school children, and about the same age. At the time of the seduction, and of the first act of sexual intercourse, each was about 16 years old. The girl testified that she submitted to his embraces under his promise to marry her "when he was old enough," and "when they were old enough." She says: "There was no time ever set when we were to be married, only after he became of age, and became old enough to be married, we would be. I didn't know whether we would be married in one year or two years or three years or five years. I knew when he would become of age." The girl's evidence, if believed by the jury, was sufficient to support

the conviction. It proved the promise, and her reliance upon it in submitting herself to the defendant's desires. But it is very earnestly pressed upon the consideration of this court that the defendant, under the facts, does not come within the purview of this statute. It is argued that a boy of 16 is incapable, under our law, of consenting to and consummating marriage; that only an unmarried male of 18 years or upward can do so (Civ. Code, § 56); that, even when the male has reached the age of 18 years, he is still under disability, and may not obtain the requisite marriage license without the consent of his parent or guardian, and that, if such consent should be withheld,—and in this case it was withheld,—he could not legally marry until he attained the age of 21 years (Civ. Code, § 69); that, as a boy of 16 is incapable of consenting to and consummating marriage, so his promise to marry is invalid, and could not be made the foundation of a civil action, much less of a criminal; that section 269 of the Penal Code makes provision for barring a criminal prosecution under the preceding section of the Code by intermarriage of the parties; and that, if section 268 of the Penal Code be held to apply to a case such as this, it must result in the hardship, if not in the absurdity, of the law, that an adult offender, who has arrived at years of discretion, whose judgment is matured, and whose passions presumably are better under control, may avail himself of marriage with his victim, and so escape criminal prosecution, while the same avenue of escape would be absolutely closed to a young lad of immature judgment and tender years, who at the worst had but indulged the innate propensity of youth. Still further, it is pointed out that a boy of 14 or 15 years of age may be thus convicted of the seduction of a mature woman of 30 or 40; and, finally, it is insisted that the statute has in contemplation only male offenders who have passed their nonage. This argument is not without much force, yet, after having given to it the full weight to which we deem it entitled, we are nevertheless of opinion that it cannot prevail. The law is designed to protect female chastity; for, as said by Judge Cooley, "whenever it shall be true of any country that the women as a general fact are not chaste, the foundations of civil society will be broken up." *People v. Brewer*, 27 Mich. 134. If a previously chaste woman submits herself to the embraces of a man, under promise of marriage from him, upon which she in fact relies, the conviction, generally speaking, may not be avoided by proof that the promise was not legal and binding. The exceptions to the rule are found in those cases in which the promise itself is base and meretricious, and known to be such by the consenting woman. Thus, if a married man seduces a woman under promise of marriage, she not knowing that he has a wife, his promise is illegal and invalid, but this fact does not excuse him. The woman, in ignorance of the fact, was

justified in relying upon that promise; but if, at the time of giving her consent, she knew the fact to be that the man was married, and that, therefore, the promise was necessarily conditional upon the death or the putting away of his present wife, so base a contract would not excuse her in law for the surrender of her chastity. The contract itself would be void, as against public policy, and the woman's reliance upon it could not be extenuated or excused. *People v. Alger*, 1 Parker, Cr. R. 333. But, within the limitations thus indicated, the general rule is, and we think it should be, that the promise need not be such a legal promise as would support an action for breach of promise of marriage, provided it be such a promise as will justify the reliance upon it of the woman betrayed. In this case, the promise was not legally binding, and, as the girl knew the age of the defendant, and is chargeable with knowledge of the law, it may even be presumed against her that she knew that the boy was incapable at the time of making a valid and legally binding contract of marriage,—that any promise which he made could certainly be repudiated by him upon attaining his majority. But this is not determinative of the main question. The boy was not incapable of making a promise of marriage, which in good faith and in good morals it was his bounden duty to perform. In such a case as this, where the presumption of legal knowledge upon the part of the girl is, to say the least, a strained one, it is far more natural to assume that her reliance sprang from her confidence in the defendant, and from her belief that, aside from any question of the legally binding force of his words, he would keep faith with her. It is precisely such confidence and such belief which is to be protected by the law, and herein we quote with approval the language of the supreme court of Indiana in *Callahan v. State*, 63 Ind. 198: "There is nothing in the statute that requires the promise of marriage to be free from all legal objections, viewed as the foundation of an action for its breach. Its purpose was to prevent the obtaining of the female's consent to sexual intercourse by means of a promise of marriage; to protect her from the arts of designing and unprincipled men, in whom she may repose trust and confidence, and to whose solicitations she may yield, believing that their promises of marriage are made in good faith, and will be fulfilled. It is not to be supposed that she will pause to consider, even if she were capable of judging, whether the promise is valid in law, and one on which she could maintain an action if broken. It is not to be assumed in such case that her consent to the intercourse is given in consequence of her reliance upon an action upon the promise for damages in case of its breach; but it may be given upon the confidence she places in the good faith of the promise, believing, not that it will be broken, but fulfilled." In *Kenyon*

*v. People*, 26 N. Y. 203, it is said: "It is not necessary that the promise should be a valid and binding one between the parties. The offense consists in seducing and having illicit connection with an unmarried female under promise of marriage. It is enough that a promise is made which is a consideration for or inducement to the intercourse." In *Polk v. State*, 40 Ark. 482, the indictment charged merely that the parties to the act were past the age of puberty, and did not charge that they were of full age and able to make valid and binding promises to marry. The court say: "The offense consists in having illicit connection with an unmarried female, who yields to the solicitations of her seducer under the inducement of a promise of marriage. And it may be committed by an infant upon an infant, provided they have reached the age of puberty." In *Crozier v. People*, 1 Parker, Cr. R. 455, it is said: "Whether the promise is binding or not, if the prosecutrix believes it, the danger and wrong are the same. If the promise is the consideration for or the inducement to the illicit intercourse, the offense is complete. \* \* \* Though infancy may be a good defense to an action for a breach of promise of marriage, I apprehend it would not avail against a prosecution under this act. The offense is certainly of no less magnitude morally, and there is no less necessity for its punishment, because the promise was intended to be, and was in fact, a false pretense."

There was sufficient evidence to justify the finding of the jury that the complaining witness was of previous chaste character. In the first place, the law presumes a woman to be chaste until the contrary is shown. *People v. Brewer*, 27 Mich. 134. In the next place, there was affirmative testimony of the girl herself to this effect. The rejected evidence by defendant that she had had sexual intercourse with other men after the date of the alleged seduction was properly excluded, and the admitted evidence that she had permitted certain liberties to be taken with herself by her young male companions was not sufficient to show that, at the time of the seduction, she was of "unchaste character," within the meaning of the law. Chastity, as here employed, means, in the case of an unmarried female, simply that she is *virgo intacta*, and though one woman may permit familiarities, liberties, or even indecencies, at the thought of which another woman would blush, so long as that woman has not surrendered her virtue she is not put without the pale of the law. *Crozier v. People*, supra. It is conceivable that a woman may permit or suffer many things which would be regarded as improprieties, and yet hold firmly to her virtue. As is happily said in *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642: "Although a female may from ignorance or other causes have so low a standard of propriety as to commit or permit indelicate acts or familiarities, yet, if she have enough sense of virtue that she would



not surrender her person unless seduced to do so under promise of marriage, she could not be said to be an unchaste woman, within the meaning of the statute." The alleged errors of the court in giving and refusing to give instructions do not call for detailed consideration. Of the instructions given, some are criticised as assuming the existence of facts as proved against defendant, but the criticism is not borne out by the court's language. Where so assuming facts, it is apparent that the instruction is an abstract consideration of the crime and of its elements, and is not directed to the particular circumstances of the case at bar. When the court came to more specifically deal with the evidence in the case, it was careful to leave all questions of fact for the determination of the jury. For example, the opening sentence of a long instruction given by the court is as follows: "The law does not require that the promise of marriage should be made at the time the sexual intercourse is had, but it is sufficient if the promise was made at any time before the act was done." It is said of this that it assumes the existence of two facts,—the first the promise of marriage, and the second that the act of sexual intercourse charged had been committed; but a reading of the whole instruction discloses, as has been said, that the court is here abstractly analyzing the necessary elements of the crime, and this very instruction concludes with the following unambiguous and unassailable proposition of law: "Therefore, I instruct you that, if you find that the defendant seduced and had sexual intercourse with Loleta Brewer, that she was of previous chaste character, and that he had previously promised Loleta Brewer to marry her, that she yielded and consented to the act because of such promise, and that she would not have consented if such promise had not been made, then the law will not hold the defendant guiltless." The instructions proposed by the defendant, and refused by the court, were either erroneous in point of law for the very reasons which we have hereinbefore considered, or were open to the objection of charging upon the effect of evidence. Upon the whole, the instructions given upon behalf of defendant were certainly quite as favorable to him as the law permits. We do not think that undue latitude was allowed in the cross-examination of defendant. The judgment and order appealed from are therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

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123 Cal. 360

**FIRST NAT BANK OF LOS ANGELES v.  
MAXWELL et al. (L. A. 316.)**

(Supreme Court of California. Jan. 21, 1899.)

**FRAUDULENT CONVEYANCES—WAIVER—JUDGMENT  
—LIENS—EVIDENCE.**

1. Complainant agreed to delay the issuance of an attachment on defendant's property for a week, on condition that defendant should make no conveyance of her property, or change its situation, in the meantime. In violation of such agreement, defendant at once conveyed the property in trust for her children, by a recorded deed. Afterwards, with knowledge of such conveyance and of the financial embarrassment of defendant, complainant took a new note from defendant, secured by a mortgage on other property. *Held*, that complainant did not thereby waive the right to attack the trust deed as fraudulent.

2. A judgment duly docketed is a lien on real estate previously conveyed by the judgment debtor in fraud of creditors, since the conveyance is void, under the Code.

3. A conveyance made with a personal intent to defraud creditors is fraudulent and void, though the debtor has ample property to pay his debts.

4. The sheriff's return of nulla bona, and the judgment debtor's statement to the officer that she had no property, is conclusive on that point, on an issue as to whether a previous conveyance by the debtor was fraudulent as to creditors.

In bank. Appeal from superior court, Los Angeles county.

Suit by the First National Bank of Los Angeles against Amelia C. Maxwell and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Reversed.

Graves, O'Melveny & Shankland, for appellant. Wells & Lee and C. Edgerton, for respondents.

HAYNES, C. Suit to remove a cloud and quiet title to real estate. Findings and judgment were for the defendants, and the plaintiff appeals from the judgment, and from an order denying a new trial. Walter S. Maxwell, the husband of Amelia, their three children, all minors, and Charles A. Baskerville, as trustee, were the other defendants. The property involved was the separate property of Mrs. Maxwell. The facts, briefly stated, are as follows: On and prior to August 23, 1893, Mr. and Mrs. Maxwell were indebted to the plaintiff in the sum of \$9,300; and plaintiff had instructed its attorneys to commence proceedings by attachment against them to collect said indebtedness, and to attach the property here in controversy. Before commencing suit, plaintiff sent for Mr. and Mrs. Maxwell, and informed them that an immediate settlement must be made, or proceedings would be taken for its collection.

That said defendants requested delay, saying they had reasonable prospects of settling in a few days. Plaintiff then agreed, "on condition that Mrs. Maxwell would make no disposition of her property, and make no change in the situation of it, that proceedings would be postponed until Saturday." That Mrs. Maxwell then promised, "on her honor,—using those words,"—that she would make or suffer no change in the situation of her property, whereupon plaintiff instructed its attorneys to delay proceedings until the following Saturday. That Mrs. Maxwell, the same day, went to her attorneys, and executed a deed to the defendant Baskerville, conveying to him the property here in controversy in trust for her three minor children, by the terms of which the trustee was to pay the rents and profits thereof, not exceeding \$300 per month, to Mrs. Maxwell, for the clothing, support, education, etc., of said children, and any surplus over that sum to be deposited in a savings bank in the name of the children, to be accumulated until the youngest should arrive at majority, when it should be distributed to them. This deed was recorded the same day, and on the next plaintiff was informed of it; and, with knowledge that it had been executed and recorded, the plaintiff took from the Maxwells their promissory note, payable one year after date, with interest payable quarterly, and, if not so paid, the principal to become due and payable upon such default, and a mortgage upon the interest of Mrs. Maxwell in the Llanfranco Block, in the city of Los Angeles, to secure said note. Default was made in the payment of the first quarter's interest, and plaintiff thereupon foreclosed the mortgage, and, after exhausting the mortgaged property, on April 7, 1894, docketed a deficiency judgment for the sum of \$5,167.05. At and prior to the execution of said trust deed one Etchepare held the promissory note of Mr. and Mrs. Maxwell, then past due, upon which he brought suit in December, 1893, and obtained judgment for \$1,723.30 and costs, and an execution issued thereon was levied upon the property described in said trust deed, and the interest of Mrs. Maxwell therein was sold to Etchepare on February 19, 1894. Upon the plaintiff's deficiency judgment being docketed (April 7, 1894), an execution was issued thereon, which was returned nulla bona, and thereafter the plaintiff performed all the acts necessary to redeem the said premises from Etchepare; and in due time the sheriff executed and delivered to the plaintiff, as such redemptioner, a deed for the said premises, and said deed was duly recorded prior to the commencement of this action.

The foregoing facts are shown by the evidence without conflict, and, excepting the directions of the plaintiff to its attorneys, and the interview between Mr. Elliott, the president of the bank, and Mr. and Mrs. Maxwell, are incorporated in the findings. The



court, however, made some additional findings, which are to the effect that, prior to the execution of the mortgage to the plaintiff upon the one-fourth interest in the Lanfranco Block, the French Bank had taken a mortgage upon all the interests therein for \$60,000, upon which Mrs. Maxwell had paid \$20,000; that at the time of the execution of the mortgage to the plaintiff she owned other real estate in the city of Los Angeles, "aggregating several thousand dollars over incumbrances, and was possessed of a large amount of personal property, unincumbered, aggregating in value between five and six thousand dollars." The seventeenth finding is as follows: "The plaintiff knew of the execution of the said trust deed, and the financial condition of the said defendants Walter S. Maxwell and Amelia C. Maxwell, his wife, at the time of the execution and delivery of the said note and mortgage by them to the plaintiff on the 24th day of August, 1893." From these findings the court drew the following conclusions of law: "(1) That plaintiff waived its right to attack said trust deed; that no legal redemption in this case was had, and that plaintiff did not become substituted to the rights of the purchaser at the sheriff's sale on the Etchepare judgment, and is not the owner of the property, and not entitled to have the same removed as a cloud thereon, or to quiet its title thereto"; and that defendants are entitled to judgment. The complaint alleged that said trust deed was made with the intent to delay and defraud creditors, and especially the plaintiff, and that the defendants Mr. and Mrs. Maxwell were insolvent; and these allegations were denied. After the findings were filed, but before judgment was entered thereon, the plaintiff, upon due notice, moved the court to amend and supplement its findings in several particulars,—among them, to find upon the question of fraudulent intent in making the trust deed, and to find that the Etchepare note was made before the deed of trust was executed. The motion was denied, and plaintiff excepted. As to the latter request, it need only be said that it was so alleged in the complaint, and not denied in the answer. A finding is unnecessary where a fact is admitted by the pleadings. The other proposed amendments and additions to the findings will be noticed, so far as material, in another connection.

Two principal questions were presented to the trial court: (1) Was said trust deed made by Mrs. Maxwell with intent to delay or defraud her creditors? (2) If so, did the plaintiff waive its right to attack it, and to have it declared void?

It is conceded that, if the plaintiff is estopped from attacking said trust deed upon the ground that it was made with intent to delay or defraud creditors, it is immaterial to the plaintiff whether it was so made or not. Appellant contends, however, that the conclusion of the court, "that plaintiff waived its right

to attack said trust deed," if regarded as a conclusion of law, is not sustained by the findings; and, if regarded as a finding of an ultimate fact, is not justified by the evidence; and this contention, I think, must be sustained. This question of waiver cannot be discussed without assuming that the trust deed was made with the fraudulent intent charged, for, unless there was first a fraud, there could be no waiver; and the court, in finding that the plaintiff waived the fraud, impliedly found that the deed was fraudulent, and would have been void as to the plaintiff but for the waiver. The facts upon which counsel for respondents base their argument that plaintiff waived the fraud are stated in their brief to be: That the bank had full knowledge of the making of the trust deed by which the property was conveyed for the benefit of the children; that it was recorded; that it knew of the mortgage upon the homestead, and of the general embarrassment of the defendants in meeting their obligations; that all the incumbrances on Mrs. Maxwell's property were of record, and, "after knowing these facts, he [the president of the bank] entered into an agreement whereby he accepted for the bank a mortgage to the bank"; and the principle which counsel say must control is "that a man who does not speak when he ought, shall not be heard when he desires to speak." If Mrs. Maxwell had informed the bank of her intention to place the property in question beyond the reach of her creditors, or sought Mr. Elliott's advice in the matter, this maxim might have an application. But "it is an essential element of estoppel by conduct that the party claiming the estoppel should have relied upon the conduct of the other, and was induced by it to do something which he otherwise would not have done." *McCormick v. Insurance Co.*, 86 Cal. 260, 24 Pac. 1003. It is not pretended that the plaintiff induced the trust deed to be made, or advised that it be made, or that subsequent to the making of it anything was done in relation to the trust property by Mrs. Maxwell or the trustee which, but for the conduct of the plaintiff, would not have been done. On the contrary, a delay in the commencement of legal proceedings and an attachment of the property conveyed by the trust deed was made upon the express condition that no conveyance of her property, or change in its situation, should be made. This promise is not controverted, except by the testimony of Mrs. Maxwell that she did "not remember it." Neither the statement of counsel for respondent, nor the findings of the court, nor the testimony of any witness show that Mrs. Maxwell did anything in relation to the property in question, in consequence of the conduct of the plaintiff, that she would otherwise not have done, except to convey the property to the trustee in consequence of the announced intention of the plaintiff to commence legal proceedings for the collection of

its claim against her. The equitable maxim invoked by counsel surely cannot be based on that; nor, indeed, do they claim any such basis for the waiver or estoppel existed, nor even that there was any verbal agreement or understanding that the validity of the trust deed would not be attacked. It was said by Sir Edward Coke, referring to *St. 13 Eliz.*, that, if there is actual fraud at the outset of a transaction, nothing afterwards can "anyways salve or amend the matter." It is conceded that this is not now the broad and unbending rule. The exceptions to it are stated in 2 *Bigelow, Frauds*, pp. 407, 408, to be cases of present or subsequent consent or ratification by the creditor, and an undoing of the fraud, as by a reconveyance before proceedings are commenced. We do not think that the acts of the plaintiff which defendants call "a waiver" amount to a subsequent consent or ratification by the creditor. "To make out a case of abandonment or waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to an estoppel on his part." *Ross v. Swan*, 7 *Lea*, 467. "A waiver is the intentional relinquishment of a known right." 28 *Am. & Eng. Enc. Law*, p. 526.

The conclusion of the court below that plaintiff waived the fraud of defendants was based, as the evidence and the findings conclusively show, wholly upon the fact that it took the note and mortgage with knowledge of the financial embarrassment of Mr. and Mrs. Maxwell, and of the making and recording of the trust deed. Those facts do not justify the inference that the plaintiff intended to waive the fraud. Nothing was said upon that subject. No stipulation to that effect was inserted in the note or mortgage. The only inference to be drawn from the mortgage is that of a condition attached by the law to all mortgages, namely, that the mortgaged property shall be first exhausted, and, if that proves insufficient, a judgment for the deficiency shall be docketed, which may be enforced against any other property liable to execution. It is not contended that this statutory right was waived as to any other property than that fraudulently conveyed, though I can see no logical or satisfactory reason why the supposed waiver would not equally apply to such other property. Any other interpretation of the law, or inference of fact, would make fraud a virtue to be carefully protected and nurtured into full fruition. There was no dealing with the trustee in relation to the trust property. From the time the trust deed was delivered, Mrs. Maxwell was a stranger to the title of the property thereby conveyed. She had no authority to act concerning it. She could neither exempt it from the payment of her debts, nor apply it thereto. The giving of a mortgage as security for an antecedent debt requires no new consideration to support it, nor does it impose upon the mortgagee any con-

dition not expressed upon its face, other than those provided by law. The note and mortgage were in writing, and expressed the whole agreement of the parties. This transaction falls far short of "clear, unequivocal, and decisive" evidence of a purpose on the part of the plaintiff to waive a legal right given it by the solemn act of the mortgagors; and, in the absence of such evidence, a court of equity will not infer a waiver. As in all cases where a mortgage is taken to secure a debt then due, the taking of the security operated to suspend the right of proceeding against the property fraudulently conveyed, or any other property of the debtor, until the mortgaged property should be exhausted and a deficiency judgment docketed; but we cannot perceive any principle upon which such suspension of the remedy, without more, should operate more favorably upon property fraudulently conveyed than upon property still remaining in the hands of the debtor, all being alike subject to the process of the law in favor of existing creditors.

Respondents cite several authorities, but none of them sustain their contention that the facts of this case show a waiver on the part of the plaintiff. Our attention is particularly called to the case of *Pell v. Tredwell*, 5 *Wend.* 661, from which they quote the following passage: "A family settlement,—that is, a conveyance by a parent of all his real estate to a daughter for the benefit of herself and her brothers and sisters,—made bona fide, will not be set aside in favor of a creditor at the time of the conveyance, by whose advice and procurement the settlement was made; the creditor having at the time ample security for the money due him, by mortgages upon specific portions of the estate, but which, after a lapse of ten years, proved insufficient, at a forced sale, to satisfy his demand. Nor will the creditor be permitted to raise the residuum of his debts by sale of the lands not covered by his mortgages." No one doubts that a voluntary conveyance, "made by the advice and procurement of a creditor," is valid as to him. *Wolf v. Van Metre*, 23 *Iowa*, 397, cited by respondents, lends no support to their contention. There the husband gave a note to the plaintiff for his personal debt, and his wife signed it as surety, and gave a mortgage on one parcel of land to secure it. She afterwards, in good faith, made a voluntary conveyance of other lands to her children; and, after the last-mentioned conveyance was made, the plaintiff, with knowledge thereof, surrendered his note and mortgage, and took a new note, and a mortgage executed by the wife on the lands conveyed to the children. The court held, "Where the voluntary conveyance is made in good faith, and the subsequent purchaser or incumbrancer has notice of it, he cannot defeat it." One material distinction between that case and this is that here the voluntary conveyance was not made in good faith, but with an undisputed fraudulent intent; and another is that under the



laws of Iowa, as declared by the court in that case, the wife was not personally liable upon the note; that she could only create a liability against her property, and could not, therefore, make a conveyance in fraud of her creditors, who could have no legal or equitable right in any of her property, except that specially charged. In the case of *Zuver v. Clark*, 104 Pa. St. 222, the statement of facts shows that the creditor was present at the execution of the deeds alleged to be fraudulent, and was a subscribing witness to their execution, and that the exchange of properties was made upon his recommendation. *Bobb v. Woodward*, 50 Mo. 95, cited by respondents, was the case of an assignment to hinder and delay creditors. It was held that the creditors might have treated the sale as a nullity, but, having failed to do so, and having lain by, and suffered the assignee to carry on the business in his own name and with his own money and credit, to sell out and replenish the stock, and engage in other transactions based on their acquiescence, the creditors were estopped. But here there was no change in the property by the trustee or the beneficiaries induced or acquiesced in by the creditors. None of the cases cited by respondents are more nearly in point than those above noticed. The burden of proving a waiver of, or acquiescence in, the fraud is upon the defendants, and such waiver or acquiescence cannot be inferred from the facts appearing in the evidence in this case.

It is further contended by respondents that plaintiff was not a judgment creditor having a lien upon the property in controversy, and was not, for that reason, entitled to redeem from the sheriff's sale to Etchepare. This contention is based upon two grounds: (1) That plaintiff waived the fraud, and thereby admitted the title of the trustee; and (2) that, admitting the trust deed was made to delay and defraud creditors, as alleged, the judgment lien could not attach to the land, because the conveyance was operative between the parties, and hence there was no title or interest in Mrs. Maxwell to which the lien could attach. The first of these grounds has been disposed of, and need not be further noticed. The second ground is wholly untenable. The Code expressly declares that such transfer "is void against all creditors of the debtor." "A void thing is as no thing." So far as existing creditors are concerned, the title and ownership of the property remain in the fraudulent grantor as fully as though no transfer had been attempted. In 1 Freem. Ex'ns, § 136, it is said: "As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale [on execution] is not a mere equity,—not the right to control the legal title, and to have the fraudulent transfer vacated by some appropriate proceeding; it is the legal title itself, against which the fraudulent transfer is

no transfer at all." This language was quoted and approved by this court in *Judson v. Lyford*, 84 Cal. 507, 24 Pac. 287. See, also, *Bull v. Ford*, 66 Cal. 176, 4 Pac. 1175, where the same point was decided. The case of *In re Estes*, 6 Sawy. 459, 3 Fed. 134, cited by respondents, appears to sustain their contention; but, as the point is conclusively settled by our own decisions, it is not necessary to review that case. If it be true, as the authorities clearly hold, that so far as it is necessary for the protection of creditors the title and ownership remain in the fraudulent grantor, and that a sale under execution will pass the legal title to the purchaser, it must logically follow that a judgment duly docketed becomes a lien on the real estate so fraudulently conveyed. If there is nothing to which a judgment lien could attach, there can be nothing which would pass by a sale on execution. I therefore conclude that the plaintiff had a judgment lien, and was entitled to redeem the property from the sale under execution issued upon the Etchepare judgment.

Another question should be briefly noticed. The answer alleges, and the court found, that, aside from the property embraced in the trust deed, Mrs. Maxwell owned real estate aggregating several thousand dollars over incumbrances, and was possessed of a large amount of personal property, unincumbered, aggregating in value between five and six thousand dollars. This is not a finding that the trust deed was not made to delay and defraud creditors, though competent as evidence tending in some measure towards that conclusion, though far from being in itself conclusive. In 2 Bigelow, Frauds, p. 393, it is said, "Indeed, it matters not, where personal intent to defraud is shown, that the fraudulent conveyance, if allowed to stand, would not harm any one, by reason of the fact that the debtor has other property, ample in amount, within the reach of his creditors;" and in *Hager v. Shindler*, 29 Cal. 60, it was said, "A rich man may make a fraudulent deed, as well as one who is insolvent." See, also, *Bull v. Bray*, 89 Cal. 300, 26 Pac. 873. There can be no question, upon the evidence appearing in the record, that there was on the part of the grantor such personal intent to defraud, and the facts stated in said finding do not overcome that evidence; and, besides, it is a finding of probative facts, merely, and not of the fact of fraudulent intent or its opposite. The evidence upon which that finding is based is also used, in argument, to show that there was personal property out of which plaintiff's deficiency judgment could have been satisfied. The return of the sheriff of "No property found," and Mrs. Maxwell's statement to the officer that she had no property, are conclusive upon that point, if it were material,—a point we need not discuss. Besides, the finding relates to the date of the trust deed, and not to the date of the execution. The conclusion "that plaintiff waived its right to attack said trust deed" not being justified by

the findings or the evidence, a finding upon the issue of the fraudulent intent with which it was charged to have been made is essential. I advise that the judgment and order appealed from be reversed, and the cause remanded.

We concur: SEARLS, C.; CHIPMAN, C.

**PER CURIAM.** For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded.

6 Cal. Unrep. 214

**RAMSBOTTOM v. FITZGERALD.** (Sac. 575.)

(Supreme Court of California. Dec. 23, 1898.)

JUDGMENT—EXECUTION—APPEAL.

The enforcement of a judgment by execution does not deprive defendant of the right to appeal.

Department 1. Appeal from superior court, San Joaquin county.

Action by R. Ramsbottom against B. M. Fitzgerald. From a judgment for plaintiff, defendant appeals. Motion to dismiss appeal denied.

J. G. Swinnerton, for appellant. Elliott & Elliott and Budd & Thompson, for respondent.

**PER CURIAM.** The respondent has moved to dismiss the appeal herein upon the ground that since the affirmance of the judgment by this court (52 Pac. 149) an execution for the enforcement of the judgment was issued out of the superior court, and has been returned by the sheriff fully satisfied. In *Kenney v. Parks*, 120 Cal. 22, 52 Pac. 40, and 54 Pac. 251, and in *Marble Co. v. Black* (S. F. 1207; recently decided) 55 Pac. 599, it was held that an enforcement of the judgment by the plaintiff does not deprive the defendant of his right of appeal. The motion to dismiss the appeal on the ground that the orders appealed from are not appealable was denied in department 2 September 12, 1898.<sup>1</sup> The motion is denied.

(123 Cal. 246; 6 Cal. Unrep. 214)

**PEOPLE v. LON YECK et al.** (Cr. 462.)

(Supreme Court of California. Jan. 6, 1899.)

WITNESS—CREDIBILITY—CRIMINAL LAW—INSTRUCTIONS—CONFLICTING EVIDENCE—REVIEW.

1. An instruction that a witness whose testimony is false in one part is to be distrusted in other parts is not erroneous.

2. Where an instruction was given at the request of one of the parties, he cannot, on appeal, object that it did not state a sound declaration of law.

3. The verdict of a jury in a criminal prosecution, convicting defendant, will not be disturbed on appeal where the evidence is squarely conflicting,—especially where such evidence is of Chinese witnesses.

4. Rulings of the trial court upon the admission of evidence will not be reviewed where no exceptions thereto are found in the record.

<sup>1</sup> No opinion.

Department 1. Appeal from superior court, city and county of San Francisco.

Lon Yeck, Lee Keong, and Yee Sang were convicted of robbery, and appeal. Affirmed.

Robert Ferral, for appellants. Atty. Gen. Fitzgerald, for the People.

**GAROUTTE, J.** The defendants have been convicted of robbery, and appeal from the judgment and order denying their motion for a new trial. The points relied upon for reversal of the judgment are few, and of little importance.

Complaint is made that the following instruction was erroneously given: "A witness whose testimony is false in one part is to be distrusted in other parts." This enunciation of the law is framed substantially in the language of the statute, and has been directly approved in *People v. Treadwell*, 69 Cal. 223, 10 Pac. 502, and *People v. Ah Sing*, 95 Cal. 656, 30 Pac. 796. However, in giving instructions to the jury bearing upon this particular question of law, courts would do well to heed the suggestions given out in the recent case of *People v. Plyler*, 121 Cal. 160, 53 Pac. 553. It may be further suggested that the instruction of which complaint is now made was given at the request of the defendants, and it is not for them to now insist in this court that it does not contain a sound declaration of law.

It is also claimed that the verdict lacked support in the evidence. To this contention it may be said that the evidence is squarely conflicting. All the direct evidence comes from the mouths of Chinese witnesses, and, as usual in cases where such is the fact and where the litigation involves their interests alone, the evidence is flatly contradictory. In such a case, especially, the verdict of the jury will not be disturbed by this court.

Complaint is made as to the misconduct of the district attorney. We see nothing in the contention of sufficient merit to demand a new trial. Various rulings made by the trial court upon the admission of evidence are claimed to be erroneous; but we find no exception to them in the record, and refrain from giving them any consideration. There is no merit in this appeal. Judgment and order affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

(123 Cal. 267)

**PEOPLE v. SKIDMORE.** (Cr. 465.)<sup>1</sup>

(Supreme Court of California. Jan. 13, 1899.)

FALSE PRETENSES—NOTES—PROPERTY—INFORMATION.

1. One signing a note instead of an application for insurance, as he intended, is not negligent, where defendant moved and manipulated the papers with the fraudulent purpose of procuring such signature, so as to prevent defendant's conviction of defrauding by false pretenses, under Pen. Code, § 532.

2. One fraudulently procuring another to sign a note which he supposed was a different instrument is guilty of defrauding another of his

<sup>1</sup> Rehearing denied.



"property" by false pretenses, within Pen. Code, § 532.

3. An information under Pen. Code, § 532, charging defendant with defrauding another of his property by false pretenses, is sufficient though there is no direct allegation that the property obtained by the fraud was the property of the person defrauded, where facts are alleged from which the ownership of the property can be inferred.

Department 1. Appeal from superior court, San Luis Obispo county.

T. F. A. Skidmore was convicted of defrauding by false pretenses, and he appeals. Affirmed.

Joseph H. Skirm, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. Section 532 of the Penal Code reads: "Every person who knowingly and designedly by false or fraudulent representation or pretenses defrauds any other person of money or property \* \* \* is punishable in the same manner and to the same extent as for larceny of the money or property so obtained." Under this section of the law, the defendant was charged by information with the commission of a felony, and pleaded guilty to the charge. He now appeals from the judgment, upon the ground that the information does not state a public offense. The gist of the information is that the defendant, by false and fraudulent representations and pretenses, defrauded M. Righetti out of a promissory note of the value of \$277.69. A copy of this note is set out in the information, and is signed, "Michael Righetti." The information has been carefully drawn, and the facts of the transaction are set forth in detail. We quote the following allegation: "Said Skidmore then and there represented and pretended to said Righetti that he (said Righetti) was then and there signing an application for insurance on his (said Righetti's) life, and an option on taking said policy applied for, but in truth and in fact, by some fraudulent pretense or deception of said Skidmore in moving and manipulating said papers, the signature of said Righetti was obtained to said promissory note."

It is first claimed that the representations made by defendant to Righetti were statements the falsity of which Righetti could have detected by an ocular inspection of the instrument which he signed. That Righetti's carelessness in signing this note is a material element in the case is not apparent, for the offense is committed against the public, and not against him. The guilty party is prosecuted in the interest of the people of the state, and not in the interest of the party defrauded. Yet, even conceding, for present purposes alone, that lack of care or gross negligence upon the part of the party defrauded might in some cases defeat the conviction of the party charged, we do not have that case before us, for here prestidigitation was practiced. It was a case of juggling, and it does not appear but that the most careful and

wary likewise would have been defrauded. The very recent case of *People v. Summers* (Mich.) 73 N. W. 818, upon its facts, is quite similar to the case at bar, and the conclusion there declared is opposed to appellant's contention.

It is also insisted that the promissory note in this case was not "property," in the sense of the word as used in the aforesaid section of the Penal Code. The *Summers* case, cited, decides to the contrary. It is also expressly held to the contrary in the case of *People v. Reed*, 70 Cal. 529, 11 Pac. 676.

It is further claimed that there is no allegation that the note was the property of any particular individual. In this behalf it is sufficient to say that all the facts of the transaction are set out in detail. Conceding in many cases the materiality of an allegation to the effect that the property obtained by the fraud was the property of the party defrauded, yet the absence of such an allegation in a case like the present is not fatal to the pleading, for the facts here set out show the ownership of the note as fully as though there was a direct allegation in the pleading to that effect. There is no merit in the appeal. Judgment affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

(123 Cal. 290)

STUPARICH MFG. CO. v. SUPERIOR  
COURT OF SAN FRANCISCO  
et al. (S. F. 1,732.)

(Supreme Court of California. Jan. 16, 1899.)

RECEIVERS — SUMMARY PROCESS — RECOVERY OF  
ASSETS — PROHIBITION.

1. The person claiming the ownership of personal property cannot be deprived thereof by a summary order of court, based on the affidavits of one of the parties to an action for dissolution of partnership that it is the property of the firm, directing the receiver to take possession.

2. Where such order has been made, and the application of the owner for a stay of proceedings thereon has been denied, a writ of prohibition will be granted restraining such proceedings.

In bank. Application of the Stuparich Manufacturing Company for a writ of prohibition to the superior court of San Francisco and others. Writ granted.

George D. Collins, for petitioner. Rothchild & Ach, for respondents.

HARRISON, J. In an action pending in the superior court for San Francisco between Paul J. Stuparich, as plaintiff, and Joseph Gassmann, as defendant, for the dissolution of a partnership, the court appointed a receiver to take into his possession all the property belonging to said partnership. The defendant in the action, claiming that certain personal property belonged to the partnership, procured an order of the court directing the receiver

to take possession of the same, whereupon the petitioner herein presented to the court a petition setting forth that it was the owner of said property, and in possession of the same, and prayed the court for a stay of proceedings upon its order directing the receiver to take it into his possession. The court denied this petition, and directed the receiver to take possession of said property. Thereupon the petitioner made this application for a writ of prohibition restraining the superior court and its receiver from seizing any of the property so claimed by it. In answer to this petition the respondents allege that the property in question belongs to the partnership, and that the petitioner has no claim or right thereto, and that at the time the receiver was appointed the property was in the actual possession and control of the partnership. There is also an averment in the answer that the property is in the possession of the petitioner herein and of the respondents, but this is evidently a clerical misprision. The name of the person who has the physical possession of the property is not alleged, but it is assumed that the property is in the possession of Paul J. Stuparich, the plaintiff in the action in the superior court, who is also the president of the petitioner herein, and who makes the affidavit for the writ in its behalf.

It is not within the function of this court upon this application to determine whether the property in question does or does not belong to the petitioner, nor did the superior court have authority by its order to direct the receiver to take the property from the possession of the petitioner. A person in possession of personal property under a claim of ownership cannot be summarily deprived thereof by an order of court based upon the affidavits of an adverse claimant, but he has the right to have his title determined in an appropriate action by the verdict of a jury or the findings of a court upon issues framed for that purpose. *Ex parte Hollis*, 59 Cal. 405; *Ex parte Casey*, 71 Cal. 269, 12 Pac. 118. The petitioner herein was not a party to the action in the superior court, and that court had no jurisdiction over it, or over its property, or to direct it to surrender to the receiver any property which it claimed to own. The fact, if it be such, that the property is in the custody of the plaintiff in the action, does not change the rule. If his possession is that of the petitioner, and not in his own right, the petitioner is entitled to be protected in such possession against the claim of the receiver; and, as its officer or bailee, the plaintiff was authorized to assert the ownership of the corporation, and the character in which he held the property in opposition to such claim. As soon as it was made to appear to the superior court that the property was claimed by a stranger to the action, the court should have denied the application of the receiver. It could have authorized the receiver to institute an action for its recovery, but it could not direct him to take the property from

the possession of the petitioner. The application for the writ is granted.

We concur: BEATTY, C. J.; McFARLAND, J.; VAN DYKE, J.; HENSHAW, J.

123 Cal. 258

WILSON v. HENDERSON et al. (S. F. 842.)  
(Supreme Court of California. Jan. 12, 1899.)

JOINDER OF PARTIES—PLEADING—PARTNERSHIP—  
COMMON AGENT—LIABILITY OF PRINCIPALS.

1. Where creditors of an insolvent corporation agree upon an agent to conduct the business of the insolvent for their joint and several benefit, and to furnish material and labor therefor, any person who sues such creditors for material furnished the agent may properly implead the insolvent corporation under the allegation that it was one of the principals to the agreement.

2. A complaint alleging that defendants, as creditors of an insolvent debtor, had authorized and directed an agent, for their joint and several benefit, to carry on the business of the insolvent, and to employ labor and to buy material therefor, does not charge defendants as partners, but as principals; and therefore there need be no further facts pleaded showing an actual or ostensible partnership.

3. If creditors employ a common agent to conduct the business of their insolvent debtor, and to employ labor and purchase material therefor, they become liable for such labor and material; and this liability is not changed by the mere fact that the agent was the assignee, and was authorized by order of court, made subsequent to the agreement, to carry on the business, and to pay the costs thereof out of the assets of the estate, unless the order was intended to supplant the agreement.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by John C. Wilson against O. L. Henderson and others. From a judgment against plaintiff, he appeals. Reversed.

G. R. Lukens and John D. Wright, for appellant. Jos. Kirk, for respondents.

HENSHAW, J. Plaintiff, for cause of action, alleged that the defendant the Vallejo Electric Light & Power Company was an insolvent debtor, and that the defendant O. L. Henderson was its assignee. All of the other defendants, 30 or more in number, were creditors of the insolvent corporation, and entitled to share ratably in the distribution of its property and assets. On the 24th day of July, 1893, all of the defendants entered into a mutual agreement that it would be to their joint and several interests that the plant and business of the insolvent should not be shut down, but should be operated and maintained as it had before the corporation's insolvency. Defendants thereupon "authorized and directed the said O. L. Henderson, for his, their, and each of their joint and several benefit and advantage, to carry on, maintain, operate, and run said plant in all respects as it should be run; \* \* \* and further authorized and empowered and directed him to employ the necessary labor for said purpose, and to buy the necessary supplies for said purpose." Following this authorization, it is next alleged



that the defendants applied for and obtained an order of the insolvency court, in which order the court found that it was for the best interests of all concerned that the plant of the corporation should be kept in operation, and that the creditors consented thereto, and by which order it was declared that Henderson, the assignee, "shall have power, and it shall be his duty, to employ the necessary labor for said purpose, and to buy the necessary supplies for said purpose; and the costs of the same shall be paid out of the assets of said estate of said insolvent in preference to any other claim." Afterwards defendant Henderson, "acting on his own behalf and as agent for the other defendants, under and in pursuance of the power and authority conferred upon him according to the terms of the agreement made as aforesaid, and for the purpose of carrying out the objects of the same, and none other," took from plaintiff, and plaintiff sold and delivered to him, certain supplies necessary for the purposes of the agreement and for the conduct of the business. For the unpaid part of the purchase price of these supplies judgment was demanded against all of the defendants, who were each and all sued in their individual capacities. To this complaint pleas by demurrer were presented, and the demurrers were sustained. Plaintiff declining to amend, judgment was entered for certain of the defendants, and plaintiff appeals.

There were many special grounds of objection raised by the demurrers of the different defendants, but every one tendered the issue of law that the complaint did not state facts sufficient to constitute a cause of action. While some of the special grounds of demurrer have been adverted to in the briefs, none have been argued, and upon consideration of them we do not think that any one of them was well taken. The general ground of demurrer is the only one which has received attention from counsel, and is the only one which, therefore, need be considered here. As to the special grounds of demurrer, suffice it to say that the complaint is sufficiently unambiguous, intelligible, and certain, and that, as will hereafter be considered, the defendants being all sued as joint principals, there is no misjoinder of parties defendant, and there is no objection to impleading the insolvent corporation under the allegation here made that it was one of the principals to the contract.

In support of the judgment, and of their argument that the complaint does not state facts sufficient to constitute a cause of action, respondents urge that the defendants, if liable at all, are liable only as partners, and that the facts pleaded show neither an actual partnership nor such a holding out to plaintiff as would estop defendants from denying a partnership liability. Again, they insist that it appears that the proceedings of the defendants ended in the order of court set out in the complaint, and that plaintiff must be held to have dealt upon the security of this order

alone, in which event he would have no right to a personal judgment against any of the defendants, but merely a right to a preferred lien or claim upon the assets of the insolvent; or, at the most, if personal liability attached, it would be to the assignee only, and the creditors and insolvent could not, therefore, be held by this proceeding. In the view which we take of the complaint, the question of partnership, actual or ostensible, becomes quite immaterial. The pleading sufficiently charges that the defendants, for their mutual interest and advantage, as joint principals, employed a common agent to conduct a certain business; that as such agent, and acting within the scope of his authority, he purchased upon behalf of the joint principals certain supplies of coal at an agreed price; that a part of this purchase price has not been paid, and that there is due and owing to plaintiff from defendants on account of this purchase a certain sum of money. The facts thus pleaded are certainly sufficient as a declaration in assumpsit, and state a cause of action against the defendants as joint principals. Under such a pleading no question of partnership, of sharing in profits, or engaging in business, need be considered. It is sufficient if the defendants have agreed, and by agreement have authorized their common agent to do certain things, and to incur liability in so doing. They become responsible for his acts within the scope of his authority. "It cannot be too carefully borne in mind," says Mr. Justice Lindley, "in all cases of this description, that a person who is neither a partner nor a quasi partner is liable on the general principles of agency for acts done by others with his authority, express or implied. If, therefore, directors, members of committees, managers of clubs, or any other persons not in partnership, pass resolutions that work shall be done or goods supplied, they authorize whatever may be done in pursuance of such resolutions; and they are the persons naturally looked to and *prima facie* liable to pay for what may be done. The question in these cases is simply one of agency, and the question of partnership or no partnership is immaterial." 1 Lindl. Partn. p. \*45.

Were these facts to which we have last adverted, and these only, pleaded in the complaint, it would require some boldness to contend that a cause of action was not stated, but it is argued that the effect of these averments is modified, and, indeed, nullified, by the further allegations showing that the defendants obtained an order of the insolvency court declaring it to be to the best interests of the insolvent and of its creditors that the business should be continued, and instructing the assignee so to do. But, for this order to avail respondents, it must appear that it supplanted the agreement, and that plaintiff contracted and furnished supplies upon its authority alone. This, however, plaintiff does not plead, nor is any such deduction fairly inferable from the complaint. To the contrary, the specific allegation is that Henderson pur-

chased coal "under and in pursuance of the authority conferred upon him according to the terms of the agreement made as aforesaid." An order of court is not an agreement between parties. If the contention is that plaintiff consented to be bound by the order in seeking payment for his supplies, it may at once be answered that this is affirmative matter of defense, and that the utmost that could be claimed in this regard from the language of the order itself is, not that plaintiff may not recover a personal judgment against defendants, but that he is given a preferred claim in the nature of a lien against the assets of the insolvent, which he ought to exhaust before personal recourse against defendants is sought. As for the order, it cannot be seen that it otherwise exerts any protective force in favor of defendants against plaintiff's action. It attempts to authorize the assignee to carry on the business of the insolvent corporation, but we have been unable to discover any authority in the insolvent act for so doing, and we have not been referred to any. The powers of the assignee in insolvency are expressly defined (Insolvent Act, § 21), and this power of continuing the business of the insolvent is not included among them. To the contrary, the act contemplates and declares—indeed, it is its main purpose—that the insolvent's estate shall be converted into money as speedily as possible (section 25), and ratably distributed among the creditors (section 31). To speculate with the assets by continuing the business is certainly foreign to these purposes. It may be—though upon this no expression of opinion is given—that the order would protect the assignee against any future demands of the consenting creditors. But this would result, not from the force of the order itself, but from the equitable principles of estoppel. But certainly the order would not avail to defeat the cause of action which plaintiff here pleads, nor to relieve the creditors, and cast the whole liability upon the assignee. The judgment is therefore reversed, and the cause remanded, with directions to the trial court to overrule the demurrers of the defendants, from the judgments in whose favor this appeal is prosecuted.

We concur: McFARLAND, J.; TEMPLE, J.

123 Cal. 293

Ex parte SILVIA. (Cr. 519.)

(Supreme Court of California. Jan. 17, 1899.)

HABEAS CORPUS — CONTEMPT — ORDER TO PAY MONEY—COURTS—JURISDICTION—HOMESTEAD—ALIMONY.

1. One cannot be imprisoned for contempt in failing to pay alimony which he is unable to pay.

2. One imprisoned for contempt for failing to pay alimony will be released on habeas corpus where the order for his imprisonment does not show that he was able to pay.

3. A husband cannot be compelled, by duress

of imprisonment, to sell or incumber his homestead to pay temporary alimony.

McFarland, J., dissenting.

In bank. Application for habeas corpus by John J. Silvia. Granted.

T. J. Geary, for petitioner. J. T. Rogers, for respondent.

PER CURIAM. The return to the writ of habeas corpus issued herein shows that the petitioner is held in custody under orders directing his imprisonment until he shall have paid a certain sum of money awarded as alimony pendente lite. When an alleged contempt consists in the failure to obey an order of court, the party charged with such failure may be imprisoned until he complies, provided he has the ability to comply. If it is not in his power to do what he has been commanded to do, he cannot be condemned to perpetual imprisonment for failure to perform an impossibility. This being so, and every court being, in contempt proceedings, a court of strictly limited jurisdiction, it is essential to the validity of a judgment directing the imprisonment of a person until he complies with an order of court that it should be found that he is able to comply. In this case the first order of imprisonment did contain a recital that the petitioner was able to pay the alimony in question, but upon a subsequent proceeding in habeas corpus before the same court, in which his ability to pay was the principal question to be determined, the order remanding him, and under which he is now held, fails to show that he is able to pay without selling or incumbering his homestead; and the question is presented whether a man can be compelled by duress of imprisonment to sell or incumber the homestead, which, under the constitution and laws of the state, is exempt from forced sale, except in certain enumerated cases, of which payment of temporary alimony is not one. In our opinion, this cannot be done. The prisoner having no means aside from his homestead, in a legal sense has not the ability to pay the alimony, and his continued imprisonment is unlawful. It is ordered that he be discharged from custody.

I dissent: McFARLAND, J.

Not participating: GAROUTTE, J.; HARRISON, J.

123 Cal. 297

PEOPLE v. TEIXEIRA. (Cr. 463.)

(Supreme Court of California. Jan. 19, 1899.)

ASSAULT—EVIDENCE—RES GESTÆ—INSTRUCTIONS.

1. Accused was in possession of hogs, which he held for trespass. The owner and one M. came up where the hogs were corralled, and there met accused. The owner alighted, and, after some words, accused assaulted him with a club, and immediately attempted to assault M., who drove away. *Held*, that evidence of the attempted assault. M. was admissible as *res gestæ*.



2. An instruction that if accused, at the time of the assault, was defending property lawfully intrusted to his care, such assault was justified, and the jury should acquit, is properly refused, since it places no limit on the amount of force which accused might use in defending the property in his possession.

Department 1. Appeal from superior court, Tulare county.

George Teixeira was convicted of an assault, and he appeals. Affirmed.

C. G. Lamberson and C. L. Russell, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. Defendant has been convicted of assault with intent to commit murder. The substantial facts giving rise to the charge are as follows: Defendant was in the possession of a certain lot of hogs, which he held for trespass. These hogs were the property of Williams. Williams and one Manuel, in a vehicle, drove up to the corral where the hogs were confined, and there met the defendant, Teixeira. Williams alighted from the vehicle. Words arose between him and the defendant, and thereupon he (Williams) was struck by a club in the hands of the defendant, who immediately thereafter also attempted to assault Manuel. Manuel at once drove away, although pursued some distance by defendant. Defendant is now charged and convicted of assaulting Williams with intent to commit murder. It may be conceded that the evidence we have stated is that most favorable to the support of the verdict of the jury. Counsel for defendant insist that the court improperly admitted the evidence bearing upon the attempted assault upon Manuel, but it is perfectly apparent that the assault upon Manuel was part of the same affray. It was essentially *res gestæ*. The fact that Williams was first a subject of the assault, rather than Manuel, is immaterial. The case would have been the same if the order of assault had been reversed. See *People v. Wong Ark*, 96 Cal. 129, 30 Pac. 1115, as to what constitutes *res gestæ*. The facts in *People v. Lane*, 100 Cal. 379, 34 Pac. 856, are not at all analogous. It was there held that the second shooting was no part of the first shooting, and therefore no part of the *res gestæ*.

It is claimed that the court committed error in allowing the prosecution to introduce some evidence in rebuttal which should have been introduced in chief. This is a matter resting largely in the discretion of the trial court. Certainly no abuse of that discretion is disclosed here.

Error is predicated upon the refusal of the court to give the following instruction: "If the defendant, at the time of the alleged assault, was engaged in the defense of property lawfully intrusted to his care, and which it was his duty or his right to maintain the possession of, the assault was justified, and you should acquit him." This instruction places no limit upon the amount of force

which the defendant might use in the defense of the property in his possession. In law he was only entitled to use that amount of force necessary for the protection of his property. The instruction fails to make the distinction. The correct principle of law was stated in another portion of the charge. There is no substantial merit in the appeal. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

123 Cal. 294

# PEOPLE v. OPIE. (Cr. 481.)

(Supreme Court of California. Jan. 19, 1899.)

LARCENY OF GOLD ORE—INDICTMENT—SUFFICIENCY—STATEMENTS OF CO-CONSPIRATOR.

1. Under St. 1871-72, p. 282, making the stealing of gold ore, whether severed from the earth or not, by the party charged, a crime, an information charging the stealing of such ore in the usual form in which grand larceny is charged, is sufficient.

2. Evidence as to the appearance, conduct, and declarations of a co-conspirator after the conspiracy is accomplished is inadmissible as against a conspirator.

Department 1. Appeal from superior court, Mariposa county.

William Opie was convicted of stealing gold ore, and he appeals. Reversed.

Maddux & Stonesifer and J. A. Adair, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. The defendant, Opie, was jointly charged with Edward Opie with the stealing of gold ore of the value of \$500. The information is in the usual form where grand larceny is charged, and it is now insisted that it is fatally defective. Under the case of *People v. Williams*, 35 Cal. 671,—the contention would have weight, but the legislature, with the view of modifying the law as there declared, passed an act found in St. 1871-72, p. 282. By that statute the stealing of gold ore, whether severed from the earth or not, by the party charged, is made a crime. And for that reason the information as here laid charges grand larceny.

Having arrived at the conclusion that a new trial must be ordered, we refrain from any detailed discussion as to the sufficiency of the evidence to support the verdict. We will only say that, while the evidence bearing upon the identification of the ore as to being ore taken from a certain mine is conflicting, still, looking at the case from all sides, we are not prepared to say that the jury were not justified in rendering a verdict against the defendant. William Opie and Edward Opie were jointly charged. William Opie was upon trial. Conceding the evidence established a conspiracy between these two parties to commit the crime of grand larceny, still the court committed error in allowing evidence to be introduced as to the appearance, the conduct,

and the declarations of Edward Ople, the defendant not upon trial. It is elementary law that such evidence as to a co-conspirator not upon trial partakes of the character of pure hearsay. This evidence was all directed towards matters occurring after the commission of the offense—after the conspiracy was accomplished and ended. There is not even the excuse for its admission that the defendant on trial was present at the time. This court has had occasion many times, and recently, to advert to the error of similar judicial action. *People v. Moore*, 45 Cal. 19; *People v. Dilwood*, 94 Cal. 89, 29 Pac. 420; *People v. Oldham*, 111 Cal. 652, 44 Pac. 312. Without question it may be said that this evidence was extremely prejudicial to defendant, and its admission demands a new trial of the case. The attorney general attempts to meet the force of these objections by saying that the conspiracy was not ended when the events occurred which this evidence disclosed. It is said the conspiracy was not ended because the property stolen had not yet been distributed between the thieves. This is no answer, for there is no evidence disclosing that it had not been distributed at the time; and, again, there is no evidence that it was ever intended that it should be distributed. In certain cases where the conspiracy discloses an intention to divide the property to be stolen, evidence of the acts and declarations of a co-conspirator taking place any time prior to the division are admitted. This is upon the theory that the conspiracy does not end until that time. The present case discloses nothing of that kind.

The instruction given as to the evidence of the expert bearing upon the value of the ore is dangerously near the border line dividing the law from the facts. The same may be said as to instruction No. 11. Upon the second trial these instructions should not be given to the jury.

For the foregoing reasons the judgment and order are reversed, and the cause remanded for a new trial.

We concur: HARRISON, J.; VANDYKE, J.

(123 Cal. 312)

MATTEUCCI et al. v. WHELAN. (S. F. 879.)  
(Supreme Court of California. Jan. 19, 1899.)

STATUTE OF FRAUDS—EXECUTION SALE OF CHATTELS—CHANGE OF POSSESSION.

Civ. Code, § 3440, making void sales of chattels against the seller's creditors, where there is no continued change of possession, does not apply where a purchase is made at an execution sale by a stranger to the proceedings, in view of Code Civ. Proc. § 698, providing that an execution sale conveys to the purchaser all the rights which the debtor had.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by F. Matteucci and another against

Richard I. Whelan. From a judgment for defendant, and an order denying a motion for new trial, plaintiffs appeal. Reversed.

A. D. Splivalo, for appellants. Reddy, Campbell & Metson, for respondent.

McFARLAND, J. This action was brought to recover certain personal property situated in a building used as a restaurant. The defendant was sheriff, and on the 2d day of November, 1895, attached the said property as the property of one M. Zaro, under a writ of attachment issued in an action commenced against Zaro by one Witt. The jury, under instruction of the court, returned a verdict for defendant, upon which judgment in defendant's favor was rendered. Plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

The pleadings, evidence, and the conduct of the trial, leave the case in an unfinished and confused condition. The learned judge of the court below well said that it was "a remarkable case." The two main points made by appellants for reversal are: (1) That the court erred in denying plaintiffs' motion for judgment upon the pleadings; and (2) that the court erred in instructing the jury to find a verdict for the defendant.

1. The court did not err in denying the motion for a judgment in favor of the plaintiffs on the pleadings. It is not necessary to determine whether or not the original answer sufficiently denies that at the time of the commencement of the action plaintiffs were the owners of, or entitled to the possession of, the property in question. The amended answer does contain such denial, and the court did not err in allowing the amended answer to be filed under the circumstances presented in the record.

2. On the 20th of June, 1895, the sheriff of the city and county of San Francisco, where the property involved was situated, by virtue of an execution issued in the case of one E. Isaacs against the said M. Zaro, sold the property in question here at public auction to the plaintiffs in this present action, and gave possession thereof to the plaintiffs, together with a certificate of sale thereof. At that time Zaro was using the property in conducting a restaurant at No. 161 Steuart street, in the city of San Francisco. Zaro had been acting as cook of the establishment, and had in his employ a man named Giovanni, whom the plaintiffs employed to take charge of the business, and they hired another man to assist him. The plaintiffs were merchants, and visited the restaurant about once a day, supplying it with groceries, wines, etc., and paying the bills incurred in the business. They also paid the rent of the premises for two months. They desired to sell the property as soon as they could find a purchaser; but, after conducting the business in this way for about two weeks, and finding that it did not pay, they told Zaro that if he could make



it pay he might take the business himself at his own expense until such time as the plaintiffs could find a purchaser. Under this agreement Zaro went into possession, and ran the business from June until the next November, when the attachment in the case of Witt v. Zaro was levied. This last attachment suit by Witt was for meat furnished Zaro a short time before the attachment was levied. The foregoing were substantially all the facts proven. There was no evidence at all connecting the plaintiffs with Isaacs, under whose judgment against Zaro the property was sold by the sheriff under execution in June. From all that appears, the plaintiffs were strangers to that suit and execution, and purchased at the public sheriff's sale as any other stranger would have had the right to do. It was with reference to this sale under the execution in June that the court said in the presence of the jury: "There is no evidence to show such an actual, continued, exclusive change of possession as is required under the statute of frauds," and instructed the jury, after the case had been submitted, as follows: "In this case I am satisfied that there was no such change of possession of this property as the law required; that this alleged sale and alleged delivery of possession of the restaurant was void as against this creditor represented by Mr. Witt, who commenced the attachment suit; and the defendant is entitled to a verdict at your hands. Therefore I direct you to find a verdict in this case in favor of the defendant. The clerk will give you the verdict, and you will select a foreman, who will sign the same." The court evidently went upon the theory that section 3440 of the Civil Code applies absolutely to public judicial sales made by a sheriff under an execution; but this principle does not apply to such a sale, at least where the purchaser is a stranger, and not a party in any way, to the proceeding. Section 698, Code Civ. Proc., provides that a sale under execution by an officer conveys to the purchaser all the right which the debtor had in the property on the day the execution was levied. It has been held in some cases, although the authorities are not uniform on the point, that, where the purchaser in such a case is the execution creditor, the rule applies; but we have been referred to no case where it has been applied to a purchaser who is a stranger to the suit. We have found no decision by this court in which the point was raised, except the case of O'Brien v. Chamberlain, 50 Cal. 285, and in that case the court expressly declined to decide the point. There the execution debtor was Moffitt, and the purchaser was O'Brien, and the court below refused to instruct the jury that, if Moffitt continued in the possession of the goods after the sale, they might take that fact into consideration in determining whether or not Moffitt or O'Brien was the real purchaser. This court reversed the judgment for error in not

giving the instruction, and said: "If the purchaser permits the property to remain in the possession of the judgment debtor, and allows him to exercise actual ownership over it after the sale, the jury is authorized to consider this circumstance in determining the question of actual fraud." That was clearly correct; and if, in the case at bar, it could be held that there was any question of actual fraud involved, it would have been proper enough for the court to have instructed the jury that in determining that question it could have considered the fact that Zaro was allowed to resume possession of the property; but under any circumstances it would not have been proper for the court to have instructed the jury that this fact alone, as matter of law, was determinative of an issue within the province of the jury. The cases on the point are largely cited by Mr. Freeman in his work on Executions, in his notes to paragraph 151. In the text he says that: "When the plaintiff in execution becomes the purchaser, some of the American cases have considered that the necessity for a change of possession is as imperative as though the sale were voluntary; but in England the question has been determined otherwise;" and that: "It seems to be almost universally conceded that when a stranger to the writ purchases and pays for property at an execution sale, the fact that he does not choose to remove it from the control of the defendant neither renders the sale fraudulent per se, nor, unless connected with other circumstances of a suspicious character, creates any presumption against its good faith." One of the quotations which he gives from adjudicated cases is as follows: "Retention of possession by the former owner of a chattel sold at sheriff's sale is not an index of fraud, because the sale is not the act of the person retaining, but of the law, and because a judicial sale, being conducted by the sworn officer of the court, shall be deemed fair till it is proved otherwise. It may, like a judgment, be shown to be collusive and fraudulent in fact, but the presumption of the law is favorable to it in the first instance. A chattel thus purchased, then, may safely be left in the possession of the former owner on any contract of bailment that the law allows in any other case." We are of opinion that the court erred in instructing the jury in this case to find a verdict for the defendant, and for this reason the judgment must be reversed. (In the testimony of one of the plaintiffs there was an incidental reference to some other attachment, but what it was does not appear, and no importance seems to have been attached to it.) In this case we decide merely the questions presented. If there be any other reasons why the judgment should have been for the respondent, they are not before us. The judgment and order appealed from are reversed.

We concur: TEMPLE, J.; HENSHAW, J.

123 Cal. 299

## PEOPLE v. JONES. (Cr. 440.)

(Supreme Court of California. Jan. 19, 1899.)

## PERJURY—AGENCY—IMMATERIAL ISSUE.

1. An averment that a conveyance from one person to another was negotiated by a third person, "acting as agent" for the first, does not raise the issue of agency, and hence a false sworn denial of the agency is not perjury.

2. In a suit to hold one as trustee of property alleged to have been conveyed to him as agent, it was not perjury for him to swear falsely that he was not an agent, but acted as the factor or intermediary of both parties, since the fact of agency did not affect his liability as trustee.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

R. A. Jones was indicted for perjury, and, from a judgment sustaining a demurrer to the indictment, the people appeal. Affirmed.

Atty. Gen. Fitzgerald, for the People. L. A. Wright and McDonald & McDonald, for respondent.

CHIPMAN, C. Indictment for perjury, to which a demurrer was sustained. Plaintiff appeals. It was averred in the indictment that a verified complaint was filed in the superior court of San Diego county, wherein one John Long was plaintiff, and R. A. Jones, the defendant here, was defendant. Long sought judgment that Jones held the legal title to certain lots in trust for Long, and to compel conveyance thereof. It was alleged in the indictment, as in Long's duly-verified complaint in his suit against Jones, that one Kampling and wife conveyed certain lots to Long, "pursuant to a sale of the said premises from said" Kampling and wife, "as vendors, to said John Long, as vendee, negotiated by the defendant, R. A. Jones, acting as the agent of said Kampling and wife; that, in consideration of part of the purchase price of said property so sold by said Kampling and wife, through said R. A. Jones, as their agent, to said John Long, \* \* \* the said Long conveyed to said R. A. Jones" certain lots, which Long was induced to do "upon the representation that he, the said Jones, would hold the same in trust" for said Kampling and wife, "and would convey the same to said Mrs. Kampling." It was alleged, also, that Kampling and wife were ignorant of the fact that Jones had procured said conveyance to be made to him by Long in part consideration of the selling price of the property conveyed by Kampling and wife to Long; that Jones paid no consideration for the lots deeded to him by Long, and concealed from Kampling and wife that he had acquired this property from Long; that Kampling and wife had conveyed to Long all their interest in the property conveyed to Jones by Long, and that the latter is now the owner thereof. The perjury complained of is in the verified answer filed by Jones to Long's complaint, in which the indictment charges that Jones deposed as follows: "That he, the said de-

fendant R. A. Jones, did not, in the property trade between B. Kampling and Emma Kampling and the plaintiff, the said John Long, \* \* \* act as agent for said B. Kampling and Emma Kampling, or either of them; that, in and about the exchange of the properties, \* \* \* he, the said defendant, acted as the factor, or intermediary of both parties,—that is to say, he brought the parties together, and let them do their own trading." Allegations follow that the action was tried on the issues formed by said complaint and answer, that defendant knew that said matter above set forth as in the answer was false, "and was matter material to the issue in said cause," etc. Respondent contends that, if the matter specifically set forth in the indictment as constituting the alleged perjury could in any event have been material, it affirmatively appears upon the face of the indictment that, in the complaint in the case of Long v. Jones, there was no direct allegation that Jones was the agent, or acted as the agent, of the Kamplings, but such agency is alleged by way of recital only, if alleged at all. If it was material to Long's complaint that he should clearly allege that Jones was the agent of the Kamplings, and as such agent negotiated the transfer alleged, the complaint, so far as set out in the indictment, failed to do so, and of course the indictment, which recites the allegations of the complaint, also failed in that particular. There was, therefore, no material issue tendered as to Jones' agency. Direct and positive averments of the fact cannot be supplied by any intendment or implication, and, where stated argumentatively, or by way of recital or inference, it is insufficient. *People v. Dunlap*, 113 Cal. 75, 45 Pac. 183. This rule applies even to civil actions. *Denver v. Burton*, 28 Cal. 549; *Stringer v. Davis*, 30 Cal. 318. But, aside from this view of the matter, we cannot regard the answer of defendant as constituting perjury. He averred that he did not act as agent of the Kamplings in the property trade referred to, but that he "acted as the factor or intermediary of both parties,—that is to say, he brought the parties together and let them do their own trading." It seems to us that defendant should have been permitted to make such an answer, without subjecting himself to the charge of perjury. Whether he was acting as "agent" or "intermediator" does not seem to be material to his liability as a trustee, because it was alleged that he took the title and agreed to hold the property "in trust for said Kampling and wife, and would convey the same to said Mrs. Emma Kampling," which does not appear to have been denied by defendant. He was equally liable as trustee, whether he acted as agent, factor, or mediator, under the allegations of the complaint, for he was charged with having received the title without consideration and as trustee. The false oath must be material to the issue, and therefore prejudicial to some



one; otherwise, however willful, it cannot be perjury. *People v. McDermott*, 8 Cal. 288. In the case just cited the defendant denied, by verified answer, the note sued upon, because, as he alleged, "he was confident that the words 'value received' were not in the note when he made it." The court held that the answer showed that the denial was made upon the ground that the words "value received" were not in the note he had signed. It was said that a very different question would have been presented if he had simply denied that the note was his. But he gave the reason for his denial which, if true, did not change the effect of the instrument; it was immaterial, and therefore did not prejudice the plaintiff. So, here, the denial of the agency, and admitting that he acted as factor or mediator, did not place Long in a worse, nor Jones in any better, position. "An agent is one who represents another, called the principal, in dealings with third persons." Civ. Code, § 2295. Section 2297 declares that "an agent for a particular act or transaction is called a special agent." It seems to us that defendant might deny that he was the "agent," and allege the exact relation in which he acted, because the allegation presented a question of mixed law and fact as to the kind of agency alleged, as well, also, whether there was any agency at all. The judgment should be affirmed.

I concur: HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

123 Cal. 373

PEOPLE v. PETE. (Cr. 450.)

(Supreme Court of California. Jan. 21, 1899.)  
CRIMINAL LAW—CROSS-EXAMINATION OF ACCUSED  
—IMPEACHMENT.

Defendant may be asked on cross-examination if he did not make certain statements at a certain place, though the inquiry as to the place tends to show that he had been arrested for another offense, where the inquiry was made to lay a foundation for impeaching him, by showing that he subsequently made other inconsistent statements.

Department 1. Appeal from superior court, Inyo county.

Pete (alias Little Pete) was convicted of larceny, and he appeals from the judgment and order denying his motion for new trial. Affirmed.

Ben H. Yandell and Richard S. Miner, for appellant. Atty. Gen. Fitzgerald, for the People.

PER CURIAM. Defendant prosecutes this appeal from a judgment and order denying his motion for a new trial, he having been convicted of the crime of grand larceny in stealing a horse. Errors are insisted upon in the overruling by the court of objections to

certain questions asked the defendant upon cross-examination by the district attorney, when the defendant was testifying in his own behalf. These questions were asked for the purpose of laying a foundation in order that the defendant might be impeached by showing that he had made inconsistent statements at other times. It has been held often that, when a party attempts to impeach a witness in this way, the witness is entitled to have the time, place, and parties present specified with particularity, in order that he may answer with a recollection refreshed as to the conditions surrounding him at the time it is claimed the statements were made. This is a salutary rule of law, and should be followed in all cases. It is now claimed that the questions addressed to the witness, as bearing upon the place where and the parties present when the statements were made, tended to show the defendant guilty of another offense. If the question or questions were asked in bad faith,—that is, were asked simply to get before the jury the imputation that defendant had been arrested upon a previous occasion for some other offense,—then, certainly, the practice was most reprehensible. But we see nothing to indicate such a purpose; and in view of the rule of law to which we have alluded, and which is a rule of law favorable to the witness, and strictly enforced in his behalf, we cannot say there was reversible error in the ruling of the court in allowing the questions. The same suggestions apply to the objections made to the testimony of the sheriff, who subsequently took the witness stand, and testified to the inconsistent statements made by the defendant. For the foregoing reasons, the judgment and order are affirmed.

123 Cal. 231

LOCKE v. KLUNKER. (Sac. 397.)

(Supreme Court of California. Dec. 31, 1898.)

MORTGAGES—FORECLOSURE—RECEIVER—GROWING CROPS—COMPLAINT—ACTION BY ADMINISTRATOR  
—NONPAYMENT—EVIDENCE—FINDINGS—RECEIVER.

1. A mortgage on land not expressly mortgaging rents and profits gives the mortgagee no right to growing crops gathered before the decree of foreclosure.

2. A receiver appointed in a suit to foreclose a mortgage on lands, not expressly mortgaging the rents and profits, does not, under Code Civ. Proc. § 564, subd. 2 (authorizing appointment of receiver where mortgaged property is in danger of being lost), acquire any right to growing crops gathered before the decree of foreclosure.

3. Complaint in action to foreclose a mortgage on lands, not expressly mortgaging the rents and profits, does not show cause for appointment of receiver, by mere allegation that the mortgaged property is probably insufficient to pay the mortgage debt.

4. Complaint in action by administratrix is not demurrable on the ground that it appears thereby that she has not legal capacity to sue, merely because it does not sufficiently appear therefrom that she has capacity to sue; but such defect must be taken advantage of by answer.

5. Complaint in action by administratrix to foreclose mortgage need not aver that she is the

owner and holder of the note and mortgage, but it is enough that they are in her possession as administratrix, and are offered in evidence, and are on their face made to her intestate.

6. Introduction by an administratrix, in an action to foreclose a mortgage, of the note with indorsements thereon, is in violation of Code Civ. Proc. § 1880, subd. 3, relating to transactions with decedent.

7. Possession of note by the payee's administratrix is evidence of nonpayment.

8. Findings of fact may be embodied in a decree.

9. Though a receiver was improperly empowered in a mortgage foreclosure suit to harvest crops on the mortgaged lands, and was not entitled to the same, he should be allowed proper expenses incurred by him therefor.

In bank. Appeal from superior court, San Joaquin county.

Action by Susan L. Locke, administratrix of George L. Locke, deceased, against Amelia Klunker, administratrix of Ludwig Teuber, deceased. Decree and order for plaintiff. Defendant appeals. Modified.

Minor & Ashley, for appellant. Elliott & Elliott, for respondent.

PER CURIAM. When this case was in department, the opinion hereto annexed was prepared by Mr. Commissioner CHIPMAN. After due consideration of the case, we are satisfied with that opinion, and with the conclusions therein reached, and that the judgment of the court below should be modified in accordance with the directions of said opinion. Therefore, for the reasons given in that opinion, the decree of foreclosure and the order settling the receiver's account are affirmed, and the court is directed to cause the net proceeds of the crops in the hands of the receiver to be paid to the defendant administratrix.

CHIPMAN, C. This is an action for the foreclosure of a mortgage. The pleadings are verified. The complaint was filed June 19, 1896, and alleged, among other things, that the entire estate of which defendant was administratrix, including the mortgaged premises, was appraised at a value less than the mortgage debt, and that said mortgaged "premises are inadequate for the satisfaction of said indebtedness, and will not probably sell for enough to satisfy the decree in this case." The complaint prayed for the appointment of a receiver "to take charge of said premises and its income, rents, and profits, with authority to harvest and sell the crops so harvested, and the same be applied on said indebtedness." Upon filing the complaint, the court made an ex parte order appointing a receiver as prayed for. Defendant demurred to the complaint in due time, and on July 6th moved the court to vacate the appointment of the receiver, upon the ground that the court had no jurisdiction to make the order, and that the facts do not establish a proper case for such appointment. The court denied the motion. The motion of defendant was heard upon an uncontroverted affidavit, from which

it appeared, among other things, that the mortgage did not contain any provision by which the rents, issues, and profits of the premises were mortgaged; nor did the mortgage provide for the appointment of a receiver.

It appeared from the affidavit that the only real property belonging to defendant estate is the mortgaged property; that defendant's intestate died April 5, 1896, leaving as his sole heir a minor son; that defendant was duly appointed administratrix May 1st, and on June 8th she petitioned to have the said real property set apart as a homestead for the benefit of the minor, which was done by order of the court of June 22, 1896. It also appeared in the affidavit that the defendant administratrix and the minor were in possession of the land at the hearing of the motion, and that on June 20, 1896, the receiver claimed possession. A bill of exceptions was duly settled August 12, 1896, showing the foregoing proceedings. August 22, 1896, plaintiff filed a second amended complaint, making the minor child a party defendant, to which the defendants in due time demurred and answered. It further appears by a second bill of exceptions that on September 7, 1896, defendants again moved the court to revoke and set aside the order appointing the receiver, and to discharge him, upon the grounds stated in the first motion, and upon the same affidavit, and upon the demurrer and answer to the second amended complaint, and upon the further grounds that the court had made no new order of appointment after the complaint was amended, and that the minor child was and is the owner of the crops. The court denied the motion. The cause was heard November 6, 1896, and the court embodied its findings of fact in the decree which it entered, as prayed for by plaintiff, on November 14, 1896. An amended decree was entered ex parte on December 8, 1896, including some portion of the mortgaged land omitted from the first decree. A third bill of exceptions was duly settled, setting forth the proceedings at the trial, and defendant's motion for nonsuit at the close of plaintiff's evidence, and motion for a new trial, and its grounds. A fourth bill of exceptions was duly settled, setting forth that the report and account of the receiver came on to be heard April 17, 1897, together with plaintiff's motion for an order directing the receiver to pay to plaintiff the moneys in his hands, the proceeds of the crops grown on the mortgaged premises; that defendants still insisted upon their objections to the appointment of the receiver, and objected to the hearing of the account and the granting of plaintiff's motion, and claimed that the moneys in the hands of the receiver should be paid to defendant administratrix and guardian; that the receiver was acting without authority of law, and the court had no jurisdiction to hear or to settle the account, because the appointment was void; that the account showed that the receiver had



received from the rents and profits of the mortgaged property \$1,173.69, and had expended in harvesting the crops and other ways \$401.77, leaving a balance in his hands of \$771.92; that the returns of sales under foreclosure showed a deficiency of \$1,019.74; that the court settled the receiver's account as rendered, and on April 20, 1897, at an adjourned hearing of plaintiff's motion, the court made an order directing the receiver to apply the moneys in his hands on the deficiency judgment of plaintiff. The appeal is from the decree of foreclosure as first rendered, and also from the order amending the decree; also, from the various orders of the court set forth in the various bills of exceptions, which need not be recapitulated here.

1. The point particularly relied upon by appellants is that, under subdivision 2, § 564, Code Civ. Proc., the court cannot, by the appointment of a receiver, take from the mortgagor, or from any person claiming under him, the rents, issues, and profits of the mortgaged premises, and apply them to the mortgage debt, unless the mortgage so provides in terms. Quite recently the point has been under examination in this court, and the previous cases reviewed. *Bank of Woodland v. Heron*, 120 Cal. 614, 52 Pac. 1006. The subject was also fully discussed in *Simpson v. Ferguson*, 112 Cal. 180, 40 Pac. 104, 44 Pac. 484. Upon the authority of these cases and the principles therein enunciated, we think the trial court erred in directing the proceeds of the growing crops of the mortgaged premises to be applied to the deficiency judgment. In the *Bank of Woodland* Case it appeared that an assignment by bill of sale had been made of the crops before the assignor or the assignee knew of the order appointing a receiver, and that the rights of third persons had intervened; and it also appeared that the receiver never had actual possession of the crops; but we think that the principle upon which the decision rests, and the reasons advanced in support of the conclusions reached, are decisive of the rights of appellants in this case, although the facts differ somewhat in the two cases.

Defendant administratrix entered upon her duties as such May 1, 1896, and was appointed guardian of the minor's person and estate April 10, 1896. She was in possession of the property at the time the receiver was appointed, and remained in possession of the real property thereafter. It does not appear when the receiver took possession of the crops, but presumably at harvest, which as to the barley may have been before, but as to the wheat must have been after, the court had set apart the real property as a homestead on June 22d. The administratrix was entitled to the possession of the crops for the purposes of administration, payment of debts of deceased, and other administrative purposes. But, apart from these facts, we do not think the appointment and the subsequent possession of the receiver created any

lien on the crops, or authorized the application of the proceeds to plaintiff's deficiency judgment. We are not aware that this court has ever held in any case, where the mortgage did not purport to mortgage the rents, issues, and profits, that the growing crops of the mortgagor may be taken possession of by a receiver, under section 564, supra, and the proceeds applied to any deficiency there may be upon the foreclosure sale of the mortgaged premises. In *Montgomery v. Merrill*, 65 Cal. 432, 4 Pac. 414, the rents and profits were expressly mortgaged, and the crops were held to be applicable to the deficiency judgment, there being no intervening rights of third parties by sale or chattel mortgage. But it was held in *Simpson v. Ferguson*, supra, that the manner of mortgaging growing crops, under section 2955, and following, of the Civil Code, is an exclusive mode, and covers every case of a mortgage given upon that class of property. It was further held that "while it is perfectly true that growing crops may be either personal or real property, according to the circumstances, and while \* \* \* a mortgage of the land gives a lien upon everything that would pass by a grant of the land, which includes crops growing thereon, it is, nevertheless, well established that such lien, so far as the growing crops are concerned, is limited in its effect to the crops growing upon and unsevered from the land at the time of foreclosure. It does not vest the mortgagee with a right to the crops grown intermediate the giving of the mortgage and the foreclosure thereof. Until the latter event, where, as in this state, the mortgage creates no estate in the mortgagee, but confers only a lien upon the property, the mortgagor is entitled to such crops, with the same absolute right and dominion over them as if the mortgage did not exist." In that case the mortgage was expressly made a lien upon the rents, issues, and profits; but, before suit to foreclose, the mortgagor had given a chattel mortgage on the growing crops; but it was held that "the mortgagor being in possession of the land, and entitled as of right to the crops grown thereon, it was competent for him to sell or mortgage, or otherwise dispose of them, and convey a good title thereto, as against the mortgagee of the land or his assigns, at any time prior to the foreclosure of the latter's mortgage."

In the case at bar the mortgagee had no lien upon the crops, by the express terms of his mortgage. The decree of foreclosure was not entered until December 8, 1896, long after the crops were gathered, and the deficiency was not ascertained until upon sale under the decree. The authority of the receiver, and the power of the court over the crops, even where the mortgage undertakes to subject the rents, issues, and profits to the mortgage, it is thus seen, are very much circumscribed under our law. Where the mortgage is silent upon the subject, the pow-

er given the court or receiver must come alone from section 564, Code Civ. Proc.; and upon this section alone must respondent rely. In the recent *Bank of Woodland Case*, supra, the question of the right of the receiver to hold the crops by virtue of his appointment alone, and to apply their proceeds to the deficiency judgment after having reduced them to possession, and whether such possession under the appointment as receiver gave the lien, received some attention. Speaking of the effect of the appointment being treated as a sequestration of the property mentioned in the order of appointment, it was said: "The cases in which that principle was declared are mainly cases in which complainants, at whose instance the receivers were appointed, had some estate in, or some right to, or lien upon, the property involved, prior to and independent of the appointment of the receiver. \* \* \* In all such cases the complainants have estates or interests in the property, or liens thereon, independent of, and not created by, the receivership, and the receiver is appointed to preserve and enforce their pre-existing rights. But in the case at bar the appellant, under his mortgage contract (it did not purport to mortgage the rents, issues, and profits) and the laws of this state, had no estate or interest in or lien upon the growing crops prior to and independent of the receivership; and the rule contended for by him as above stated should not be extended to such a case."

We do not think it was ever intended by section 564, supra, to create a new lien by the mere appointment of a receiver, in a case like the present one; or that, when appointed for any proper purpose (as he may be to restrain the commission of waste, for example), he may be empowered to take possession of the crops of the mortgagor, and apply them to the mortgage debt; nor do we think that, having taken possession under such appointment, any lien is thereby acquired for any such purposes. Any other view would, we think, in effect create a new contract for the parties, and give a lien upon property not included in the mortgage. As there was no showing by the plaintiff or allegation in the complaint, except that the mortgaged property was probably insufficient to pay the mortgage debt, there was no sufficient cause for the appointment of a receiver; and, as the receiver had no authority to take possession of and harvest the crops, it follows that the court had no authority to apply the proceeds of the sale of the crops to the payment of the deficiency judgment. The administrator was entitled to these proceeds, as property of the estate. The deficiency judgment was payable only in due course of administration, and gave no lien upon the crops or their proceeds. The unpaid balance of plaintiff's judgment became the subject of a claim against the estate, and could be paid only as any other claim upon proper proceedings.

2. The complaint was twice amended, and

demurrers were interposed. It is objected to the second amended complaint that it did not allege facts sufficient to constitute a cause of action, and that it appears thereby that plaintiff had not legal capacity to sue, and failed to show that plaintiff was the owner and holder of the note and mortgage. It was alleged in the second amended complaint, and not denied in the answer, that the note and mortgage were executed by defendant's intestate to George L. Locke, plaintiff's intestate; that the latter died December 9, 1895; and that, "after due proceedings had in this court, this plaintiff was, by order of this court duly given, made, and entered, appointed administratrix of the estate of the said George L. Locke, deceased, and thereafter duly qualified as such administratrix, by taking the oath of office, and giving bonds, as required by law." It is not enough that it does not sufficiently appear from the complaint that plaintiff had capacity to sue. It must appear therefrom that she has not such legal capacity. The omission can only be taken advantage of by answer. *District No. 110 v. Feck*, 60 Cal. 405; *Miller v. Luco*, 80 Cal. 258, 22 Pac. 195; *Wilhoit v. Cunningham*, 87 Cal. 453, 25 Pac. 675.

There is nothing in the point that plaintiff is not alleged to be the owner and holder of the note and mortgage. On their face they are made to plaintiff's intestate, and were in plaintiff's possession as administratrix, and were offered in evidence. An averment that plaintiff was the owner and holder was unnecessary. *Bank v. Boyd*, 99 Cal. 604, 34 Pac. 337.

3. Appellant claims that the motion for a new trial should have prevailed:

(a) Because there was no evidence of nonpayment other than the promissory note itself, which was not identified, with its indorsements of payments, and that introducing the note was making a witness of plaintiff's intestate; citing Code Civ. Proc. § 1880, subd. 3. This section of the Code does not apply.

(b) The denial of nonpayment is made on want of information to answer the allegation of nonpayment. The evidence of nonpayment was the introduction of the note, on which certain payments were indorsed, as shown in the complaint. The objection made to this evidence was that it was incompetent, irrelevant, and immaterial, because it was not shown that the indorsements were made by authority of any one, or that they were "all the indorsements that should be upon the note, and were not proper evidence of what the payments upon the note were." The court found that the allegation of nonpayment in the complaint was true. There was, we think, evidence of nonpayment,—enough to support the finding. Possession of the note by plaintiff was some evidence of nonpayment.

4. It is complained that the findings of fact were embodied in the decree. This was permissible (*Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868); and we think the findings support



the judgment of foreclosure. The account of the receiver shows that the expenses incurred by him all related to the harvesting, protection, and sale of the grain; nothing is charged for his services. While we have held that the court had no authority to empower him to do this work, we cannot agree with appellant that he should pay over the entire proceeds of the crop. There is no suggestion that he failed to harvest the crops economically, and with as little cost to the defendant estate as the administratrix could have done. He was acting, at least, under color of authority. It was held in *Staples v. May*, 87 Cal. 178, 25 Pac. 346, where a receiver in a foreclosure proceeding had mined ores on ground not the subject of the mortgage, that, as a trespasser, he was liable only for the net proceeds of the ore extracted. We do not think the receiver in this case should be held to any greater liability.

Our conclusion is that the decree foreclosing the mortgage should be affirmed; that the order settling the receiver's account should also be affirmed; but that the order directing the net proceeds of the crops to be applied to the payment of plaintiff's deficiency judgment should be modified so as to direct that such proceeds be turned over to defendant administratrix, as assets of the estate.

We concur: HAYNES, C.; BELCHER, C.

123 Cal. 219

**TOMPKINS et al. v. MONTGOMERY.**  
(S. F. 806.)

(Supreme Court of California. Dec. 31, 1898.)

INSTRUCTIONS—CONTINUANCE—AFFIDAVIT.

1. A requested instruction that if the jury found that J., "by reason of having hired the team, wagon, and driver from defendant, had become, as it were, the owner \* \* \* for that day," defendant was not responsible for injuries received by negligence of driver, is properly refused, because submitting to the jury a question of law.

2. An instruction directing a verdict for defendant if the jury find a certain fact, of which there is no evidence, is properly denied.

3. Statement of defendant, in affidavit for continuance on ground of absent witness, that he has not known the address of the witness for the past six weeks or two months, implies that he had known it up to that time, and that he did know it at the time the case was set for trial, it having been set for trial more than two months before the day affidavit was made; so that continuance is properly denied for want of diligence, it not appearing that he had made any effort to secure the testimony of the witness.

Department 1. Appeal from superior court, Alameda county.

Action by Emma A. Tompkins and husband against Montgomery. Judgment for plaintiffs. Defendant appeals. Affirmed.

For former opinion, see 47 Pac. 1006.

E. M. Gibson and Welles Whitmore, for appellant. A. A. Moore, for respondents.

HARRISON, J. The defendant is the proprietor of an hotel and livery stable at Cazadero, and on the 1st of June, 1895, the plaintiff Emma A. Tompkins was a guest at the hotel. On that day a party consisting of 10 persons started to go from Cazadero to Ft. Ross, in a vehicle drawn by four horses, which were driven by an employé of the defendant; and after proceeding a few miles the vehicle was overturned, and the plaintiff thrown out upon the ground and seriously injured. The present action was brought to recover damages for the injury, alleging that it was caused by reason of the negligence of the defendant's servant. Judgment was rendered in favor of the plaintiff for \$13,500. The present appeal is from an order denying a new trial.

Whether the vehicle was overturned by reason of the negligence of the driver, as well as the extent of the injury, and the amount of compensation to be awarded the plaintiff, were matters which were determined by the jury upon the evidence before them, and their verdict thereon must be accepted as final. The amount of the verdict cannot be held as excessive, in view of the injury shown to have been sustained.

The main ground of the defense before the jury was that the team had been hired from the defendant by one Joy, and that it was under his direction and control in making the trip from Cazadero to Ft. Ross, and, consequently, that the defendant was not liable for the negligence of the driver. The evidence before the jury tended to show that a day or two before the accident a party of guests at the hotel was made up for the purpose of taking this drive, and that Mr. Joy, who was to be one of the party, went to the office of the hotel the afternoon before the accident, and made arrangements for the team for this day, and was told that the charge therefor would be \$15. Mr. Joy did not get up the party, nor does it appear that any one went at his request or upon his invitation. When he engaged the team he said nothing about the payment for it, or by whom it was to be made, nor did he say anything to any of the party that he was to be paid by them. Before going on the trip, Mrs. Tompkins inquired of Mr. Ward, who was the defendant's general manager, what the fare for the trip would be, and was told by him that it would be \$2. Others also testified that Mr. Ward told them that the fare for the trip would be \$2. No entry was made upon the defendant's books of the hiring of the team by Joy, and, owing to the accident, no charge was made to any one for the team, or for the fare of the trip. The driver was furnished by the hotel, and was the person usually employed by the defendant in that capacity. The court instructed the jury that, if they found from the evidence that at the date of the accident the team and the driver were under the control and management of Joy, the defendant was not liable to the plaintiff. The verdict which was rendered necessarily implies that, upon

the evidence before the jury, they found that it was not under his control or management, and this conclusion must be accepted as correct.

The defendant requested the court to instruct the jury that if they found that Joy, "by reason of having hired the team, wagon, and driver from defendant, had become, as it were, the owner or proprietor of said team, wagon, and driver for that day," the defendant was not responsible. The court did not err in refusing to give this instruction. It would have been to leave to the jury to determine a proposition of law, rather than a fact. If the defendant had requested the court to instruct the jury, as a proposition of law, that Joy had become the owner of the team and driver by reason of having hired them, the court would have refused it, and it was justified in refusing an instruction which depended upon such a finding by the jury. The defendant cannot complain that the court gave the instruction with the modification "that the team and conveyance and driver were under the control of Joy." Neither can he complain of a similar modification in the other instruction which was requested by him.

The court properly refused to instruct the jury that the defendant was not liable if they should find from the evidence that the plaintiff was not thrown from the wagon, but jumped therefrom. There was no evidence before the jury which would have authorized them to find that she jumped from the wagon.

When the case was called for trial the defendant asked for a continuance upon the ground of an absent witness, and filed his affidavit in support thereof, but the court denied his motion. The statement in his affidavit that he had not known the address of the witness for the past six weeks or two months implied that he had known it up to that time, and that he did know it at the time the case was set for trial. The case had been set for trial upon that day more than two months previous, and it did not appear that the defendant had made any effort to secure the testimony of this witness. The court properly refused a continuance upon the ground of this want of diligence on the part of the defendant.

The record is quite voluminous and contains many exceptions which were taken at the trial to the rulings of the court upon the admission of testimony; but, upon a careful examination, we find no error therein of which the defendant can complain, or any ruling that requires an extended consideration. Upon an appeal from an order granting or denying a new trial, the sufficiency of the complaint, or the correctness of the ruling in overruling a demurrer thereto, cannot be considered. *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

123 Cal. 303

## PEOPLE v. BURGLE. (Cr. 438.)

(Supreme Court of California. Jan. 19, 1899.)

ASSAULT WITH INTENT TO KILL — INSANITY — INSTRUCTIONS—MOTION IN ARREST OF JUDGMENT.

1. One accused of assault with intent to murder, who interposed a defense of insanity, is not prejudiced by the failure to define malice to the jury as defined by Pen. Code, § 188.

2. Nor was accused prejudiced by the giving of an instruction which left the condition of defendant's mind at the time of committing the assault out of consideration, where the court had, in other portions of the charge repeatedly told the jury that, if accused was insane in committing the assault, he was incapable of forming the necessary intent.

3. An instruction that, where accused pleads insanity, "we hear everything that he says, consider everything that he does, we observe his conduct on the stand, we don't check him in stating his testimony, because one of the purposes is to see whether he is a sane man or not," is not prejudicial as authorizing the jury to infer that the issue was accused's insanity at the time of trial, and not when committing the assault, where the jury had in various forms been told that the question was whether or not accused was insane at the time of committing the crime.

4. On the issue of the insanity of one charged with assault with intent to commit murder, testimony was received to show that the prosecuting witness had oppressed accused to such a degree in financial transactions as to drive him to insanity. The jury was instructed that this testimony was admitted solely on the question of insanity, and was irrelevant for any other purposes, and then charged that, where a man pleads insanity, his testimony is heard, his acts are considered, his conduct on the stand observed, and he is not checked in testifying, because one of the purposes is to ascertain whether he is sane or not, but, if the jury should "conclude that he is a sane man, \* \* \* those things drop out of the case." *Held*, that the instruction was not erroneous as directing the jury to disregard accused's testimony entirely if they found him sane, the words "those things" referring solely to the evidence admitted on the issue of insanity.

5. It is not prejudicial to refuse a proper instruction, the principle of which is embodied in other parts of the charge.

6. An order denying a motion in arrest of judgment is not appealable.

Department 2. Appeal from superior court, city and county of San Francisco.

Anthony Burgle was convicted of an assault with intent to commit murder, and from the judgment, from an order denying a new trial, and from an order denying a motion in arrest of judgment, he appeals. Appeal from order denying the motion in arrest of judgment dismissed, and judgment and order denying a new trial affirmed.

Walter Gallagher and J. S. Guilfoyle, Jr., for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. Defendant was convicted of an assault with intent to commit murder, alleged to have been committed upon the person of one Sigmund L. Braverman; and he appeals from the judgment, from an order denying a motion for new trial, and also from an order denying his motion in arrest of judgment.

Appellant's contentions for a reversal are



all based upon asserted errors of the court committed in giving and refusing instructions to the jury. The evidence, beyond all doubt, warranted the jury in finding that the appellant assaulted the prosecuting witness with intent to murder him, unless the appellant, at the time of the assault, was insane; and therefore the only rulings of the court in the matter of instructing the jury which are of much significance in the case are those touching the subject of insanity. There are, however, some exceptions to instructions given by the court touching the general nature of an assault with intent to commit murder. In its general charge to the jury the court correctly and very fully stated the nature of the crime of assault with intent to commit murder, and informed them that the defendant should not be convicted of the crime charged, unless, at the time of the assault, he intended to kill the prosecuting witness under such circumstances that, if he had killed him, the homicide would have been murder; and the court, having described the crime of murder, used the following language: "In defining the crime of murder, which crime the defendant is alleged to have attempted to commit, I have told you that it involves the element of malice aforethought. The word 'malice' imports a wish to vex, annoy, or injure another person, or an intent to do a wrongful act." The appellant objects to the foregoing language, because it does not contain that description of express and implied malice which is to be found in section 188 of the Penal Code. It is doubtful, however, whether the language of section 188 should be given to the jury at all in a case of assault with intent to commit murder. It seems to have been intimated in *People v. Wallace*, 101 Cal. 285, 35 Pac. 862, that said section should not be given in a case like the one at bar, because implied malice is not equivalent to that actual intent which is essential to the crime of assault with intent to commit murder. See, also, on this subject, *People v. Mize*, 80 Cal. 42, 22 Pac. 80. The appellant did not ask the court to instruct the jury in the language of section 188; and, at all events, it is apparent that appellant was not injured by the fact that section 188 was not given to the jury as an instruction. Another sentence of the court in its general charge to the jury upon the subject of intent is objected to by appellant, not because it does not, on its face, state the law correctly if applied to a sane man, but that it leaves out the consideration of the soundness or unsoundness of defendant's mind at the time of the assault. But the court had over and over again told the jury that, if the appellant was insane at the time of the assault, he was incapable of forming the intent necessary to constitute the crime; and, considering all that the court had said upon that subject, the jury could not have been led astray by the omission to restate the matter again in

the language to which exception was taken.

The appellant particularly objects to the following language, which constitutes the first part of a sentence: "Now, a man comes and pleads that he was insane. We hear everything that he says; consider everything that he does; we observe his conduct on the stand; we don't check him in stating his testimony, because one of the purposes is to see whether he is a sane man or not." The latter part of this sentence is as follows: "But if you have concluded or shall conclude that he is a sane man, of course those things drop out of the case, and they form neither a defense nor a palliation against a crime, if the crime is proven to have been committed." The charge was an oral one, and the first half of the sentence seems to be one of those remarks which a person engaged in oral conversation is often led to make without any very accurate notion of what he is about to say. There is no great pith or moment to it; its meaning and intent are somewhat obscure; but we do not think that the jury could have given it any meaning prejudicial to the appellant. The appellant contends that the jury might have inferred from the language that the main question was whether or not the appellant was a sane man at the time he was on the witness stand, and not whether or not he was a sane man at the time of the assault; but the court had repeatedly told the jury in various forms that as to the matter of insanity the question was whether or not the appellant was insane at the time of the assault, and the language used by the court cannot be fairly construed as meaning anything more than that the appearance of the appellant at the time of the trial might be considered as a circumstance, however slight, in determining the defendant's sanity at the time of the alleged committing of the offense. It is also contended by appellant that the last half of the sentence told the jury that, if they found that the appellant was sane, then they were to disregard his testimony altogether. But this contention cannot be maintained. A great deal of testimony had been admitted tending to show that the prosecuting witness had oppressed the appellant to a great degree in financial transactions,—this testimony having been admitted for the purpose of showing that these financial transactions had tended to drive appellant to insanity. Immediately prior to the use of the language above quoted, and to which exception was taken, the court had instructed the jury that this testimony as to the financial transactions was admitted solely upon the question of insanity, and that it was not relevant for any other purpose, and the court was clearly referring to that matter when it said that, if the jury should conclude that the appellant was sane, then "those things drop out of the case,"—that is, those things which had been admitted solely as tending to show appellant's insanity. There

was no error in refusing to give instruction No. 1 asked by appellant. It is doubtful whether the instruction upon its face is clearly correct; but the principle involved was, we think, clearly stated in other instructions of the court. The appeal from the order denying the motion in arrest of judgment is dismissed, that order not being appealable. The judgment and order denying a new trial are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

123 Cal. 316

DENNING v. STATE. (S. F. 1,379.)

(Supreme Court of California. Jan. 19, 1899.)

CLAIMS AGAINST STATE — HARBOR COMMISSIONERS  
— GOVERNMENTAL FUNCTIONS — INJURIES  
TO EMPLOYEES.

1. St. 1893, p. 57, § 1, authorizing one to sue the state for a claim not allowed by the board of examiners, does not create any liability or cause of action which had not previously existed.

2. St. 1889, p. 380, authorizing the state harbor commissioners to collect sufficient tolls to enable them to control San Francisco Bay, does not make their duties purely administrative, enabling their employé to recover of the state for injuries occasioned by their negligence.

3. Though the harbor commissioners exercise administrative functions while acting as wharfingers, yet their duty of extinguishing fires in wharves is purely governmental, and hence one employed by them to extinguish such fires cannot recover of the state for an injury caused by their negligence.

4. An action by an employé of the state harbor commissioners, for injuries received occasioned by their alleged negligence, is an action of tort, and not of contract.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by John W. Denning against the state of California. From a judgment for plaintiff, and an order denying a motion for new trial, defendant appeals. Reversed.

Atty. Gen. Fitzgerald, for the State. R. R. Bigelow, Henley & Costello, and Edw. J. Banning, for respondent.

PER CURIAM. The plaintiff, Denning, was employed by the board of state harbor commissioners as a night deck hand upon a tugboat—the Governor Irwin—belonging to the state and used by said board. Among other duties of the plaintiff as a deck hand, it is alleged he was required to place lights on the top of the cabin on each side, and for this purpose climbed a ladder eight or nine feet high, reaching from the deck to the top of the cabin; that the ladder was insecurely fastened, and became detached at one side, and caused the plaintiff to fall, whereby he sustained serious injuries, and to recover damages therefor he brought this action, alleging that it was caused by the negligence of the defendant. The defendant demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. It was overruled by the court, and the defendant answered. A jury trial was

had, and the plaintiff had judgment, from which, and from an order denying a new trial, the defendant appeals.

The most important question in the case is whether the state is liable for the negligence of the board of state harbor commissioners, whereby the plaintiff, an employé, it is alleged, was injured. This question was raised by the defendant by demurrer to the complaint, by motion for nonsuit, by a request to instruct the jury, and by a specification that the evidence does not justify the verdict. The complaint alleges that the plaintiff was employed by said board "as a night deck hand on a steam towboat, owned by the state of California, and operated by it in and upon the waters of the Bay of San Francisco, through its servants, the said board of state harbor commissioners"; but for what specific purpose it was so operated is not alleged. Upon this subject, however, there was some evidence. Capt. Farley, who was in the immediate command of the boat at and before the time of the accident, testified: "There are two boats, and three crews. The day crew do the towing and attend fires, in case fire comes in, and the night crew does nothing but attend fire duty at night, except every third Sunday and every third holiday the night crew is on in the day time." And the plaintiff testified: "I was night hand on that boat, in case of fire alarms,"—and again: "The boat was head on at the time the accident happened, lying at the side of a wharf, ready for action when the alarm came in. The boat was tied up to a little dock at the end of Mission street."

The point made by appellant in the several ways above mentioned is that the boat was used as a governmental agency in promoting public interests, and that in such case the state is not liable for the negligence of its agents, the board of state harbor commissioners, or of its employé in the immediate control of the vessel. To this the respondent replies—first, that the legislature intended, by the act of February 28, 1893, to make the state liable for the negligence of its officers and agents to the same extent that other corporations are liable; and, second, that, if the state is not responsible for the negligence of their officers or agents in the discharge of a strictly governmental duty, it is responsible for their negligence while they are in the discharge of purely administrative or business functions, and that they were so engaged at the time the plaintiff was injured. The first section of the act of 1893, relied upon by respondent, is as follows: "All persons who have, or shall hereafter have, claims on contract or for negligence against the state not allowed by the state board of examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the state in any of the courts of this state of competent jurisdiction, and prosecute the same to final judgment. The rules of practice in civil cases shall apply to such suits, except as herein otherwise provided." St.



1893, p. 57. This statute has been considered by this court in at least two cases, arising under different facts, and in both it was held that said statute did not create any liability or cause of action against the state where none existed before, but merely gave an additional remedy to enforce such liability as would have existed if the statute had not been enacted. *Chapman v. State*, 104 Cal. 690, 38 Pac. 457; *Melvin v. State*, 121 Cal. 16, 53 Pac. 416. Respondent's first point cannot, therefore, be sustained.

Respondent's second contention concedes that an action will not lie against the state for injuries caused by the negligence of its officers or agents in the discharge of a purely governmental duty; but it is contended that said board was not engaged in the discharge of a purely governmental power, but was engaged in the discharge of a purely business function. By section 2504 of the Political Code, as amended in 1889 (St. 1889, p. 380), it is provided that "the commissioners shall have possession and control of that portion of the Bay of San Francisco, together with all the improvements, rights, privileges, easements and appurtenances connected therewith," for the purposes therein provided. Among other things, they are required to construct such number of wharves as the wants of commerce may require, and to repair and maintain all the wharves, piers, quays, landings, and thoroughfares, and to make such improvements as may be necessary for the safe landing, loading and unloading, and protection of all classes of merchandise, and for the safety of passengers passing into and out of the city of San Francisco by water, and to construct a sea wall, dredge slips, and docks to a depth that will admit of the free ingress and egress of all classes of water craft, to perform which dredging the board is authorized to purchase or construct dredging machines, scows, steam tugs, and the necessary machinery, and employ men for operating the same. Said board is also authorized to fix and regulate, from time to time, the rates of dockage, wharfage, crantage, tolls, and rents, and collect such amount of revenue therefrom as will enable the commissioners to perform the duties required of them by the act, and for the purpose of collecting such revenue the board is authorized to appoint wharfingers and other officers. The board is also authorized to make rules and regulations in relation to the mooring and anchoring of vessels in said harbor, providing and maintaining free, open, and unobstructed passageways for steam ferryboats and other steamers navigating the waters of the bay, so that they can make their trips without impediment from vessels at anchor or other obstacles, besides many other things which need not be mentioned.

Article 15 of the constitution contains the following provisions:

"Section 1. The right of eminent domain is hereby declared to exist in the state to all

frontages on the navigable waters of the state.

"Sec. 2. No individual, partnership or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary or other navigable water in this state, shall be permitted to exclude the right-of-way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always attainable for the people thereof.

"Sec. 3. All tide lands within two miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships or corporations."

These provisions of the constitution clearly show that the state has retained the control of the harbors and frontages thereon for the use and benefit of the people, for the promotion of commerce and the general benefit of the body politic, and not as a mere business enterprise, through which profits may accrue to the state treasury; and the statute creating the state board of harbor commissioners is intended and adapted to the execution of this purpose. It gives, it is true, various powers to that board, and imposes upon it various duties, some of them of a character which, under certain circumstances, may give a cause of action against the state. The construction of sea walls, wharves, piers, boats, etc., requires contracts for material and labor, and the state is liable upon its contracts. And so the board is authorized to conduct the business of a wharfinger, collecting tolls and charges for loading and unloading freight upon its wharves, storage thereon, etc., a business that might be conducted by an individual or private corporation; but all such business necessarily involves matters of contract upon which the state may become liable. But the powers and duties of the board are diversified. It has control of the bay and of the vessels using it, keeping open passageways for the ferryboats, controlling the anchorage of vessels, removing vessels from the wharves and piers when unloaded, and the general care of all the property belonging to the state, and connected with the wharves and piers, or used by said board. These duties are of a police character, and purely governmental. The fact that the board is authorized or required to collect tolls and charges for dockage and wharfage to such extent "as will enable the commissioners to discharge the duties required of them by the act" does not affect its character as a governmental agency. In *Melvin v. State*, 121 Cal. 16, 53 Pac. 416, the plaintiff was a visitor at the state fair conducted by the state board of agricul-

ture, and was injured by the seats giving way, the seats being insecure through their negligent and insecure construction. The board was authorized to charge, and did charge and receive, fees for admission; but it was said by this court, after stating that fact: "It does not follow, however, that the society is organized for gain. It exists for the sole purpose of promoting the public interest in the business of agriculture and kindred objects. It is an agency of the government, and in no sense an organization for pecuniary profit to the state." Citing *Daggett v. Colgan*, 92 Cal. 56, 28 Pac. 51. So here, the fact that the board is authorized and required to collect tolls and charges under the act does not make the board an instrument or agency of the state for profit, or convert it into a mere business enterprise. The act creating the board and defining its powers and duties was inspired and authorized by the constitution itself, in the interest and for the benefit of the people, through the promotion of commerce, which is always one of the chief cares and imperative duties of all governments. But, even if it were true that, in so far as the duties of the board were those of a wharfinger, the liabilities of the state to its employés are or should be the same as that of a private corporation engaged in the same business, it does not follow that the state is or would be liable to the plaintiff, inasmuch as he was employed in a distinct branch of the service, viz. the protection against or extinguishment of fires, which, even in the case of municipal corporations, is uniformly held to be the exercise of a purely governmental function; and there is certainly as strong ground for distinguishing between the different functions of the board as there can be for distinguishing between the different functions of municipal corporations, in the exercise of some of which the corporation is liable for negligence, while in others it is not.

Respondent refers to *Chapman v. State*, 104 Cal. 690, 38 Pac. 457, where the state was held liable for the negligence of the board of harbor commissioners in permitting a wharf to become unsafe, and which fell, whereby a large quantity of coal placed thereon was lost, and, after correctly stating that the liability of the defendant was that of a wharfinger,—a bailee,—and that the action was substantially an action for the breach of a contract, he argues that "the relation of master and servant is a contract relation, and this action, the same as in the *Chapman Case*, is brought to recover damages for a breach of duty under the contract." This action, however, is in tort, and not upon contract. A tort is defined to be "any wrong, not consisting in mere breach of contract, for which the law undertakes to give to the injured party some appropriate remedy against the wrongdoer." *Cooley, Torts*, p. 2. The same author (page 19) says: "One may become liable, in an action as for tort, either (1) by actu-

ally doing to the prejudice of another something he has no legal right to do; (2) by doing something he may rightfully do, but wrongfully or negligently doing it by such means, or at such time, or in such manner, that another is injured; or (3) by neglecting to do something which he ought to do, whereby another suffers injury." In the *Chapman Case* the defendant's contract of bailment was to deliver a certain quantity of coal, and the damages for a breach of that contract was the value of the coal agreed to be delivered, and the contract itself furnished at least one of the essential standards for the measurement of damages, viz. the quantity of the coal lost. Here the contract of employment has nothing whatever to do with the liability, except to create a duty on the part of the employer,—a duty not expressed in the contract, and for the violation of which the contract of employment furnishes no rule or standard for the estimation of damages. Nor is the action grounded upon the contract, but upon the duty springing from the relation created by it, viz that of employer and employé, and under the old system of pleading was always classed as an action *ex delicto*.

Having concluded that the action is not upon contract, that it did not arise out of the employment of the plaintiff by the board while it was engaged in the exercise of a mere business function, but in the exercise of a governmental power for the benefit of the public, and that the act of 1893 authorizing suits against the state is merely remedial, and did not create a liability where none existed before, this action is brought clearly within the case of *Bourn v. Hart*, 93 Cal. 321, 28 Pac. 951. There the petitioner asked this court for a writ of mandate compelling the board to allow his claim against the state, in accordance with the provisions of an act of the legislature appropriating \$10,000 for his relief, for injuries received by him while acting as a guard at the state prison, through the alleged negligence of his superior officer. The writ was denied, the court saying: "In entering the service of the state the petitioner assumed all the risks attending such employment, whether arising from its ordinary perils, or resulting from the negligence or misfeasance of other servants of the state, and the appropriation made by this act is a mere gratuity, as the state was under no legal liability to compensate him for any loss which he may have sustained while thus in the discharge of his duties."

In this discussion we have assumed, without deciding, that the evidence was sufficient to sustain the charge of negligence on the part of the officers and agents of the state, and our conclusion renders it unnecessary to consider numerous alleged errors of law occurring upon the trial. The judgment and order are reversed, with directions to the court below to sustain the demurrer to the complaint.



123 Cal. 356

**PEOPLE v. ARLINGTON. (Cr. 468.)**

(Supreme Court of California. Jan. 20, 1899.)

FORGERY—INDICTMENT—EVIDENCE—OTHER CRIMES.

1. Since the statute provides that one who utters a fictitious order for the payment of money, with intent to defraud any person, is guilty of the crime, an indictment alleging that defendant uttered such an order to J., with intent to defraud a certain company, is sufficient, without showing that J. is connected with such company.

2. Evidence in chief that a defendant charged with making and uttering a fictitious order for the payment of money had on prior occasions gone under assumed names, and had been arrested for drunkenness, is not admissible, as tending to show intent, system, and guilty knowledge.

3. Nor is evidence that on a prior occasion he wrote a check under an assumed name.

Department 1. Appeal from superior court, city and county of San Francisco.

A. Arlington was convicted of making and uttering a fictitious order for the payment of money, and he appeals. Reversed.

A. S. Newburgh, R. H. Gaylord, and G. B. Keane, for appellant. Atty. Gen. Fitzgerald, for the People.

**GAROUTTE, J.** Defendant has been convicted of making and uttering a fictitious order for the payment of money. Objection is now made for the first time to the sufficiency of the allegations of the indictment. The pleading appears to have been drawn with great care, and we find no substantial objection to it.

The indictment charges the order to have been uttered to Charles Johnson, with intent to defraud the United Carriage Company. It is now claimed that there should be some showing by the pleading that Johnson was in some way connected with this carriage company. We see no reason why such a showing could not be made by the evidence, if it were necessary. But the statute says, if the defendant utters the writing with intent to defraud any person, he is guilty of the crime; and it would seem that the allegations of the indictment fully satisfy the requirements of the statute.

Under objection the court admitted the evidence of a detective and a policeman to the effect that the defendant, upon occasions prior to the making and the passing of the order here involved, had gone under assumed names, and had been arrested for drunkenness. We know of no law justifying the admission of this evidence, and the attorney general has failed to call our attention to any legal principle justifying it. Its admission is violative of elementary principles. The attorney general says in his brief: "This testimony was admissible as tending to prove intent, system, scienter, guilty knowledge." We fail to see how this testimony tends to do any of these things. It is hardly necessary to point out how the admission of this evidence was prejudicial to defendant's case. Going under assumed names, and being ar-

rested for drunkenness, are matters not conducive to a good character for defendant. And it is expressly held in *People v. Denby*, 108 Cal. 56, 40 Pac. 1051, that the admission of this kind of evidence is not only error, but is reversible error. It is claimed by the attorney general that the case of *People v. Meyer*, 75 Cal. 383, 17 Pac. 431, is opposed to the *Denby* Case. We fail to find any inconsistency in the principles declared in the two decisions. In the *Meyer* Case the court held that upon cross-examination the defendant might be asked if he had ever been convicted of a felony. The decision went no further, and is fully supported by *People v. Chin Mook Sow*, 51 Cal. 597. The decision in that case is directly placed upon the authority of section 2051, Code Civ. Proc. It may be further suggested that all these cases arose upon the question as to the proper limit of the cross-examination of a defendant. In this case the evidence was directly offered in chief. When a person is accused of crime, and placed upon trial, he cannot be required to defend himself against anything but the specific charge, and he cannot be compelled, under the rules of law, to maintain the honesty and integrity of his entire life.

A witness (Evatt) also testified that upon a previous occasion the defendant made different statements as to his name. The witness says: "One name he gave me was Allison. He said he was of the firm of Allison & Gray,—wrote out a check to that effect." This evidence is objectionable, for the reasons already given. Under certain circumstances, in cases of forgery, other forgeries may be proven against a defendant. Our Reports contain many cases where the principle has been recognized and applied, but the evidence quoted falls far below the mark as coming within the rule there declared.

Some complaint is made of the instructions of the judge. In view of the fact that many of these instructions probably will not be given upon a second trial, we refrain from an examination of them in detail. Judgment and order reversed, and cause remanded for a new trial.

We concur: **HARRISON, J.; VAN DYKE, J.**

123 Cal. 348

**LLOYD v. DAVIS et ux. (S. F. 872.)**

(Supreme Court of California. Jan. 20, 1899.)

LIMITATIONS—DEMURRERS—BANKRUPTCY—DEATH OF TRUSTEE—COURTS—JURISDICTION—MORTGAGES—PAYMENT OF TAXES—EVIDENCE.

1. Where an amended and supplemental complaint does not show on its face when the original complaint was filed, a demurrer, on the ground that the action was not brought before limitations had run, is properly overruled.

2. Rev. St. U. S. § 5103, providing for the settlement of an estate of a bankrupt by the appointment of a trustee by the creditors, to whom the bankrupt's property shall be conveyed, provides also that such settlement shall be deemed

to be proceedings in bankruptcy, and the trustee shall have all the rights and powers of an assignee in bankruptcy. *Held* that, where the trustee dies, a state court has no authority to appoint a successor, or direct the execution of the trust, within Civ. Code, § 2289.

3. The settlement of an estate by the trustee does not divest the jurisdiction of the federal district court which adjudicated the bankruptcy, and, where the trustee dies, such court has power to take such steps as the circumstances require, so that a mistake as to the proper step to be taken cannot be collaterally attacked.

4. A mortgage covered an undivided 120-acre interest in a ranch. Prior to the action to foreclose, an action of partition was brought, joining as parties the trustee of the bankrupt mortgagee and the mortgagor. Five parcels of the ranch were set off to the mortgagor, including the lot in dispute, and all adjudged to be subject to the mortgage lien. *Held*, that the mortgagor in the foreclosure suit was bound by the adjudication that the lot in dispute was subject to the mortgage.

5. Where the mortgagee has the right, and it is his duty, to pay the taxes on the property to preserve his security, and receipts for taxes, some of which recite that the taxes were received from the mortgagor or third persons, are among the papers left by the trustee of the bankrupt mortgagee on his death, the receipts are admissible in evidence in the foreclosure action, as tending to prove the taxes were paid by the mortgagee.

6. The receipts are sufficient to sustain a finding that the taxes were paid by the mortgagee, where not contradicted by evidence of the mortgagor.

**Commissioners' decision. Department 1.** Appeal from superior court, *Contra Costa* county.

Suit by John Lloyd, assignee of D. Ghirardelli, a bankrupt, against John Davis and his wife. From a judgment for plaintiff, and from an order refusing a new trial, defendants appeal. Affirmed.

A. H. Griffith, for appellants. Edward J. Pringle, for respondent.

HAYNES, C. Suit to foreclose a mortgage executed by appellants to "Rudolph Hochkoffler, trustee of the creditors of D. Ghirardelli, bankrupt," on the 6th day of April, 1883, to secure their promissory note of that date for the sum of \$17,961.25, payable to the order of said Hochkoffler, as such trustee, one year after the date thereof, with interest at 7 per cent. per annum. The action was dismissed as to the other defendants not above named. The plaintiff had judgment, and defendants appeal therefrom, and also from an order refusing a new trial.

The complaint upon which the cause was tried purports to be an "amended and supplemental complaint," and no other appears in the transcript. To this complaint the defendants demurred: (1) That it did not state facts sufficient to constitute a cause of action; and (2) that said cause of action is barred by the provisions of section 337 of the Code of Civil Procedure. The demurrer was overruled, and the defendants answered, but did not by their answer plead any statute of limitations; and, as there was no issue, there was no finding upon that question. The

amended and supplemental complaint was filed December 30, 1895. It shows that the action was commenced by Rudolph Hochkoffler, as trustee, to whom said note and mortgage were executed; but neither the original complaint, nor any statement of the date at which it was filed, appears in the transcript, and therefore it does not appear that the action was barred at the time the suit was commenced. In *Wise v. Williams*, 72 Cal. 544, 548, 14 Pac. 204, it is said: "Unless it clearly appears from the face of the complaint that plaintiff's cause of action is barred, the issue must be raised by answer." And in *Curtiss v. Insurance Co.*, 90 Cal. 245, 249, 27 Pac. 211, it is said: "Here, however, the question is as to a rule of pleading, and we do not understand that a complaint showing money to have been loaned at a date sufficiently remote to admit of the running of the statute raises a presumption that it has run. On the contrary, when the allegation is consistent with the opposite conclusion, i. e. that the debt is not barred, the defense must be raised by plea,"—and several cases are there cited to that proposition. As the original complaint may have been filed before the statute had run, and nothing appearing in the amended complaint to show that it had not, the demurrer was properly overruled, so far as that ground is concerned.

Under the other ground of demurrer, viz. that the complaint does not state facts sufficient to constitute a cause of action, it is contended that the facts alleged show that the plaintiff is not the real party in interest. This question is raised also by the answer, by exceptions to evidence, and by an attack upon the second finding, and may, therefore, be discussed generally.

The general facts of the case are that on June 6, 1870, D. Ghirardelli and Angelo Mangini, co-partners, were, as co-partners and individually, upon petition of their creditors, adjudged bankrupts by the United States district court for the district of California, under the bankruptcy act of 1867. On June 24, 1870, it was resolved by said creditors that it was for their best interests that the estate of said bankrupts should be settled and distribution made by a trustee under the inspection and direction of a committee of creditors, pursuant to section 43 of said act (section 5103, Rev. St. U. S.); and the creditors thereupon nominated Rudolph Hochkoffler as such trustee, and Joseph W. Stow and B. Corruith as such committee, and on July 11, 1870, said court confirmed said proceedings, and ordered said bankrupts to convey, transfer, and deliver all their property and estate to said trustee, and this order was complied with on July 15, 1870. All or part of the mortgaged premises were conveyed by Ghirardelli to one Ivancovich prior to the proceedings in insolvency, and on April 8, 1871, Ivancovich conveyed to the defendant John Davis the same land, and Da-



vis and wife executed to Ivancovich a mortgage thereon to secure the sum of \$8,000, and this mortgage was assigned by Ivancovich to said Rudolph Hochkofler as such trustee in February, 1875, and on April 6, 1883, Davis and wife executed to said trustee a new note and mortgage, the same that are here in suit. Hochkofler, the trustee, died in September, 1891, after having commenced this action. The bankruptcy act of 1867 was repealed in June, 1878, to take effect September 1st of that year, with a proviso that such repeal should not invalidate or affect any case in bankruptcy instituted and pending prior to the day the repeal should take effect, but as to cases so pending the act repealed should continue in full force and effect until they were finally disposed of. On December 24, 1891, J. M. Gitchell, purporting to act as one of the registers in bankruptcy in said district court, reported to said court that said trustee had recently died, and that there was no person in charge of said bankrupts' estate, and thereupon, and upon the recommendation of certain creditors, said court made an order appointing John Lloyd, the plaintiff herein, an assignee in bankruptcy of said bankrupts' estate, and ordered that the executor of said Hochkofler, deceased, execute to said Lloyd a deed of assignment of all the estate, right, title, and interest which said Hochkofler had, as trustee, in the estate of said bankrupts, and such conveyance and transfer was made, and said Gitchell, as register in bankruptcy, also executed to said Lloyd an assignment of the same estate and effects; and on January 10, 1892, the superior court in which this action was pending made an order substituting said Lloyd as plaintiff in this action in place of said Hochkofler, deceased.

Appellants contend that, the creditors of the bankrupts having elected a trustee to settle the estate under the direction of a committee, and the estate, property, and effects of the bankrupts having been conveyed and assigned to the trustee, the district court had no jurisdiction to appoint an assignee, or to authorize or direct a conveyance and transfer of the estate to him; that Hochkofler was the trustee of an express trust; that the order of the district court appointing an assignee did not extinguish the trust or alienate the property rights or interests of the beneficiaries, or vest any rights, duties, or functions in the assignee, and that therefore it appears that "Lloyd, assignee of the estate of D. Ghirardelli, bankrupt," is not the real party in interest in this action; and that a trustee should have been appointed by the superior court, in which this action was pending, under the provisions of section 2289 of the Civil Code, which provides: "When a trust exists without any appointed trustee, or where all the trustees renounce, die or are discharged, the superior court of the county where the trust property, or some portion thereof is situated must appoint another trustee,

and direct the execution of the trust.  
\* \* \*

In this we think appellants are mistaken. The settlement of the estate of a bankrupt under the provision of section 43 of said act (section 5103, Rev. St. U.S.), by a trustee, does not divest the jurisdiction of the district court, but said section expressly declares that "the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy, and the trustees shall have all the rights and powers of assignees in bankruptcy." It also provides that the trustee shall have and hold the property conveyed to him in the same manner and with the same powers and rights as the assignee in bankruptcy would have done. The settlement of the estate of a bankrupt by a trustee, under said section, being "a proceeding in bankruptcy," over which the state courts have no jurisdiction, it would appear to be clear that the superior court could not have the power to appoint a successor to the trustee, or "to direct the execution of the trust"; and it would appear to be equally clear that the jurisdiction of the district court, not having been divested by the election of the creditors to appoint a trustee, continued for the purpose of such further action as the circumstances might require, and, having jurisdiction to take some proper proceeding, a mistake as to the proper step to be taken would be an error merely, and could not be attacked collaterally. It can make no difference to the appellants by whom payment of their liability upon the note and mortgage may be enforced, provided that payment thereof secures them from further liability; and it is not suggested that there could be such liability to any one except the creditors, who, they rightly say, are the beneficiaries of the trust. But these creditors are parties to the proceedings in bankruptcy, though not individually named upon the record, and are bound by the action of the bankruptcy court, unless in some proper manner they have such action set aside and vacated. But that said court had power, by some appropriate action, to prevent an absolute failure of the purposes and intent of the bankrupt act, I think is beyond question. No provision was made for the contingency of the death of the trustee, nor for the appointment of a successor. In *Re Trowbridge*, 9 N. B. R. 276, Fed. Cas. No. 14,191, it was said: "The proceeding contemplated by section 43 is evidently intended to be one by arrangement, and not by judicial process or proceedings. The power and jurisdiction of the court are, however, retained over the matter, in order that it may interfere whenever it may become necessary for the preservation and enforcement of the rights of all parties concerned." It is obvious that circumstances made it necessary for the district court to take some action for the preservation of the rights of the creditors, and we are not called upon to decide whether its action was technically regular or not. It

had jurisdiction, and the creditors are concluded by its order. Respondent, having been vested with all the right, title, and interest which was before vested in the trustee, was rightly substituted as plaintiff in the action, and for the purposes of the action is the real party in interest.

The court found that lot 192, containing 41.17 acres, was covered by said mortgage, and this finding is attacked by appellants. In addition to several parcels specifically described in the mortgage, there was included therein an undivided interest in the ranch San Pablo, amounting to 121 acres. Prior to the commencement of this action, an action was brought to partition said rancho, and Hochkofler, the mortgagee, and these appellants, were made parties. All the lands described in said mortgage were parts of said rancho, but five several parcels described in the complaint were set off to Davis in satisfaction of his undivided interest of 121 acres, and said lot 192 was one of these five parcels; and by the decree in the partition case all of them were adjudged to be subject to the lien of said mortgage. Defendant Davis testified that he got said lot by taking possession in his own right, but admitted that it was decreed to him in the partition. It was therefore adjudged in the partition case that it was included in the mortgage, and by that adjudication both these parties are bound, whether said lot was originally covered by the mortgage or not.

The costs in said partition suit assessed against defendant John Davis amounted to \$2,606.45. These costs were a judgment lien on the mortgaged premises, and were paid by plaintiff Lloyd, and included in the amount found due under the mortgage. The mortgage authorized the payment, but appellants contend that this amount was settled by the transfer of a claim against the California & Nevada Railroad Company. As to whether it was taken in satisfaction of said judgment, or to be applied if collected, the evidence was conflicting, and we cannot disturb the finding that it was not paid by said transfer.

Appellants also object to the amount of taxes found by the court to have been paid by the mortgagee, and quote from the sixth finding that "there is now due and owing to the plaintiff, for amount paid on taxes on the mortgaged premises, with interest, the sum of four thousand three hundred and sixty-four dollars and seventy-eight cents." The quotation omits the following, which appears in the finding after the word "plaintiff," viz. "for amounts paid in satisfaction of the judgment in said partition suit, and," so that said sum includes both judgment and taxes. The amount of taxes found to have been paid by the plaintiff is sustained by the evidence, if the evidence was properly received.

It was objected, to the introduction of receipts for taxes paid before the present plaintiff was appointed assignee, that they did not show that the taxes were paid by Hochkofler,

the mortgagee; one of them reading, "Received from John Davis," etc., and another, "Received from Wells, Fargo & Co." These receipts came to the hand of the plaintiff among the papers left by Hochkofler at his death. Under section 4, art. 13, of the constitution, a mortgage, for the purposes of taxation, is deemed an interest in the property affected thereby, and the taxes assessed are made a lien on the property and security, and may be paid by either party; and, if the tax on the land be paid by the owner of the security, it becomes a part of the debt so secured. As the mortgagee had not only a legal right to pay the tax assessed upon the land, but as it was his duty to do so for the protection of his security, we think they were admissible as evidence tending to prove that the taxes were paid by him as mortgagee, and were sufficient to justify the finding, in the absence of evidence on the part of the defendants, who must have had personal knowledge of the fact if the taxes had been paid by them.

Appellants, in their opening brief, attack the correctness of the computation of interest upon the note, contending that an agreement was made by which the annual interest should be \$1,000 per annum, instead of 7 per cent., and also that there was paid upon account of interest after March 1, 1891, the sum of \$3,924.75, and compute the interest accordingly. Neither of these points is made by any specification of insufficiency of evidence or error of law. The only specification relating to interest in any manner is the fourth, which says: "The sixth finding is unsustained by the evidence, for the reason that both by the complaint and the evidence it is affirmatively shown that all interest on said note and mortgage was paid down to March 1, 1891,"—and it is not specified that there was any omission to credit interest paid after that date. It is explained by respondent that the payments made after March 1, 1891, were applied upon interest, and paid the interest to that date. The agreement to reduce the interest to \$1,000 per annum is in the record, and contains the condition that it should not have effect longer than the annual payments should be punctually made.

Finding no error in the record, I advise that the judgment and order appealed from should be affirmed.

We concur: CHIPMAN, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

123 Cal. 358

PEOPLE v. SCHELL. (Cr. 471)  
(Supreme Court of California. Jan. 21, 1899.)

LARCENY—EVIDENCE.

In a prosecution for the larceny of a gray horse, defendant asked a witness if, at a certain



time and place, "defendant and another person did not have some conversation in regard to a gray horse, and where this defendant could find that gray horse." *Held*, that it was not error to reject the question as too general, though it would have been admissible if it had been explicitly directed to a conversation, which defendant afterwards testified to as having been had at said time and place, wherein he was told by the other person that he had a gray horse, which he would turn into defendant's pasture, and which defendant might sell, and on his return to his home that night he found the gray horse in his pasture.

Department 1. Appeal from superior court, Fresno county.

Hiram Schell was convicted of grand larceny, and he appeals. Affirmed.

S. J. Hinds and M. D. Ashbrook, for appellant. Atty. Gen. Fitzgerald, for the People.

**GAROUTTE, J.** Defendant has been convicted of the crime of grand larceny in stealing a certain gray horse, and now prosecutes this appeal.

At the conclusion of the people's case defendant placed a witness (Amos) upon the stand, who testified that he heard a conversation between defendant and one Spivey, in Fresno, the day prior to the time when the horse was taken. He was then asked the following question: "I will ask you if at that time this defendant and another person did not have some conversation in regard to a gray horse, and where this defendant could find that gray horse?" An objection was made and sustained to the question, and this ruling is assigned as error. After the witness had been withdrawn, the defendant took the stand, and testified that Spivey told him, at the conversation of the previous day, that he (Spivey) had a gray horse, which he would turn into defendant's pasture, and which defendant might sell, and upon his return to his home that night he found this gray horse in his pasture. This evidence of the defendant was clearly admissible, the truthfulness and good faith of the statements being matters for the jury to test; and if the question addressed to the witness Amos had been explicitly directed to the conversation, which was afterwards testified to by defendant, it should have been answered. But it was so general that it could not have been apparent to the judge that the answer would be competent evidence. At the time the question was asked Amos, the judge knew nothing of the claim of the defendant that he took the horse under authority from Spivey. He should have been so informed; otherwise, the question was entirely too general. Anything relating to a gray horse would be a pertinent answer to it, yet a thousand matters pertaining to a gray horse would be wholly inadmissible as evidence. The question should have been more pointed. The trial judge should have been informed in some way as to the particular matters intended to be proven by the answer of the witness. In the form the

question was presented, it was impossible for the judge to know.

We have examined with care the three instructions refused by the trial court, and find either the subject-matter of them covered by other instructions, or legal justification for their refusal. For the foregoing reasons the judgment and order are affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

123 Cal. 377

CHICAGO CLOCK CO. v. TOBIN et al.  
(S. F. 869.)

(Supreme Court of California. Jan. 23, 1899.)

APPEALS—PRESUMPTIONS—JUDGMENTS—NAMES.

1. In an action by the seller for the rescission of a sale, where neither the findings of fact nor any of the evidence appears in the record, it will be presumed that the court imposed on the seller all the conditions for recovering the goods that the facts would justify.

2. A judgment against "M. E. Tobin and John J. Tobin," whereas the action was against "E. M. Tobin and John J. Tobin, Jr.," where the pleadings and judgment, taken together, show clearly who are designed to be bound by the judgment, is not reversible.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by the Chicago Clock Company against E. M. Tobin and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Frank Shay, for appellants. Haven & Haven, for respondent.

**BRITT, C.** The case alleged by the complaint in this action is, in substance: Plaintiff, a corporation, agreed to sell certain carpets and other furniture to defendants, they promising to pay for the same the sum of \$1,727 in specified monthly installments. Defendants received possession of the goods, but agreed that plaintiff should remain the owner thereof until full payment of the price, with the right to retake possession upon default of any of the agreed payments. Defendants paid installments amounting to \$535, and afterwards refused to pay anything further, and refused to redeliver the goods. The sums paid by defendants on the contract were no more than the reasonable value of the use of the goods by them, and the depreciation thereof from wear exceeded in amount the payments aforesaid. Plaintiff prayed that the contract and the payments made thereon be declared forfeited, and for recovery of possession of the goods. Besides sundry denials, the defendants pleaded, both by answer and cross complaint, that they were ready and willing to surrender the goods, but claimed a recovery of the money they had paid on their contract with plaintiff. The judgment was that plaintiff recover from "M. E. Tobin and John J. Tobin, defendants," possession as prayed, "provided that plaintiff pay to said

defendants the sum of two hundred dollars, being the sum paid by defendants to plaintiff in excess of the value of use and depreciation of said property."

Defendants contend that the purpose of the action and the effect of the judgment was to rescind the contract of sale, and that they should have recovered the whole amount—\$535—which they had paid the plaintiff. Admitting, though without deciding, that the action proceeds for a rescission, still the result contended for does not follow. No findings of fact appear in the record, nor any of the evidence at the trial. We must, therefore, assume, in support of the judgment, that the court imposed upon plaintiff, in favor of the defendants, all the conditions of recovering the goods which the facts before it would justify. Civ. Code, § 3408. Considering the state of the record, defendants have little reason to complain of the provisions of the judgment. See *Rayfield v. Van Meter*, 120 Cal. 416, 52 Pac. 666.

It is objected that in the body of the judgment defendants are named, respectively, M. E. Tobin and John J. Tobin, whereas the action is against E. M. Tobin and John J. Tobin, Jr. There is nothing in the objection. The pleadings and judgment, taken together, show clearly who are designed to be bound by the judgment, and that the error is but a clerical misprision, which may be corrected on motion, if deemed desirable for any purpose. *Fallon v. Brittan*, 84 Cal. 511, 24 Pac. 381. The judgment should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

123 Cal. 248

TRUMPLER et al. v. TRUMPLER et al.  
(Sac. 398.)

(Supreme Court of California. Jan. 7, 1899.)

#### APPEAL—RECALL OF REMITTITUR—PARTIES.

1. The nominal parties to a decree in partition sold the land to another, and 10 years afterwards, for the purpose of defeating his title, moved for a new trial, without notifying him, and fraudulently induced an attorney to appear for those of them who had been defendants, and to agree to such trial, and to confess the assignment of error on appeal from the order denying the new trial, whereby a remittitur issued from the appellate court, ordering a new trial. *Held*, that the court would recall the remittitur, on a showing by the purchaser of the fraud practiced on the court.

2. The propriety of recalling the remittitur was not affected by the fact that some personalty was included in the decree, and not conveyed by the nominal parties.

3. The real party in interest may move the appellate court to recall a remittitur secured in fraud of his rights, and by imposition on the court by the nominal parties; he being the legal representative of the parties by purchase of the subject-matter, under Code Civ. Proc. § 473, and having control of the action, under section 385.

In bank. Appeal from superior court, Yolo county.

Suit by Harry F. G. Trumpler and others against Barbara Trumpler and others. On appeal from an order denying a new trial, there was a judgment of reversal, and a remittitur issued, and J. H. Glide moved to recall the remittitur and set aside the judgment. Motion granted.

J. Chas. Jones, for appellants. H. G. Soule, for respondents.

McFARLAND, J. This case is now before us upon a submitted motion of J. H. Glide for an order recalling the remittitur hereinbefore issued, vacating the judgment of this court reversing the order of the superior court denying a new trial, and dismissing the appeal. The facts upon which the motion is based, appearing upon the face of the moving papers, are substantially these: The parties named as plaintiffs and defendants were the heirs and successors in interest of one Louis Trumpler, deceased, who died August 15, 1882, leaving several large tracts of land in Yolo county. The action was for the partition among the parties to the suit of said land. The interest of each party was set forth in the complaint, which concluded with the prayer that the lands be partitioned among the parties according to their interest as alleged therein. The defendants filed an answer in which they "admit, all and singular, the allegations in the said complaint contained," and "also join in the prayer of said complaint," and suggest certain names as suitable persons to make division of said lands. Such proceedings were afterwards had that an interlocutory decree was entered in accordance with the prayers of the parties, and the persons named in the answer were appointed referees to make the partition and division; and afterwards, on January 17, 1887, a final decree was entered, in which partition was made of the lands in accordance with the prayer of the complaint and of the answer. McKune & George appear as attorneys for the plaintiffs, and all the proceedings and the interlocutory and final judgments were in accordance with the consent of all the parties. Afterwards, in 1888, all these parties to the action conveyed all their interest in the lands to the said Glide, who makes this motion; and he at that time entered into the possession of the lands, and has been continuously in possession ever since. He paid for the lands \$46,999.98. On May 18, 1897, more than 10 years after the entry of the judgment, another attorney, J. Charles Jones, without any substitution of attorneys having been made, filed in the court in which the judgment had been entered a notice on the part of the plaintiffs of an intention to move the court for a new trial. This notice had an admission of service indorsed on it by Harry G. Soule, as attorney for defendants. On the same day, May 18, 1897, an order was made in the court below denying the motion for a



new trial. On May 20, 1897, notice of appeal to this court was given by the said attorney who moved for the new trial; and acknowledgment of service of the notice was by the said Soule, as attorney for defendants, indorsed thereon. On July 21, 1897, a stipulation was filed in this court, signed by the said attorney who appeared for plaintiffs, and by the said Soule as attorney for defendants and respondents, by which it was confessed that the errors assigned by appellants in the record were well taken, and that the order denying a motion for a new trial should be reversed, and the cause remanded to the superior court of Yolo county; and upon said stipulation an order was made by four of the justices of this court reversing the order denying the motion for a new trial and remanding the cause, and thereupon a remittitur was issued from this court on the 24th day of August, 1897. It appears by the affidavit of said Soule that he had no knowledge concerning the action, except that he understood it was a partition suit; that he was informed by the attorney who appeared for the plaintiffs that it was merely a friendly suit; that there was no work for him to do except to sign a few papers, and that he agreed to act merely as a personal accommodation to the attorney who appeared for plaintiffs, supposing that he would ask for nothing improper; that Harry F. G. Trumpler, one of the plaintiffs, whom he knew to be a brother of the defendants, also appeared with the attorney, and asked that affiant appear and sign certain papers; that he supposed it was a family matter, in which no one except members of the Trumpler family were concerned, and that the proceedings to be taken were the result of a friendly agreement between them; that he "did not know nor was he any way informed of the fact that a final judgment and decree had been rendered and entered in 1887 in the action in which said papers were filed"; that he "had no knowledge that J. H. Glide was interested in the property affected by said action, and did not know and had not heard that said Jones, the attorney who appeared for plaintiffs, was at that time prosecuting actions against said Glide to recover the property affected by said action"; and that he "did not know of any error of any kind in any way made in said action when he signed said 'confession of error,' nor does he now know of any such error, except as stated to him, but he signed the same under the circumstances and in the manner and for the reasons hereinbefore stated, and because he understood that said defendants wanted him to do so." It appears further that one of the persons named as defendant (Barbara Trumpler) had died long before the date of said motion for a new trial and said confession of error, and that there had been no substitution of her personal representative as a party to the suit. It further appears that on the 30th day of March, 1896, said Harry F. G. Trumpler, one of the plaintiffs herein, had com-

menced an action against Glide and others to partition the said lands, claiming an interest therein, and that all of the plaintiffs in this present action appeared in said last-mentioned action, either as plaintiffs or defendants, and claimed an undivided interest in the whole of said lands; that Glide had answered in said action, claiming title to the whole of said lands under his purchase thereof as aforesaid; that said action came on for trial in June, 1898; that, after all the other parties to the action had rested their case, Glide offered the judgment roll in this case at bar as a muniment of his title, and that the evidence was objected to by the other parties on the ground that the judgment was not final, because this court had on the 24th of July, 1897, reversed the order of the superior court denying a new trial; and that Glide then learned for the first time of the proceedings taken in this action for a new trial, and of the judgment of this court reversing the order denying a new trial. Upon these facts Glide bases his motion to recall remittitur, etc.

The general principles governing the jurisdiction of this court over a case which has been here, after the issuance of remittitur, and the power of the court to recall a remittitur, have been well settled. They were first elaborately stated in the case of *Rowland v. Kreyenhagen*, 24 Cal. 52. In that case the court, having stated that as a general rule this court cannot exercise any jurisdiction over a case in which a remittitur has been issued by its order and filed in the court below, say as follows: "But this general rule rests upon the supposition that all of the proceedings have been regular, and that no fraud or imposition has been practiced upon the court or the opposite party; for, if it appears that such has been the case, the appellate court will assert its jurisdiction and recall the case. Against an order or judgment improvidently granted upon a false suggestion, or under a mistake as to the facts of the case, this court will afford relief after the adjournment of the term, and will, if necessary, recall a remittitur and stay proceedings in the court below. This is not done, however, upon the principle of resumption of jurisdiction, but upon the ground that the jurisdiction of the court cannot be divested by an irregular or improvident order. In contemplation of law, an order obtained upon a false suggestion is not the order of the court, and may be treated as a nullity. If, under color of such an order, the proceedings have in part found their way back to the court below, yet in law they are considered as still pending in the appellate court, and that court may take such steps as may be necessary to make the fact and law agree. These views are fully sustained by the numerous authorities cited on the argument by counsel for appellant." In *Vance v. Pena*, 36 Cal. 328, the court ordered that the remittitur be recalled, and said as follows: "In

Rowland v. Kreyenhagen, 24 Cal. 52, we held that, although this court loses jurisdiction after the remittitur has been issued and filed in the court below, yet if any fraud or imposition has been practiced upon the court or the opposite counsel by the party procuring the dismissal, or the order of dismissal has been improvidently granted upon a false suggestion, the appellate court will recall the remittitur and stay the proceedings in the court below, and assert its jurisdiction, even after adjournment of the term, upon the ground that its jurisdiction cannot be devastated by such irregular order, and that the order itself is a nullity. This must be so, or intolerable injuries might result." The same rule has been declared in *Hanson v. McCue*, 43 Cal. 178; *Bernal v. Wade*, 46 Cal. 640; *Holloway v. Galliac*, 49 Cal. 149; *People v. McDermott*, 97 Cal. 249, 32 Pac. 7; and in *re Levinson's Estate*, 108 Cal. 459, 41 Pac. 483, and 42 Pac. 479. The case at bar is one to which the principle above stated clearly applies. It appears that the nominal parties plaintiff and defendant had no further interest whatever in the land; that the motion for a new trial and the confession of error were for the sole purpose of defeating the real party in interest, who was given no notice and had no knowledge thereof; that the attorney who appeared for the respondents and signed the confession of error was deceived and beguiled into doing acts, the purpose and consequence of which he had no conception; and that the confession was an imposition upon this court, by which it was wrongfully induced by parties having no real interest in the litigation to render a judgment injuriously affecting the rights of the person who was the real owner of the land involved. An intervention by Glide in the court below after the setting aside of a judgment which had stood for 10 years would afford him no adequate remedy.

It is contended that, because Glide was not a nominal party to the record, he is not in a position to make this motion, but this contention cannot be maintained. The injury of which he complains was done by this court in its order of reversal, which was based on the confession of errors, and made in ignorance of the true state of the facts; and he is entitled to have his remedy where the wrong was done. As to the land involved, he was the legal representative of all the nominal parties to the action, within the meaning of section 473 of the Code of Civil Procedure (*Plummer v. Brown*, 64 Cal. 429, 1 Pac. 703), and under section 385 he had control of the action; and he had the right to exercise that control in whatever condition, or at whatever point, the action was when he first discovered that his grantors, the nominal parties, had taken steps adverse to his rights. Section 385 applies to this court, except in instances where the Code otherwise provides, or where it would be evidently applicable only to the nisi prius court; and the case at bar does not

present such instance. Although no case exactly like the one at bar has been called to our attention, yet in *People v. Mullan*, 65 Cal. 396, 4 Pac. 348, the views above stated were substantially declared. In the latter case default was wrongfully entered against the defendant Mullan, but before the default he had conveyed the land in contest in the action to the Cucamonga Company, who moved to set aside the default. The court below had denied the motion, apparently upon the ground that the company was in no position to make it, but this court reversed the order refusing to open the default. The company, a corporation, appealed. The court say: "But we regard the corporation as in legal effect the assignee and legal representative of Mullan, and standing in his shoes. We think the motion was well made. Code Civ. Proc. § 473; *U. S. v. Patterson*, 15 How. 12. The company could have moved in the name of Mullan, and it has substantially done this. We should be sacrificing form to substance, to hold otherwise. The same remarks apply to the appeal." The same general principle was announced in *Malone v. Mining Co.*, 93 Cal. 384, 28 Pac. 1063. In that case the Del Norte Gravel-Mining Company was the grantee of the defendant's land involved in the action, and, although not a nominal party to the action, moved to set aside a default against the defendant. The court below denied the motion, and the Del Norte Company appealed. This court reversed the motion, and said, among other things, as follows: "The Del Norte Gravel-Mining Company, as grantee of the defendant, had a clear right in its own name to move to have the default and judgment set aside, and, on denial of its motion, to appeal from the order, and thus bring the matter to this court for review. *Plummer v. Brown*, 64 Cal. 429, 1 Pac. 703; *People v. Mullan*, 65 Cal. 396, 4 Pac. 348." The same general principle was decided in *Plummer v. Brown*, *supra*. There is nothing in the cases cited by respondent in conflict with these views. In *Leonis v. Biscailuz*, 101 Cal. 330, 35 Pac. 875, the only question was whether a person could become a formal intervener in this court under section 387 of the Code of Civil Procedure, and it was held that that section could be invoked only, as it expressly provides, "before the trial." In *Faulkner v. Hendy*, 99 Cal. 172, 33 Pac. 899, there was a motion of an assignee of one of the parties for a substitution of attorneys, submitted upon conflicting affidavits; and, although that motion was denied, it was ordered that the assignee's attorney be allowed to file briefs in the case. And in *re Ryer's Estate*, 110 Cal. 556, 42 Pac. 1082, the only question involved was as to the proper parties to be served with notice of appeal. And neither of these cases presented the state of facts which we have here in the case at bar.

The proper action to be had here is not at all embarrassed by the fact that, in addition to the partition of the lands, there was also



a division of a small amount of personal property. That part of the judgment which involves the personal property may be disposed of in accordance with the wishes of the nominal parties to the action.

Under the above facts the judgment reversing the order denying a new trial must be set aside, and the remittitur recalled. We think, however, that the appeal should not at present be dismissed, but that the parties should have a further hearing as to that part of the action, if so desired. The judgment of this court heretofore rendered, reversing the order of the superior court denying a new trial, is set aside, and the remittitur heretofore issued on the 24th day of August, 1897, is hereby recalled, and the clerk of the superior court of Yolo county is hereby directed to return the same to the clerk of this court. The action to dismiss the appeal will be placed upon the law calendar for further hearing.

We concur: TEMPLE, J.; HARRISON, J.; GAROUTTE, J.; HENSHAW, J.

123 Cal. 337

**IN RE YOUNG'S ESTATE. (S. F. 998.)**

(Supreme Court of California. Jan. 20, 1899.)

**WILLS—CONSTRUCTION—EXTRINSIC WRITINGS—PAROL EVIDENCE—PATENT AMBIGUITY—RIGHTS OF HEIRS—SEPARATE ESTATE OF WIFE—COMMUNITY PROPERTY—APPEAL.**

1. Testatrix provided in her will that "two deeds" should be handed to her husband, and after his death they should go to M. *Held*, that parol evidence is inadmissible to show what deeds were meant.

2. The evidence is inadmissible as explaining a patent ambiguity.

3. Testatrix some days prior to making her will executed two deeds to M. of her separate real estate. The deeds were not delivered in testatrix's lifetime. The will provided that there should be handed to her husband "two deeds"; after his death the two deeds to go to M. *Held* insufficient to create a devise of the real estate to M., and inoperative for any testamentary purpose.

4. Under Code Civ. Proc. § 475, providing that a judgment may be reversed only when the appealing party has sustained injury, the contestant of a will, who has no interest except as heir, cannot on appeal complain of the court's construction of a valid clause of the will.

5. Community property is not subject to administration or distribution in the wife's estate.

6. A petition for distribution of the wife's estate alleged the declaration by the wife of a homestead out of her separate estate. Contestants did not deny the allegation. By a decree of probate court the homestead was set aside to the husband. *Held*, that on appeal contestants cannot question the validity of the homestead, as no issue was joined thereon in the court below.

In bank. Appeal from superior court, Napa county.

Proceeding in the estate of Anna Young, deceased. From a decree of distribution, from an order setting aside certain property as community property, and from an order setting aside a homestead to the surviving husband, certain sisters of the decedent appeal. Reversed in part and affirmed in part.

F. E. Johnston and Geo. E. Colwell, for appellants. T. B. Hutchinson, for respondent.

**HENSHAW, J.** These are appeals by two sisters of the deceased, Anna Young, from the decree of distribution made in the matter of her estate, from an order setting aside certain property as community property, and from an order setting aside the homestead to C. H. Young, the surviving husband. Anna Young died testate on the 29th of April, 1894, and in due time her will was admitted to probate. That will is as follows: "Calistoga, the 15th of April, 1894. Anna Young's Will.—To C. H. Young, my husband, my bank book shall be handed to him, with gold watch and chain, also two deeds. After my husband deatts the two deeds shall go to Katarina Muhr. After all expenses are paid, the balance of the money in bank shall be divided between C. H. Young and Katarina Muhr. Also my husband shall control all of my business, pay insuring, tax and repairs to property, furnish clothing to my niece, Katy Muhr, in reason, and her portion of the money in the German Savings Bank shall remain on interest until she is fifty years old. Signed Anna Young, my hand, seal." The testatrix at the time of her death owned real estate in the counties of Napa and Sonoma, which was her separate property. There was on deposit in the German Savings & Loan Society Bank of San Francisco the sum of \$2,200, which was also her separate property. She left a note and mortgage, which was executed to her by one Fales, and other personal property, over all of which there is a contest as to whether or not it was community property or a part of her separate estate. C. H. Young, the husband, was appointed administrator with the will annexed. In his petition for a final distribution he asked that the Fales note and mortgage and certain furniture be declared community property; that a certain piece of real estate, which was the separate property of the deceased, and upon which she had declared a homestead in her lifetime, be set aside to him as a homestead; that one-half of the money in the German Savings & Loan Society be distributed to him absolutely, and the other one-half be distributed to him in trust for Katarina Muhr until she arrived at the age of 50 years; and that the lands in the counties of Napa and Sonoma be distributed to Katarina Muhr, subject to a life estate in himself. Objections were presented to the petition. On the hearing, oral and documentary evidence was introduced, and the court made and entered its decree substantially in accordance with the petition, saving that the lands in Sonoma and Napa counties were distributed "to C. H. Young, as trustee, during his life, for Katarina Muhr, that he account to her for the proceeds thereof, and that upon the death of said C. H. Young the possession thereof be delivered to said Katarina Muhr, the owner of said property." By the evidence taken at the hearing it was shown that on

April 11, 1894, Anna Young was sick. She was looking forward to undergoing a surgical operation from which she might not recover. She then made two deeds of grant, bargain, and sale to Katarina Muhr, her cousin, whom she called her niece. The lands described in these deeds were her separate property. One was for all the land owned by her in Napa county; the other, for all the land owned by her in Sonoma county. The husband signed and acknowledged these deeds with her. Witnesses were called in to witness her signature, she stating to them that she was making the deeds in view of the impending surgical operation; that the witnesses were young men, and so would probably outlive herself and her husband, and she wanted her affairs arranged in case anything should happen to her. Four days later she wrote her holographic will as above set forth. She placed this will inside of her bank book, and placed the bank book in its usual envelope. The two deeds were placed in another envelope, which was sealed. She wrapped the will, the bank book, and the deeds in a single package. She went to a hospital in San Francisco to undergo the operation, and handed this package to Katarina Muhr, saying: "There is my will, and the two deeds. Put them in the office, and, if I get well, I will get them; and, if I do not, you get them and give them to my husband." Upon her death, Katarina Muhr recovered the package and gave it to C. H. Young. The deeds thus identified were admitted in evidence. The court, in construing the will, adjudged the two deeds mentioned in the will to be the deeds admitted in evidence, and construed the direction in the will that the two deeds should be handed to the husband, and after the husband's death "the two deeds shall go to Katarina Muhr," as vesting an estate in Katarina Muhr, with the husband as trustee of the property for her during his lifetime.

1. To the introduction of this evidence many objections were taken and exceptions reserved. It will not be necessary to consider these in detail. The rules governing the introduction of evidence touching the interpretation and construction of wills are all well settled. Many of them are cast into succinct form in the provisions of our Code. No more in wills than in any other writing is parol evidence admissible to vary the terms of the instrument. Parol evidence—even declarations of the testator—is never admissible to modify, change, or vary his expressed intent. Civ. Code, §§ 1318, 1340. This must be deduced from the face of the will, or the bequest or devise fails. The apparent exceptions to this rule which allow parol evidence in the case of latent ambiguities, or to establish an implied trust, or to perfect imperfect descriptions of beneficiaries, or of the subject-matter of a devise or bequest, are not true exceptions at all. In no case is such evidence allowed or considered to change the expressed intent. The

proofs afforded by such evidence are employed merely as an aid to the court in determining what in fact was the expressed intent. In the same manner an existing writing may by reference be incorporated into, and made a part of, a will. But, before such an extrinsic document may be so incorporated, the description of it in the will itself must be so clear, explicit, and unambiguous as to leave its identity free from doubt. The identification of the paper must be had from a description given in the will itself; otherwise, the will is not wholly in writing, as our law requires, but rests partly upon a writing and partly in parol. In re Shillaber's Estate, 74 Cal. 144, 15 Pac. 453; Chambers v. McDaniel, 28 N. C. 226; Phelps v. Robbins, 40 Conn. 250; Smart v. Prujean, 6 Ves. 565; Habergham v. Vincent, 2 Ves. Jr. 209; 1 Jarm. Wills (6th Ed.) \*98; 1 Redf. Wills (4th Ed.) \*261 et seq.

Applying these familiar principles of construction, it is apparent, not only that the deeds are not referred to with sufficient definiteness to insure certainty in their identification, but that there is even a patent ambiguity in the very language of the will which attempts a designation of them. There shall be handed to C. H. Young "two deeds." Any two deeds by any person conveying any kind of an estate in any land would fill the measure of this requirement, so that to the admissibility of parol evidence to aid this clause there are two objections, each equally insurmountable: The first, that the description of an extrinsic writing must be so definite as not to require such evidence; the second, that parol evidence is never admissible to explain a patent ambiguity. Civ. Code, § 1318.

But, were these objections to the consideration of the parol evidence entirely removed, there are yet others equally fatal to the construction which the court in probate has put upon this clause of the will. There was no delivery of these deeds during the testatrix's lifetime. What validity they possess then comes from the will, and, therefore, if by the act of the testatrix title to these lands passed, we must find in the will both an intent to devise them, and operative words to effect the intent. We are not here unmindful of the rule that permits reference to an extrinsic writing duly incorporated into a will for the purpose, not alone of determining the subject-matter of a devise, but even for determining the character of the estate conveyed. Fesler v. Simpson, 58 Ind. 83. But in the case just cited, and in all such cases, there must in the will itself be found a clear intent to devise, and words legally sufficient to create a devise. If such words exist at all in this will, they are contained in this language: "To C. H. Young, my husband \* \* \* shall be handet \* \* \* two deeds. After my husband deatts the two deeds shall go to Katarina Muhr." Assuming a proper identification of the two



deeds, there is left in this language nothing of doubt or uncertainty. The directions are plain, explicit, and not to be misunderstood. The intention of the testatrix then was that two paper instruments, in form, grant, bargain, and sale deeds of her lands in the counties of Sonoma and of Napa, duly signed and acknowledged by her and by her husband, should at the proper time in the administration of her estate be handed to her husband, and after his death be handed to Katarina Muhr. What effect would a compliance with the terms of these directions have upon the title to the real estate? Unquestionably, none. For this reason it is strenuously argued that, as the law favors a construction which avoids total or partial intestacy (Civ. Code, § 1326), and, as it is not to be supposed that a testator, in so solemn an instrument as a will, would exact the doing of a vain and empty thing, it must be certain that this testatrix intended to devise some estate in these lands to the husband and cousin, and that the decree of distribution should do so accordingly. It is true that courts have always leaned to constructions which will avoid intestacy, and their swift willingness in this regard has passed into a rule of construction; but there are well-defined limits beyond which the courts have not gone, and beyond which they could not go without subverting all rules, and leaving the interpretation of every will to the mere caprice and whim of the chancellor. One of these rules, firmly established, and never departed from or even criticised, is that the expressed intent will not be varied under the guise of correction because the testator misapprehended its legal effect. The testator is presumed to know the law. If the legal effect of his expressed intent is intestacy, it will be presumed that he designed that result. The inquiry will not go to the secret workings of the mind of the testator. It is not, what did he mean? but it is, what do his words mean? In *Bingel v. Volz* (Ill. Sup.) 31 N. E. 14, it is well said: "The purpose of construction, as applied to wills, is unquestionably to arrive if possible at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will." To the same effect may be cited *Arthur v. Arthur*, 10 Barb. 9; *Caldwell v. Caldwell*, 7 Bush, 515; *Sturges v. Cargill*, 1 Sandf. Ch. 318; *Rosborough v. Hemphill*, 5 Rich. Eq. 95; *Abercrombie's Ex'r v. Abercrombie's Heirs*, 27 Ala. 489.

The case thus presented is one where the expressed intent of the testatrix is plain, but where a full performance of the acts which she has directed will amount in law to nothing. The testatrix, it may be assumed, did not understand the legal effect which would follow a compliance with her will, or thought that the legal effect would be other than it is. But a court for this reason is not justified in

speculating over what may have been in the testatrix's mind, and in substituting what it may believe to have been her intent in place of the directions which she has actually employed. The inquiry of the court in construing a will comes to an end when the intent has been discovered from the language of the will. Its duty is then limited to giving effect to that intent, so far as may be, without doing violence to express law or the mandates of public policy. It is never at liberty to supply omissions, or to wrest language from its plain import, and give it such a meaning as it may be guessed the testatrix would have intended if she had known that her own efforts to create a legal devise had resulted in failure. In *re Walkerly's Estate*, 108 Cal. 659, 41 Pac. 772. Here, to repeat, there is no doubt as to the language, and its meaning. The testatrix merely mistook the legal effect which would follow a compliance with her directions. While no form of expression is required to create a devise, and while, considering that wills are frequently made by ignorant people in a great extremity of sickness, and under an impending fear of immediate death, and while, therefore, much liberality is and should be shown in construing the terms of such instruments, in every case some words must be employed from which, under the rules of law, an expressed intent to devise particular real estate must be found in the will itself; otherwise, the court is not carrying out the last will of the deceased, but is making testamentary disposition of his property for him,—not such disposition as the testator made, but such disposition as the court thinks he would have made. This can never be permitted. We may well leave this branch of the case with the following quotation from *Buller, J.*, in the case of *Dacre v. Dacre*, 1 Bos. & P. 251: "I agree that a testator may express his intention by what words he pleases, and the court is so to expound his expressions that every word may stand, if possible. The court is to pronounce according to the apparent intent of the testator, but that intent must be found in the words of the will, and is not to be collected by conjecture dehors the will, or, as my lord chief justice expressed himself in a late case, as the question has not been asked of the testator, it is but conjecture what would have been his answer. I hold that, if there are repugnant or inconsistent clauses, the court must take the whole will and find the meaning as far as they can; but if the words are sensible, and there are none used but what may stand, then they must all so stand, and the will must be construed according to the plain meaning of those words, without any ingenious conjecture whether the testator meant more or not."

2. Construing and giving effect to the terms of the will relative to the disposition of the money in the German Savings Bank, the court decreed "that one-half of all mon-

ey on hand in said estate, up to and not exceeding eleven hundred dollars, is the property of Katarina Muhr, under the terms of said will, but by the terms of said will it is not to be distributed to her until she attains the age of fifty years, and that said portion of said Katarina Muhr's money be distributed to C. H. Young, as trustee for said Katarina Muhr, to be held by said trustee for said Katarina Muhr until she attains the age of fifty years, and that he account to her for the proceeds thereof." As to this it is argued that the court has given a construction not permissible under the terms of the will, and that by that construction a void trust is created. It is to be remembered that, as the appellants and contestants are heirs of the deceased, they are not parties injured, if a valid bequest of the moneys was made under the will, no matter what form, under the interpretation of the court, was given to that bequest. In other words, these appellants are interested only, if the deceased died intestate, as to the money. Section 475 of the Code of Civil Procedure suffers a judgment, decision, or decree to be reviewed, modified, or reversed only when the complainant or appealing party has sustained or suffered injury by it. It is clear, by the terms of this will, that there was made to Katarina Muhr a present gift, vesting immediately. The time of payment only was deferred. If the condition deferring the time of payment is repugnant to the gift, the condition, and not the gift, would be void. In *re Walkerly's Estate*, 108 Cal. 627, 41 Pac. 772; 1 Jarm. Wills, § 837. Katarina Muhr is not complaining of the interpretation given to this clause, and, having gone so far as to see that a valid bequest of the money was made to her, appellants' concern in the matter is at an end, and we need be at no pains further to consider this question.

3. The so-called Fales note and mortgage were executed to deceased. From this the disputable presumption arises that they were her separate property. The court received evidence upon this question, as also upon the question of the title to certain articles of furniture, and decided that they were community property, and therefore not subject to administration in the wife's estate. It is insisted by appellant that this evidence had no proper place in proceedings under a decree of distribution, the sole purport of which is to distribute the property under the will or under the laws of succession; and the question of what property belongs to the estate, and is in the hands of the representative for distribution, is determined by the decree settling the representative's final account. In this reliance is had upon *Burdick's Estate*, 112 Cal. 387, 44 Pac. 734. This statement of the proposition by appellants is stronger than the law warrants, and than the case above cited upholds. Wherever a man dies, possessing both separate and community property, both pass into his estate for the purposes

of administration and distribution, and the final account would do no more than declare that such property was in the estate. It might not, and probably would not, determine the distinctive characters and kinds of property, but would leave that for the reception of evidence under the petition for distribution. Upon the other hand, where a wife dies, no administration at all is to be had upon any but her separate property; and therefore it may well be argued that a final account, decreeing that such and so much property is in the hands of the representative for distribution, is an adjudication between the representative and the heirs and devisees fixing the status and character of that property. But whether in this case the final account did so declare, and, further, whether under such declaration the administrator who shows himself to be the husband is estopped therefor and thereby from contesting the title because he has not appealed from the decree settling the final account, are questions which need not here be considered; for, under the record presented, they are merely speculative. The bill of exceptions does not present the final account, and it cannot, therefore, be said what adjudications upon these matters the decree settling it contained. So far as the case before us now is concerned, there is but a finding supported by evidence that the property in question was community property. Such being the case, it was not subject to administration or distribution in the wife's estate, as the court properly decreed.

4. A homestead had been declared by the wife upon what was admittedly her separate property. The declaration was proper in form and substance. If the property was of such a kind as that it could be impressed with the homestead characteristics, there is no question but the title to it descended absolutely to the husband. In *re Croghan's Estate*, 92 Cal. 370, 28 Pac. 570. The validity of this homestead, which was upheld by the decree, is here attacked upon the ground that the property, though used as a home by deceased and her husband, was in fact a public inn or hotel. The petition for distribution alleged the homestead. The appellants in their written objections did not deny these allegations, but, to the contrary, affirmatively alleged the same facts. In no way is the validity of the homestead brought in question. "The rules of pleading and practice in civil cases are applicable to proceedings in the probate courts. Issues joined in such proceedings are to be tried and determined by that court as in civil cases." *Burton's Estate*, 63 Cal. 36. No issue having been joined upon the question of the validity of the homestead, it does not lie with appellants to assail the decree in this particular.

That portion of the decree which construes the will as creating a devise of the real estate described in "two deeds" mentioned in the will, and distributing the property in accordance with the devise so found, is reversed,



and the court is directed to decree that this language in the will is insufficient to create a devise, and is inoperative for any testamentary purpose. In all other respects the decree is affirmed.

We concur: TEMPLE, J.; GAROUTTE, J.; HARRISON, J.

123 Cal. 331

In re SARMENT'S ESTATE. (Sac. 543.)  
(Supreme Court of California. Jan. 20, 1899.)  
ADMINISTRATORS—RIGHT TO FUNDS—ACCOUNTING  
—CHARGES—INTEREST—PAYMENTS—EVIDENCE—EMBEZZLEMENT.

1. An administrator cannot be charged with compound interest unless he has been guilty of some positive misconduct or willful violation of duty.

2. The fact that an administrator kept the funds of the estate on deposit in a bank managed by his brother, who was surety on his bond, and that such funds were used by the bank as the funds of other depositors, does not show that he embezzled the funds, so as to justify charging him with compound interest.

3. An administrator cannot be charged with interest on funds of the estate prior to the date of their receipt.

4. A widow's receipt to an administrator for the "balance" of the widow's allowance is prima facie evidence that no more is unpaid.

5. An order directing that the administrator, on payment to the clerk of the court of all moneys of the estate in his hands for distribution to creditors, shall be entitled to his discharge, is erroneous, since, so long as the administrator remains in office, he is entitled to retain the funds of the estate in his possession.

Department 1. Appeal from superior court, Tulare county.

Final accounting of the administrators of the estate of Peter J. Sarment, deceased. From an order disallowing certain items, and charging the administrators with compound interest, they appeal. Reversed.

M. L. Short and Horace L. Smith, for appellants. Dixon L. Phillips and Rowen Irwin, for respondents.

HARRISON, J. The administrators of the above estate have appealed from the order settling their final account and directing a disposition of the estate in their hands. The estate is insolvent, and the account was contested by the surviving widow and one of the creditors of the deceased. The court disallowed some of the items of expenditures set up in the account, and held that the administrators should be charged with compound interest upon certain moneys in their hands from the time of their receipt.

1. A former account of their receipts and expenditures prior to June 24, 1894, filed by them December 5, 1894, in which they had charged themselves with the proceeds of certain sheep sold by them in 1893, had been settled by the court at the sum of \$5,163.76. Certain items of expenditure which were omitted from that account were presented and allowed in the present account, and the court

finds that they had in their possession, on August 1, 1893, the sum of \$5,007.09, upon which they should be charged with compound interest from that date at the rate of 7 per cent. It is contended by the appellants that the court erred in thus charging them with interest upon this amount. An administrator is not to be charged with even simple interest upon the funds of the estate which may be in his hands, unless it is made to appear to the court that the estate, or the parties interested in it, have sustained loss by reason of his negligence or fault; but he is to be charged with compound interest only in cases in which he has been guilty of some positive misconduct or willful violation of duty. *Wheeler v. Bolton*, 92 Cal. 159, 28 Pac. 558. As he is required by the statute to take into his possession all of the estate of his intestate, and to give bonds for its preservation, it would be inequitable to charge him with interest upon moneys which might at any time be received by him, from the date of their receipt, merely because he had retained them in his possession. Until the estate should be in a condition which would authorize him to take steps for its settlement, he would violate no duty in failing to take such step. Whether any delay in procuring an order for its settlement would authorize the court to charge him with interest must be determined by the court upon a consideration of all the circumstances of the case, including the character and condition of the estate, the causes of the delay, and whether it has been reasonable or unreasonable. *Walls v. Walker*, 37 Cal. 424. The burden of showing that he should be charged with interest is upon the contestant. The court finds that in July, 1893, the administrator Biddle embezzled and wrongfully mingled the proceeds of the sale of the sheep with his own funds; and also that the administrators were negligent in the management of the estate, and in failing to file their final account and close up the estate at the proper time for doing so, and that the estate has been for three years in a condition to file their final account and close it up. It is upon these findings that the respondents seek to sustain the order of the court charging the administrators with compound interest. We are of the opinion, however, that the claim of the appellants that these findings are not supported by the evidence must be sustained. The court does not find, nor is there any evidence, that the administrators used the funds of the estate in their own business, or made any profit from their use. The mere fact that one of them mingled the proceeds of the sale with his own funds would not justify charging him with interest thereon, since he had the right to their custody, and there is no provision of law which required him to keep them separate from all other funds. The finding is rested upon the evidence of the administrator Biddle that he kept the moneys he realized from the sale of the sheep with his brother,

S. E. Biddle. His brother was one of the sureties on his bond, and was manager of the Bank of Hanford, and when the money was received by the administrators it was turned over to him, and presumably, although there is no direct evidence to that effect, was deposited by him in the bank. Payments by the administrators on account of the estate were made by checks drawn upon the Bank of Hanford, signed "Joe D. Biddle & Co.," and indorsed upon their face, "On acct. P. J. Sarment estate." There was no evidence that S. E. Biddle or the Bank of Hanford made any use of the funds thus deposited other than the use made by banks of deposit of the funds of their depositors. This evidence did not justify the court in finding that the administrator Biddle had embezzled the funds of the estate, or in holding that he should be charged with compound interest thereon. The record does not disclose the date at which the administrators had reduced the entire estate to money, but it appears therefrom that they were in possession of certain real estate, from which they received rents, until January 5, 1895, at which date it was sold under a decree of foreclosure. As the present account was filed May 27, 1897, the finding of the court that the estate had been for three years in a condition to be closed was unauthorized.

2. At the hearing of the contest certain errors in the account were discovered, from which it appeared that the administrators should be charged with \$466.01 more than was shown by the account as presented by them, and the court found that this amount had been embezzled by Biddle, and held that the administrators should be charged with compound interest thereon from April 1, 1894. This amount was made up of three items, viz.: \$139.01 for an error in stating the account; \$60 collected for rent in the last three months of 1894; and \$267 collected for rents by suit, the date of the receipt of which is not shown, but it appears that it was not paid at the date of the former account. It is manifest that the administrators should not be charged with interest prior to the dates at which they received the money, and we are unable to find any evidence which would authorize the court to find that this money was embezzled or converted by the administrators, or which would justify imposing the penalty of compound interest thereon.

3. The appellants contend that the finding by the court that a claim of upwards of \$7,000 against the estate in favor of Shoobert, Beale & Co. was purchased by S. E. Biddle for the sum of \$200, for the use and benefit of the administrator Biddle, is not sustained by the evidence. For the purpose of settling their account, this finding does not affect the appellants; but to the extent that this is an indirect charge upon their integrity in the performance of their trust, and for that reason a basis for charging compound interest, they are justified in challenging the finding. Not

only is there no evidence in support of the finding, but there is direct testimony to the contrary by both the administrator and his brother.

4. After settling the account, the court in its order directed a pro rata payment upon the claims allowed, and also that \$575 be paid to the surviving widow as a part of the family allowance previously ordered. The administrators claim to have paid this allowance in full, and that the court erred in allowing this payment. The disposition which the court might make of moneys in their hands belonging to the estate is immaterial to the administrators. All that they are concerned in, upon a settlement of their account, is to be credited with the various payments they have made, and to have the accounts settled according to the correct amount in their hands. Whatever disposition the court makes of this amount is no concern of theirs, and, if the parties interested therein make no objection to the order, they should be content. The administrator testified that he had paid to the widow the whole of the family allowance, and produced a voucher from her which he procured a short time before the hearing, in which she acknowledges the receipt from the administrators of "one thousand dollars, balance payment of the eighteen hundred dollars allowed by the court for widow's allowance." The production of this voucher, purporting to be for the "balance" of the \$1,800, was prima facie evidence that no more was unpaid, and threw upon the contestant the burden of showing the contrary. In the absence of any other evidence, and with the testimony of the administrators that the whole had been paid, the court should have given them credit for the full amount. In their account filed herein they credit themselves with the payment of \$1,575 as the balance of the family allowance, and the widow in her contest does not dispute this payment by them, but alleges that of this sum about \$700 had been paid to the mercantile house of Kutner, Goldstein & Co., without her knowledge or consent. There was no evidence in support of this averment, and the widow did not testify at the hearing, or give any evidence controverting that of the administrators that the family allowance had been fully paid. The court, however, ruled that the voucher from her could be received as a voucher for only \$1,000, and thereupon the administrators offered evidence of other payments for her account. After the order for family allowance was made, an arrangement was entered into between the widow, the administrators, and the above mercantile house in Hanford, by which that mercantile firm was to furnish the widow with supplies, and the administrators were to pay for the same from the amount of the family allowance. Under this arrangement, the sum of \$400 was paid to Kutner, Goldstein & Co., and credited to the administrators upon their former account. The further sum of \$300 was paid upon this account with the mercantile firm,



November 8, 1894, for which the court should have allowed the administrators credit. A bill of \$87.80 was paid by them to Hicks & Co. under a similar agreement, and should have been allowed them by the court. They also paid two sums, of \$25 and \$7, respectively, to the widow upon her family allowance, for which they were entitled to credit. It would appear, although there is no direct evidence thereof, that the sum of \$225 was credited to the administrators upon the account for family allowance in the settlement of the former account, but it does not appear whether this was any part of the \$400 paid to Kutner, Goldstein & Co. for which they received credit in that account. It is impossible to tell from the record whether the administrators have received credit for all the payments made by them for the family allowance, but this matter can be determined by the court upon the next hearing.

5. After settling the account and apportioning the money in the hands of the administrators, the court directed that, "upon the payment into court and to the clerk thereof the sum of \$3,029.82 by the said J. D. Biddle, the administrator, which last-mentioned sum is to be paid out and distributed as herein-before directed, the said administrators shall thereupon be entitled to their discharge." No authority is cited in support of this portion of the order, nor is it authorized by any provision of the statute. The administrator is responsible for the assets in his hands, and so long as he remains in office is entitled to retain them in his possession, until disposed of to the parties entitled thereto under the directions of the court. *In re Welch's Estate*, 110 Cal. 605, 42 Pac. 1089; *De Greayer v. Court*, 117 Cal. 640, 49 Pac. 983. Upon the entry of an order for the payment of the claims against the estate, the administrator becomes liable therefor to the creditors, both personally and upon his bond, and each creditor is entitled to an execution against him therefor. Code Civ. Proc. § 1649. He cannot escape this liability by complying with an order which the court had no power to make. *In re Spanier's Estate*, 120 Cal. 698, 53 Pac. 357. The court, therefore, erred in making this part of the order. The order is reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

123 Cal. 307

PEOPLE ex rel. WEBSTER v. BABCOCK.  
(S. F. 979.)

(Supreme Court of California. Jan. 19, 1899.)  
SCHOOLS—SUPERINTENDENT—ELECTION—VACANCY.

St. 1863, p. 605, § 14, authorizing the board of education, in case of vacancy in the office of superintendent, to appoint a person to fill the vacancy until the regular election then next following, when the office shall be filled by the election of the people, means the next "general" election, and not the next election at which superintendents are to be elected.

Department 2. Appeal from superior court, city and county of San Francisco.

Quo warranto by the people, on the relation of Reginald H. Webster, against Madison Babcock. There was a judgment for relator, and defendant appeals. Affirmed.

Rodgers & Paterson, for appellant. Atty. Gen. Fitzgerald, C. W. Greene, A. A. Moore, and Garber & Garber, for respondent.

HENSHAW, J. On the 14th day of October, 1895, the office of superintendent of schools of the city and county of San Francisco became vacant by the death of the incumbent, who, on November 6, 1894, had been elected to fill the office for the term of four years, commencing upon the first Monday in January, 1895. On the 24th day of October, 1895, the board of education of the city and county of San Francisco appointed Madison Babcock, appellant herein, to fill the vacancy "until the regular election then next following." On November 3, 1896, there was held throughout the state of California a general election, and at the same time, and in conjunction with this general election, there was held a municipal election in and for the city and county of San Francisco. The proclamation for this election included in the list of officers to be voted for thereat one superintendent of schools for an unexpired term. Upon the ballots cast at that election appeared the names of candidates for this office, and one of them, the relator, Reginald H. Webster, was by the board of election commissioners duly declared to be elected to the office of superintendent of schools of the city and county of San Francisco. A certificate of election was issued to him, he qualified in all respects as required by law, made formal demand upon the appellant for possession of the office, and, upon refusal of the demand, with leave of the attorney general, instituted this action to determine the right to the office.

Section 14 of the consolidation act of the city and county of San Francisco thus declares: "In case of a vacancy in the office of superintendent, the board of education may appoint a person to fill the vacancy until the regular election then next following, when the office shall be filled by election of the people." St. 1863, p. 605. The constitution declares (article 9, § 3) "that a superintendent of schools for each county shall be elected at each gubernatorial election." Section 14 of the consolidation act, above quoted, contains the law governing the method of filling vacancies in this office. *People v. Babcock*, 114 Cal. 559, 46 Pac. 818. The determination of this appeal turns upon the construction to be given to this section.

By appellant it is contended that the "regular election then next following" means the next election at which officers of this class, to wit, superintendent of schools in counties, are to be elected, and that the final clause, "when the office shall be filled by election of the peo-

ple," is adjectival and descriptive in character; or, to paraphrase the section, and give it the meaning for which appellant contends, it is that the person appointed by the board to fill the vacancy shall hold office until the coming of that election at which the office is to be regularly filled by election of the people. Since, under the constitution, the superintendent is regularly elected at each gubernatorial election for the term of four years, this construction practically is equivalent to saying that the person so appointed shall hold office for the unexpired term. Upon the part of respondent it is argued that the phrase "regular election," as here used, has no such meaning as that imputed to it by appellant; that the word "regular" is employed in the sense of "general," as contradistinguished from a "called" or "special" election; that the election at which relator was elected was such a general election, both for the state and for the municipality.

In support of his position respondent relies with much confidence upon the case of *People v. Budd*, 114 Cal. 168, 45 Pac. 1060. In that case, the office of lieutenant governor having become vacant by the death of the incumbent, this court was called upon to construe the language of section 8, art. 5, of the constitution, relative to the filling of the vacancy. This court decided that the phrase "the next election by the people," as employed in the constitution, did not mean the next general election, or the next election held by the people, but that the section, taken as a whole, simply provided for the filling of vacancies by appointment; that the appointee held until the office was filled in the manner provided by law, and that the section itself did not provide the manner nor contain any provision for the holding of such an election. Therefore, and under all these facts, it was determined that the appointee held until the next election at which a lieutenant governor would have been regularly elected, or, in other words, until the next gubernatorial election. But in this case, as in all such cases, no set rule can be formulated for the construing of the provisions of similar statutes. Cases may be instanced, and, indeed, some are cited in *People v. Budd*, where the phrase "regular election" has been construed to mean the next election at which officers of the particular class are regularly to be elected; but no such inflexible definition can be given to the word "regular," as will hereafter clearly appear.

In the case of any particular statute, the construction can be determined only by considering the context in which the word is found, the purpose of the statute, and the object which it was designed to fulfill. The next regular election may mean the next election at which officers are to be regularly elected, or it may be used merely to exclude special elections, or it may be used synonymously or interchangeably with the word "general." Thus, in *State v. Conrades*, 45

Mo. 47, the act under consideration provided: "If any officer in St. Louis county named in the act of which this is amendatory shall hereafter vacate his office by death, resignation or otherwise, except by expiration of his term of office, it shall be the duty of the governor of the state to appoint until the next regular election a suitable person to perform the duties of the office." The act of which this was amendatory declared that, "if any county judge shall vacate his office by death, resignation or otherwise, \* \* \* it shall be the duty of the governor of the state to appoint for the remainder of the term for which such officer was elected or appointed a suitable person to perform the duties of such office." Construing these acts the court say: "By the act of 1859 the governor was invested with full power to appoint, whenever a vacancy occurred, for the remainder of the term. The act of 1864 was a limitation on this power of appointment, and abridged its exercise to the next regular election. It is insisted that, in passing this law, the legislature meant that the executive appointee should continue to hold his office till the next regular election of county judges, and that the act had exclusive reference to that election. But this construction, we think, is founded in misconception, and is not maintainable. It was the obvious intention to give the people an opportunity to elect this officer at the earliest practicable moment, without incurring the expense of a special election. When applied to elections, the terms 'regular' and 'general' have been used interchangeably and synonymously. The word 'regular' is used in reference to the general election occurring throughout the state. It was employed by the draftsmen of this bill, in contradistinction to the election which was held in St. Louis county specially for judges of the county court."

In sections 754 and 854 of the municipal corporation act of 1883 (St. 1883, pp. 251, 267), provision is found for filling vacancies in municipal offices. It is declared that "any vacancy occurring in any of the offices provided for in this act shall be filled by appointment by the board of trustees; but, if such office be elective, such appointee shall hold office only until the next regular election, at which time a person shall be elected to serve for the remainder of such unexpired term." If "regular election" is here to be construed as the election at which this class of officers is regularly chosen, then, in the cases of some officers contemplated by the charter, the regular election could only be at the end of the term, and the provision that a person shall be elected to serve for the remainder of the unexpired term would be meaningless. These instances are given, not as having any determinative force upon the question here presented, but in illustration of the fact that the phrase "regular election" has no fixed and inflexible meaning.

Coming to the consideration of the meaning of the phrase as employed in the consolidation



act, it is apparent, we think, that the word "regular," as here used, is an adjective, synonymous with "general," and that it was not within the contemplation of the legislative mind that the appointee of the board of education should hold for the remainder of the unexpired term. If such had been the intent, it could readily have been expressed in brief and certain terms; but to give this language that meaning would be to deprive of all efficacy the final clause of the section, "when the office shall be filled by election of the people." We cannot accede to the construction which appellant puts upon this sentence—First, because so to do would be to say that the legislature used a most unhappy and cumbrous circumlocution to express an extremely simple idea; and, second, because thus to construe the clause is to do direct violence to the proper and grammatical use of language. If it be said, as appellant contends, that the clause is only descriptive, and the verb "shall be filled" is to be considered as importing mere futurity, the result is to attribute to the legislature, in a case which does not call for it, a faulty and ungrammatical use of the parts of English speech. The clause, grammatically construed, is mandatory in its nature, and is a declaration that, when the next regular election arrives, the office shall be—must be—filled by the people. But, such being its construction, it is without meaning if the phrase "regular election" is to be held to mean the election at which the office is regularly to be filled; for such an election can only come at or near the expiration of the term. "Regular election," as thus employed, then, is synonymous with "general election."

Whether it be a general state election or a general municipal election it is unnecessary here to determine, since the election at which the relator was elected was both a general state election and a general municipal election. The judgment appealed from is therefore affirmed.

We concur: TEMPLE, J.; McFARLAND, J.

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which deceased belonged, and then, by shooting himself, end the programme, is admissible, though made in a town where deceased had not resided for several years; the question whether he was included in the threat being for the jury.

Department 1. Appeal from superior court, Tuolumne county.

Frank J. Gross was convicted of manslaughter, and from the judgment and from an order denying a new trial he appeals. Affirmed.

F. W. Street and Crittenden Hampton, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. Defendant has been convicted of manslaughter, and appeals to this court. It is now insisted that the evidence fails to justify the verdict. We pass the contention by saying that, after a careful examination of the record, we are entirely satisfied the verdict has full support in the evidence.

It is claimed that error was committed in the refusal of the court to give the following instruction: "If you find from the evidence that, while the deceased and his brother were engaged in fixing the water barrel, the defendant said to them, 'Don't turn off the water,' and went into the saloon, and if you further find from the evidence the deceased and his brother left the water barrel, and returned with arms, then I instruct you that defendant's saying to deceased and his brother, 'Don't turn off the water,' and then going into the saloon, was no sufficient cause for the deceased and his brother, or either of them, returning armed to said water barrel." There are many legal objections which may be urged to this instruction as a sound declaration of law. As a fair illustration of these objections, it may be said that the evidence fairly indicates that the defendant did not go into his saloon until the brothers had left the water barrel for their weapons.

The following question was asked and answered under objection: "Q. I will ask you, Mr. Block, if you heard this defendant state, while at Tuttletown or elsewhere, that he would wipe out the entire Gross family?" The witness answered: "He said he would wipe out the name, and then shoot himself, and that would end the programme." The question was entirely proper, and likewise the answer. The fact that the deceased had not been living in Tuttletown for several years is an element wholly immaterial. The threat was a broad one. It appeared to cover the entire Gross family, and under this language it was for the jury to say whether or not the deceased was included therein. There is no error in the record. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

123 Cal. 389

**PEOPLE v. GROSS. (Cr. 460.)**

(Supreme Court of California. Jan. 25, 1899.)

**HOMICIDE—EVIDENCE—THREATS OF ACCUSED—INSTRUCTIONS.**

1. In a prosecution for homicide, an instruction that, if accused made a certain statement to deceased on the street, and then went into his place of business, it was no excuse for deceased to go and arm himself, and return to the place where the altercation had taken place, is properly refused where the evidence shows that accused did not go into his place of business until after deceased had gone after his weapon.

2. In a prosecution for homicide, accused's statement, prior to the commission of the act, that he would wipe out the entire family to



123 Cal. 399

In re BROWN'S ESTATE. (S. F. 1,432.)  
(Supreme Court of California. Jan. 25, 1899.)

INSURANCE—EXEMPTIONS TO WIDOW.

Under Code Civ. Proc. § 690, subd. 10, exempting moneys accruing on an insurance policy issued on the life of a debtor if the annual premiums do not exceed \$500, the proceeds of a policy, the premiums on which exceeded \$500 annually, cannot be set apart to the widow as exempt.

Department 2. Appeal from superior court, San Mateo county.

Petition by Lucy P. Brown, widow of A. Page Brown, deceased, asking that certain life insurance money be set apart to her and her minor children. From an order denying the petition, she appeals. Affirmed.

Harold Wheeler, for appellant. Mullany, Grant & Cushing, Roger Johnson, Morrison, Foerster & Cope, Geo. C. Ross, T. C. Coogan, and Edw. F. Fitzpatrick, for respondents.

PER CURIAM. The appeal in this case is from an order of the superior court denying appellant's petition asking that certain life insurance moneys be set apart to her and to her minor children. There is no controversy as to the facts. The decedent, A. Page Brown, died testate in 1896, leaving a widow and three minor children. The inventory showed the value of the estate to be \$43,869.21, of which \$25,000 consisted of moneys collected by appellant, as executrix, from the New York Life Insurance Company, upon its policy No. 356,577, issued to her husband some six years prior to his death, and which was made payable to his estate. All of the estate was community property. The estate was indebted to such extent that the total assets of the estate, after deducting expenses of administration, a homestead, family allowance, etc., are not sufficient for the payment of the creditors in full. The widow's petition is based upon the provision of section 1465 of the Code of Civil Procedure, which requires the court to set apart to the widow all property exempt from execution, and upon that portion of section 690, *Id.*, which reads as follows: "The following property is exempt from execution, except as hereinafter specially provided: \* \* \* Sec. 10. All moneys, benefits, privileges or immunities accruing, or in any manner growing out of any life insurance on the life of the debtor, if the annual premiums paid do not exceed five hundred dollars." Exemptions are the creatures of statutes and exceptions to the general rule. No property is exempt unless made so by express provision of law. No assumed legislative policy can justify the courts in adding to the statutory list of exemptions. Legislators are presumed to understand the force and effect of the language which is used, and to have contemplated all circumstances which would make it desirable that other property not in the lists of exemptions should be added thereto. The language used is entirely unam-

biguous. The legislative intent is clear, and is to no extent defeated by executing the law as it reads. Under such circumstances it is fruitless to talk of the literal meaning of the language, and of other meaning than the literal meaning. In fact, no attempt is made to find any other meaning in the language. The attempt is to defeat the express legislative will; not by giving the language used another meaning, for that is impossible, but by saying the law as it plainly reads is unreasonable. What chance is there for the construction of the law? It simply says that moneys accruing upon an insurance policy issued upon the life of the judgment debtor are exempt if the annual premiums paid do not exceed \$500. It is as plainly said that, if the annual premiums paid do exceed \$500, no part of the same is exempt, as though it had been so added in words. And, besides, we do not expect to find in such a statute negative words, for nothing is exempt save what is expressly made so; and when a statute gives a list of exempt property it expressly provides that no other property is exempt. To construe an unambiguous statute is an attempt to defeat the expressed legislative will, and not to ascertain it. Probably no one would ever have questioned this view, or contended that a statute means something different from what it plainly expresses, were it not for the fact that in 1868 a statute was enacted upon this subject, which, it is contended, was the source from which the present code provisions were derived. St. 1867-68, p. 500. That provision is that moneys accruing from certain life insurance policies shall be exempt, "provided, however, this exemption shall not extend beyond such moneys, benefits, rights, privileges and immunities as have been or might have been secured by the payment of an annual premium of five hundred dollars." The difference in the two statutes is obvious. The statute of 1868 exempts some portions of all moneys accruing upon certain policies, with a proviso that an exemption shall only extend to such benefit as might have been secured by the annual payment of \$500. It expressly exempts some portion of larger policies. The code provision only exempts moneys accruing upon policies where the annual premiums do not exceed \$500. It cannot be construed as exempting part only of any policy.

It is said that the statute is remedial, and should be liberally construed to effect the purpose of the legislature. That is so, but that is not a liberal construction which defeats the plainly expressed purpose of the legislature. The purpose here is as plainly expressed as it could be, and is entirely accomplished by executing the unambiguous statute. An example of liberal construction would be to make such words as "tools of the mechanic," "implements of husbandry," etc., as comprehensive as possible. But it would not be a liberal construction of a statute which simply makes exempt policies up-

on which the annual premiums are less than \$500 to hold that it also makes exempt monies due upon a policy upon which the annual premiums exceed \$500 to the extent of benefits which could have been earned by an annual premium of exactly \$500. The order appealed from is affirmed.

123 Cal. 391

**In re KRUGER'S ESTATE** (three cases).  
(Sac. 532-534.)

(Supreme Court of California. Jan. 25, 1899.)  
**APPEALABLE ORDERS—PROBATE COURT—JURISDICTION—FIXING ATTORNEY'S FEES—NOTICE—SET-OFF.**

1. An order directing the representatives of a decedent to pay a certain fee to the executor's attorney is appealable.

2. An order to pay such fee cannot be made without notice to heirs, devisees, and legatees.

3. The order cannot be made at the executor's final settlement on the notice for such settlement, where the executor's final account contained no proposal to make any charge for the fee.

4. The probate court has jurisdiction to allow damages occasioned by the negligence of an executor's attorney as an offset against his claim for compensation.

**Department 2. Appeals from superior court, Nevada county.**

In the matter of the estate of W. H. Kruger, deceased, an order was made fixing the fees of the executor's attorney, and the legatees and devisees appeal separately. Reversed.

Fred Searls and Geo. T. Wright, for appellants. P. F. Simonds and A. J. Ridge, for respondents.

**HENSHAW, J.** These are separate appeals by the residuary legatees and devisees under the will of Kruger, deceased, from the order of court fixing the attorney's fees of the attorney of the executor, and ordering payment of the amount from the funds of the estate. Merguire, an executor of the estate of deceased, presented his fifth annual account, and at the same time tendered his resignation as executor, to take effect upon its settlement. He petitioned also for the court to determine the compensation to which he was entitled. Due notice was given of the hearing of all these matters. A hearing was had, the account settled, and the compensation of the executor fixed. Thereupon Merguire presented an application to the court, setting forth that, as executor, he had employed J. M. Walling, attorney at law, on behalf of himself and his co-executrix, as their attorney at law in the matter of the estate; that Walling had rendered valuable services to the estate, for which he had been compensated only in part; and that such services had been rendered upon an agreement between himself and Walling that the amount of the latter's compensation should be determined and fixed by the court. The application requested the court to fix the amount of compensation for the services of the attorney. No notice of this application

was given to the heirs, devisees, and parties in interest. In fact, no notice whatever was given. But the court proceeded forthwith to take testimony, notwithstanding the protest of one of the residuary legatees, who happened to be present, and who insisted that, in the absence of notice, the court was without jurisdiction to pass upon the matter. The court made its order directing the representatives "to pay to said J. M. Walling, Esq., from the funds of the said estate, the sum of seven thousand five hundred dollars."

The order is an appealable order. *Stuttmeister v. Superior Court*, 72 Cal. 487, 14 Pac. 35; *In re Kasson's Estate* (Cal.) 51 Pac. 706. The compensation of the attorney of the executor, while not a claim against the estate, is an expense of administration, allowed to the executor, the amount of which is to be fixed by the court and paid out of the estate (*In re Levinson's Estate*, 108 Cal. 450, 41 Pac. 483, and 42 Pac. 479); but such an order for the payment of money, by which the property of the heirs, legatees, and devisees is to be taken from them, cannot be made without notice and an opportunity to them to be heard. It cannot require the citation of authority in support of the proposition that one may not be thus deprived of his property without process of law. Commonly, the account of the executor includes the item of attorney's fees as an expense of administration; and, when the notice required by law of the hearing and settlement of the account is duly given, the parties in interest are afforded an opportunity of contesting that with any other items which fall to meet their approval. Here the final account of the executor contained no hint or suggestion that it was proposed to make any charge upon account of the services of the attorney, and, while upon all matters properly embraced within the account due notice was given, this was not such a matter. The order of the court fixing the compensation of the attorney without notice to the parties in interest is therefore void.

Upon the hearing, one of the devisees who was present offered evidence upon the question of the value of the services of the attorney, which, it was insisted, showed that, by reason of the culpable negligence of the attorney, there had been lost to the estate the sum of \$14,000. Objection was made to the introduction of the evidence, upon the ground that it could not be considered by the court in the proceeding at bar, because the court did not have jurisdiction or power to consider or determine the liability of an attorney for his negligence in the conduct of litigation on behalf of the estate, and that the only remedy of a person interested in the estate for injury occasioned by such negligence was through the medium of a civil suit against the attorney. The court ruled that such negligence could be considered "incidentally" in determining the value of services for which compensation was asked, and overruled the objection. Later, however, when the court



came to deliver its decision, it announced that it "refused to allow in this proceeding, as an offset or counterclaim, any damages claimed to be occasioned by the alleged neglect of J. M. Walling in the Henry suit." It is evident from the foregoing that it is a matter of dubiety whether or not the court weighed the evidence touching the question of negligence, what it meant when it said that it would consider it "incidentally," and whether its final refusal to allow as an offset any damages claimed was because of its conviction that no damages had resulted, or because of its conviction that it was not within its power so to do. As the question is certain to arise upon a rehearing of the application to fix the attorney's compensation, it should be said that it is well settled that it is within the jurisdiction of the court in probate to fix the compensation which shall be allowed to the attorney of the personal representative of the deceased. *Gurnee v. Maloney*, 38 Cal. 85; *Sharon v. Sharon*, 75 Cal. 38, 16 Pac. 345; *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230; *Pennie v. Roach*, 94 Cal. 515, 29 Pac. 956, and 30 Pac. 106; In re *Ogier's Estate*, 101 Cal. 385, 35 Pac. 900; In re *Blythe's Estate*, 103 Cal. 350, 37 Pac. 392; In re *Levinson's Estate*, 108 Cal. 450, 41 Pac. 483, and 42 Pac. 479. Indeed, as early as *Gurnee v. Maloney* it was decided that the court in probate not only had jurisdiction to fix the value of the services rendered by an attorney to the administrator on behalf of the estate as an expense of administration, but that the court had exclusive original jurisdiction to adjust and enforce such demand. Having jurisdiction, it must, of necessity, have power to do full and complete justice between the parties; and where an attorney contracts with the representative of the estate, knowing that, in law, the value of his services, so far as they are to be a charge upon the estate, is to be fixed by the court in probate, he cannot be heard to say, if dereliction is charged against him, that the question is one not cognizable before that court to which alone he must look for compensation; for it is the duty of the court in determining the compensation to hear all evidence pertinent to the consideration, and it would indeed be extraordinary if an attorney, in support of his claim for compensation, could be heard to urge his faithful performance of duty, and that, in answer, the opposing heirs should not be permitted to show that, by reason of his culpable dereliction, he was entitled to less compensation, or to none at all. The order appealed from is reversed.

We concur: TEMPLE, J.; McFARLAND, J.

123 Cal. 324

CAPELLI v. DONDERO et ux. (S. F. 768.)  
(Supreme Court of California. Jan. 19, 1899.)

REFORMATION OF INSTRUMENTS—MISTAKE OF FACT—EVIDENCE—FINDINGS—APPEAL AND ERROR.

1. Where there is evidence, though conflicting, to support the findings of the trial court on 55 P.—67

questions of fact, the weight of such evidence cannot be determined on appeal.

2. In an action to reform a deed alleged to have been executed under a mistake of fact, it appeared that plaintiff and defendant, who were tenants in common of certain land, agreed to divide it by the center line of a private road running through the tract, and employed a surveyor to establish such line; that said road, as used by the parties, diverged from a straight line near plaintiff's buildings, leaving sufficient space intervening for the convenient use thereof; that the surveyor, who established such line in plaintiff's absence, instead of following the center line of such road, ran a straight line between the initial and terminal points, passing so near plaintiff's buildings as to deprive him of the convenient use of them; that the deed in question, prepared by direction of both parties, described the division line as so surveyed, though they supposed, and for several years thereafter understood, that such line, as therein described, was the center line of such road (which they had continued to use as theretofore); and that such mistake was not discovered until afterwards, when defendant began the erection of a fence on the line as surveyed. *Held*, that such evidence supported findings in favor of plaintiff.

3. Oral evidence as to an alleged mistake was admissible in an action to reform a deed on such ground.

4. Under Civ. Code, § 3399, authorizing the revision of a written contract on the ground of mistake, it was not necessary, in order to entitle a party to the reformation of a deed on such ground, that such mistake should have been mutual.

5. Where plaintiff claimed, in an action to reform a deed, that the center line of a certain private road had been agreed on by the owners of adjoining lands as the division line between them, and that, through a mutual mistake, a different line was so designated in the deed, it was not error to admit in evidence a certain deed to another person, made by defendant three years thereafter, in which such private road was referred to as a boundary.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county.

Action by Charles Capelli against Charles Dondero and wife. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Julius Lee, for appellants. Geo. P. Burke, for respondent.

CHIPMAN, C. Action to reform a deed on the ground that it was executed under a mutual mistake of the parties to it. It appears from the findings of fact that prior to December 10, 1890, plaintiff and defendant Charles Dondero were the owners of a tract of land situated near the town of Watsonville, containing about 74 acres. On or about said date they agreed to divide said land so that each could own his interest in severalty, and to that end agreed to make a certain private roadway, running through the tract from west to east, the dividing line, plaintiff to take the portion on the southerly side, and defendant Charles Dondero that on the northerly side, of this road. This private road was entered by a gate at the county road, and terminated on the eastern boundary line of the tract at a stake marked "C & D," midway of

two cherry trees. A surveyor was employed to establish the center line of this road, which was to become the division line. He ran a straight line between the two points agreed upon, which gave a course north, 70 deg. east, distance 38.15 chains, instead of following along the center of said road, as was agreed should be done. Some distance from the gate entrance, and south of this road, plaintiff's buildings, barns, and outhouses were situated, "a sufficient distance from the southerly line of said private road so as to make and render the said barns, buildings, and outhouses convenient of access and use by said plaintiff." A plat is attached to the complaint, which the court finds correctly shows the location and course of this road and its center line, and the situation of plaintiff's said buildings relative thereto. The contention turns upon the question as to the location of this center line. Plaintiff contends, and the court found, that the center of this road from the center of the gate took a course north, 70 deg. east, for 21.62 chains, to a point west of, and not far from, plaintiff's buildings, where it bore a little more to the north, following the center of the road (69 deg. 25 min. east) 5.21 chains; thence along the center of this road north, 70½ deg. east, 11.30 chains, to said stake marked "C & D." Appellants contend for a straight line from the point of beginning to the point of ending. The difference in acreage is very little. The slight divergence from a straight line near the buildings, returning to it at the stake "C & D," was necessary to give to plaintiff the free and unobstructed use of his buildings. It further appears from the findings that on December 18, 1890, by direction of both parties, one Julius Lee, Esq., who had been their attorney, prepared a deed, which was executed by defendant Charles Dondero to plaintiff, conveying the tract south of this road, describing the dividing line as it was surveyed. The deed was left with Lee, who had it recorded in January, 1891. The parties at this time, and until July 8, 1895, mutually understood that the division line as described in the deed was the center of said road, and the said deed was executed and accepted under such belief; but said described line was inserted in said deed by the mutual mistake of the parties named therein. No stakes or marks were placed by which said line could be ascertained by any person examining the same. Plaintiff did not discover said mistake until about July 8, 1895, when, for the first time, the defendants commenced to erect a fence upon said line, and procured said surveyor to lay out by stakes the line surveyed by him. Plaintiff then discovered that the line did not follow the center of said road, as originally agreed upon, but was so run that the fence so constructed by defendants stands a distance of four or five feet from the center of said private road, and so close to the said buildings "as to render them, in their location and situation to said fence, worthless, and of no value or use to plaintiff."

If said fence had been erected on the dividing line, as agreed upon, "plaintiff would have had the free and uninterrupted use and enjoyment of said buildings." Defendant Charles Dondero conveyed to his wife, co-defendant, his interest in the premises on November 18, 1894, who had full knowledge and notice of all the facts above related. A jury was called to pass upon the principal issues of fact, which were determined in favor of plaintiff. The court adopted most of these findings of the jury and certain of its own, and gave plaintiff judgment, from which, and from the order denying a new trial, defendants appeal.

1. The principal question raised by appellants is that the evidence does not support the findings. It is true, as appellants contend, that evidence warranting the reformation of a deed must be clear and convincing, and not loose, equivocal, or contradictory, leaving the mistake open to doubt; and, unless the proofs come up to this standard, equity will withhold relief. But these are rules for the government of the trial court, and are not controlling in this court where the findings find support in the evidence. *Ward v. Waterman*, 85 Cal. 502, 24 Pac. 930. This court cannot enter upon an examination of all the evidence to determine where the preponderance lies. Upon questions of fact its province is to determine whether there be evidence tending to support the findings, and it cannot decide as to the weight of the evidence where there is a conflict. Plaintiff testified that the agreement was to divide the land by the center of the private road which he described as delineated on the plat used at the trial, and as running through the tract from west to east. The instructions given the surveyor were to follow the center of this road. He was not present when the survey was made, but left one Scrivani (who was in his employ) to represent him. With respect to the road as shown on the map, his buildings were a little distance south of the road. (The exact distance is not given, but it was sufficient for their convenient use.) After the survey was made, he and Dondero took the field notes to the attorney of the parties, and directed him to make the deed according to the survey. Neither party knew anything about courses, and plaintiff testified that when he signed the deed he knew nothing about the description in it. After the deed was executed, the parties continued to use the road as before, and not until in 1895, when Dondero commenced to erect his fence, did plaintiff know that the survey ran so close to his buildings, and did not follow the center of the road at that point. The fence made by Dondero on the surveyed line was within three feet of two of plaintiff's buildings, and within a foot and a half of one of them, depriving him of their convenient use. He also testified that he saw no stakes on the line except from the gate to his house. There is much evidence (probably preponderating) that the road from the gate



was well defined to a point near the dwelling, but beyond that point it was undefined, and held no certain course. But it is not probable that for all these years plaintiff had allowed a road to run so near his dwelling and other buildings as was this surveyed line, and that he consented to or directed a division line which would give Dondero the right to erect a fence which would so seriously affect the enjoyment of his property. But, be this as it may, the jury and the court found that the dividing line agreed upon was as claimed by plaintiff, and we think there was evidence to support this conclusion.

Appellants contend (1) that plaintiff was bound by the survey, because the person who acted for him at the time knew that the line was established where defendants claim it should be; and (2) that plaintiff is charged with knowledge of this fact, or with the means of knowledge which he had so near at hand. It appears, however, that after the survey was made the parties continued to use the road for five years before Dondero made known his claim by fencing on the surveyed line. During all this time plaintiff was indulging the mistake that the surveyed line was along the middle of this road, as the agreement called for. He saw no stakes along this disputed part of the road, and might well have rested upon the belief that the line was along the middle of the road. The jury and court found, upon sufficient evidence, that plaintiff and Dondero had agreed upon a line in the middle of this road, and we do not think plaintiff's agent can be presumed to have had authority to consent to any deviation from that agreement in a matter of such importance to plaintiff. The evidence does not disclose his instructions. Scrivani (the agent) testified that he carried the chain and stuck the stakes, and the surveyor testified that Scrivani must have seen that the line ran close to the buildings, and that he made no objection to it. There is no evidence that Scrivani communicated this fact to plaintiff, and plaintiff testified that he did not know where the surveyed line was until in 1895, when Dondero began to make his fence. In the absence of any evidence to the contrary, it must be presumed that plaintiff authorized no other line to be surveyed than the one agreed upon, and we do not think that the knowledge of Scrivani that the line deviated from the one agreed upon can be imputed to plaintiff, for there is no evidence that Scrivani knew what the agreement was, or that he informed plaintiff where the survey fixed the line. Plaintiff had a right to assume that the line would be, and in fact was, run according to the agreement; and negligence to inquire just where the line was established cannot be presumed under the circumstances of the case.

2. It was not error to admit oral evidence as to the mistake, and as to how it arose (*Isenhoot v. Chamberlain*, 59 Cal. 630); and it is not necessary that the mistake should have

been mutual (*Civ. Code*, § 3399; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630).

3. Error is alleged in allowing the introduction of a deed from Dondero, executed in 1893 (three years after the agreed division), in which he refers to this private road as a south boundary. The purpose of this evidence no doubt was to show that he recognized the existence of this road, and that it bounded his property on the south. We think the evidence was admissible, because plaintiff and Dondero were, according to plaintiff's testimony, at that time using the road as before, and plaintiff had not then learned where the surveyed line was. The evidence also tended to corroborate plaintiff's evidence.

No point is made that the finding as to Mrs. Dondero's knowledge of the facts was not justified by the evidence. Mr. Dondero testified that he gave plaintiff notice in 1895 as to building the division fence, and the case seems to have been tried as though he were the owner or controlled the property north of the road. Whether his deed to his wife in October, 1894, would affect the rights of plaintiff, need not, therefore, be, and is not, considered. The judgment and order should be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

123 Cal. 374

#### PEOPLE v. GODWIN. (Cr. 403.)

(Supreme Court of California. Jan. 23, 1899.)

SEDUCTION — TRIAL — WITNESS FOR DEFENDANT — IMPEACHMENT — CROSS-EXAMINATION — HARMLESS ERROR — LAW BOOKS — READING TO JURY — ASSIGNMENT OF ERROR — RECORD.

1. In a prosecution for seduction, after a witness for defendant denied having sexual intercourse with prosecutrix, the evidence being of a negative character, and favorable to neither party, defendant could not impeach him by examining him as to contrary declarations.

2. A witness for defendant in a prosecution for seduction was asked on cross-examination if he ever knew of improper conduct on the part of the prosecutrix, and answered that he never had had improper relations with her, as he had testified on his examination in chief. *Held* that, if the question was improper cross-examination, it was harmless error.

3. Refusal to allow the reading of a law book to the jury is not ground for reversal where the record does not show the abstract sought to be read.

Department 1. Appeal from superior court, San Luis Obispo county.

William H. Godwin was convicted of seduction, and he appeals. Affirmed.

Graves & Graves, for appellant. Atty. Gen. Fitzgerald, for the People.

GAROUTTE, J. Defendant has been convicted of the seduction of a female of previous chaste character, under a promise of marriage, and now prosecutes this appeal. Rul-

ings upon the admissibility of evidence are mainly relied upon for a new trial. Defendant placed one St. Clair upon the witness stand, and in answer to a direct question he testified that he never had had sexual intercourse with the prosecutrix. He was thereupon asked if he had not at several specific times and places stated to certain individuals that he had had such intercourse with the prosecutrix. Objections were sustained to these questions, and such rulings are now insisted upon as error. The action of the trial court has full support in the law. It is only when the witness gives hostile evidence that a party may impeach him by showing contradictory statements made at other times. The answer of the witness being "No," the evidence was purely of a negative character. It was neither favorable to one side nor the other, and, if the witness had been impeached, the case before the jury would have assumed no different aspect. The only purpose in any case of introducing the inconsistent and contradictory statements of the witness is to cast doubt and distrust upon the evidence he has previously given. As already suggested, if this witness had been impeached, either by inconsistent statements or general bad reputation for veracity, the result would simply have been that the evidence he gave would have been cast out. There would have been no evidence before the jury that in fact he had had intercourse with the prosecutrix. In other words, his answer to the question addressed to him by counsel for defendant being "No," it neither weakened nor strengthened the case. After impeachment, the case would have stood exactly the same as before. This principle is well settled by the authorities found in the reports of this state. *People v. Conkling*, 111 Cal. 616, 44 Pac. 314; *People v. Crespi*, 115 Cal. 50, 46 Pac. 863. The witness St. Clair, upon cross-examination, was asked the following question: "Q. During the time you knew her, or at any time, have you ever known of any improper conduct on her part?" In direct examination the witness only testified as to his personal acquaintance and relations with the prosecutrix. For this reason the matter inquired about was not proper cross-examination. While various objections were made to the question, there was no objection upon this ground, and for this reason the ruling of the court in admitting the answer probably was not error. In addition, it appears the witness answered the question by saying that he never had had any improper relations with the prosecutrix. This answer was only a repetition of a statement he had previously made several times, and no possible harm to defendant could have been caused by it.

The court refused to allow defendant's counsel to read to the jury extracts from a decision of this court, and this ruling is assigned as error. The practice of reading law books to the jury is not a commendable one, and this court has often so declared. *People v. Ander-*

son, 44 Cal. 70. In this particular instance we know nothing as to the character of the extract sought to be read. The record is entirely silent upon the matter, and for this reason, even conceding such a practice allowable in exceptional cases, there is nothing before us showing the case to be of that character.

We have examined the remaining contentions put forward by appellant's counsel, and find them without merit. For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

123 Cal. 384

### DAVIS v. HART. (S. F. 1,228.)

(Supreme Court of California. Jan. 24, 1899.)

PROCESS—SERVICE—LIMITATIONS—DEATH OF DEFENDANT—CONSTITUTIONAL LAW.

1. Code Civ. Proc. § 581, as amended in 1889, requiring that no action shall be further prosecuted unless summons shall have been issued within one year and served within three years from bringing suit, includes an action in which defendant dies within the year.

2. Code Civ. Proc. § 581, as amended in 1889, requiring issuance of a summons within one year and service within three years from bringing suit, is not unconstitutional as applied to a case where defendant dies within the year, because cutting off plaintiff's opportunity to serve his summons within the year in which he could issue it.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Samuel Davis against Amos Hart, administrator of the estate of George D. Jordan, deceased. From a judgment for plaintiff and an order denying a new trial defendant appeals. Reversed.

Bishop & Wheeler, for appellant. Freeman & Bates, for respondent.

TEMPLE, J. This action was commenced against George S. Jordan July 1, 1886, by filing a complaint and issuing a summons thereon. The action was upon a promissory note dated July 1, 1882, due one year after date, without grace. The summons was not served. Defendant then resided, as plaintiff knew, in Sierra county, in this state. The suit was commenced on the very last day upon which it could have been brought to avoid the bar of the statute of limitations. That purpose accomplished, plaintiff rested upon his oars, and seven months thereafter defendant died. No administrator was appointed on the estate of Jordan until April, 1896, when plaintiff procured the issuance of letters to defendant. Afterwards, the first thing done in the case, the court of its own motion, and without the knowledge of defendant, dismissed the action for want of prosecution. The first appearance in the action on the part of the plaintiff after the issuance of summons was in a successful motion to



vacate and set aside the judgment so entered on the 12th day of June, 1896. At the same time an order was made substituting Amos Hart, administrator of the estate of Jordan, as defendant, and the clerk was directed to issue a summons directed to the said defendant. The summons was issued and served, and the defendant, appearing specially, moved to quash the summons on the ground that the same was unauthorized by the statute. The motion was denied on the 15th day of August, 1896, and defendant excepted. On the 15th day of September, 1896, plaintiff filed a supplemental complaint, alleging the death of defendant Jordan, and that the claim had been duly presented to the administrator, and that the administrator rejected the same on the 11th day of April, 1896. After the motion to dismiss had been denied, defendant demurred to the amended and supplemental complaint, and also answered, always reserving the objection to the further prosecution of the case on the ground that summons was not served and was not returned within three years after the commencement of the action. The demurrer was overruled, and the case came to a trial, defendant objecting that the court had lost jurisdiction of the case, and that the same should not be further prosecuted, but should be dismissed, as provided in section 581, Code Civ. Proc. The court, however, proceeded, against the protest of the defendant, to try the case, and judgment was for the plaintiff. Defendant appeals from an order denying a new trial, and still insists upon his objection that the court should have dismissed the case under section 581, Id.

It is not denied that this case is strictly within the language of section 581, as amended in 1889, and that there is no doubt that it is one of a class of cases which that amendment was especially designed to include. It was intended to prevent the indefinite extension of the life of an obligation in spite of the statute of limitations by simply commencing an action. Such obligations should not be kept alive without the knowledge of the debtor lying in wait for him in case he should acquire further property. It is a matter of general interest that a debtor should know whether the debt is kept alive or not. Uncertainty upon this matter hampers enterprise. The language of the statute could not be made less ambiguous than it is: "No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, and served and return thereon made within three years after the commencement of the said action, or unless appearance has been made by the defendant." The language shows that great care was

taken to make the statute comprehensive, and free from doubt. The repetitions are evidently to remove all possibility of doubt. First, the prohibitory form is used: "No action shall be prosecuted," and "no further proceedings shall be had therein." Then the same thing is repeated in the affirmative form: "All actions heretofore or hereafter commenced shall be dismissed." The legislative will is thus not only made sure, but that it is absolute and imperative is manifested. Could there be any doubt that it was intended to include all actions? A cardinal rule of interpretation is that a statute free from ambiguity and uncertainty needs no interpretation. This must be so, for all interpretation and construction is for the purpose of ascertaining the legislative will. When this is clear, interpretation is not allowable. In such case it cannot be argued that the result is unjust or against policy. It is itself conclusive upon these subjects. True, the literal sense will not always prevail. But, even in such cases some ambiguity must be found in the statute itself. Thus, a statute making it an offense to lay hands upon a priest carries upon its face a suggestion that the words are not to receive a literal interpretation. To lay hands upon another is often a mode of stating an act of violence, and plainly it is so used in the statute. So other parts of the statute may be inconsistent with the more obvious sense of particular provisions, or a policy may be disclosed in the law which would be defeated by a literal interpretation of some special provision; and so, too, sometimes clauses may be restricted in their operation, when it appears from the statute that it was not intended that they should apply to all that would be comprehended by the words literally construed. And other instances might be mentioned, but in all these cases some reason is found in the statute itself to induce a belief that the legislature did not intend the statute to receive the obvious and literal construction. In such cases the statute or clause will be so interpreted, if possible, as to further the general purpose rather than to defeat that purpose; but where, as here, the meaning is free from doubt, and the case in hand is clearly the very case the statute was intended for, and the practice followed is exactly that which the legislature intended to prohibit, construction is out of the question. We may refuse to obey the law, but we should not cloak our refusal under a pretense of construing language which is unambiguous, and cannot be made clearer by any explanation.

It is said this case differs from the case of *Vrooman v. Li Po Tai*, 113 Cal. 302, 45 Pac. 470. I see no difference in principle, but it is immaterial. Neither the opinion in that case nor any opinion that can be written is less ambiguous than the statute itself, which, as we have said, neither needs nor admits of construction.

But it is said the law is unconstitutional as applied to this case, because it cuts off plain-

tiff's opportunity to serve his writ before the end of the year within which he could issue his summons. The statute does not allow any particular time within which to serve the summons after its issuance. A plaintiff is required to serve the summons within three years after the suit was commenced. If he allows eleven months to pass before issuing summons, then eleven months of the time allowed him to serve his summons have also passed. His opportunity to serve his summons commenced with the bringing of the action. Here, in fact, the summons was issued on the day the suit was brought, but that will make no difference. Plaintiff had seven months within which he could have served his summons before Jordan died. The period had commenced to run, and, having begun, it did not stop running because of the subsequent disability, if it could be deemed a disability. There are no exceptions to the bar of the statute except those found in the statute itself (Wood, Lim. § 252); and when the statute has commenced it continues to run, notwithstanding the death of the defendant or an intervening disability, unless it is expressly provided otherwise in the statute. Disability of the defendant does not in any case prevent the running of the statute, nor will ignorance of the creditor as to the residence of the debtor, or that he has property which can be reached, or even of his own right of action, prevent the running of the statute. The fact that Jordan died within the year, and before summons was served on him, is an immaterial circumstance, unless the statute has provided that such circumstance shall prevent the running of the statute. Whenever the statute has commenced to run, delay in bringing an action is always at the risk of an intervening disability, which may, in the absence of statutory saving, prevent suit being brought at all. Code Civ. Proc. § 353, cannot apply to this case, for the time limited for the commencement of the action had run before the death of Jordan. Under that section a party having a cause of action against the estate of a deceased person is not bound to cause administration to be had, because the statute expressly extends his time for one year after the issuance of letters. Here the condition is reversed. The time continued to run whether letters were issued or not, and, having commenced to run, would have continued to do so whether the plaintiff could have caused administration to be had or not. There was no actual hardship here, however, for the creditor could have caused letters to be issued at any time. In no event could his alleged ignorance that Jordan died possessed of an estate cut any figure. All creditors are bound to know such facts at the risk of losing their debt. The order and judgment are reversed, the cause remanded, and the court is directed to dismiss the action.

We concur: MCFARLAND, J.; HENSHAW, J.

123 Cal. 395

**BALFOUR v. FRESNO CANAL & IRRIGATION CO. (Sac. 302.)**

(Supreme Court of California. Jan. 25, 1899.)

CORPORATIONS—CONTRACTS—RATIFICATION—NOTICE.

Where a corporation ratifies a contract made by its president without authority, it is bound by any declarations he may have made during the negotiation determining the meaning of an ambiguity, since it is presumed to have notice of all the facts relating to the negotiation.

Department 2. Appeal from superior court, Fresno county.

Action by Robert Balfour against the Fresno Canal & Irrigation Company for a decree declaring that there was nothing due from him to defendant under certain irrigation contracts, and for an injunction. From a judgment for plaintiff, and from an order refusing a new trial, defendant appeals. Affirmed.

Frank H. Short, for appellant. L. L. Cory, for respondent.

TEMPLE, J. This appeal is from a judgment and from an order refusing a new trial. It is the second appeal in the case. The first was taken by the plaintiff, and will be found reported in 109 Cal. 221, 41 Pac. 876, where a more detailed statement of the facts can be found than is deemed important here. The language of the contract is there stated, and it was determined that such language was fairly susceptible of two constructions, without doing violence to its usual and ordinary import, on any established rule of construction; and that, therefore, there was an ambiguity, to explain which it was competent to show the surrounding circumstances, and how the parties understood its terms, as manifested by their declarations during the negotiations which preceded the execution of the contract.

The only ruling discussed in the opinion relates to the exclusion of the conversations between the president of the defendant corporation and the plaintiff. The court held that the trial court erred in striking out the evidence on motion of the defendant, and for such error the judgment was reversed, and the cause remanded for a new trial. Upon the new trial the same evidence was offered and received, but the objections made were not precisely the same. On the first trial the objection was that the evidence was incompetent, and could not be received to contradict, add to, or vary the terms of the written contract. On the last trial the objection was added that no one present had authority to represent the corporation. It is admitted that the corporation ratified the contract made, but it is contended that the power was vested entirely in the directors, and all that they ratified was the written contract, and they cannot be held to any other construction than that which would be given the language unaided by those unauthorized conversations. The corporation accepted the con-



tract as written, and can be bound only by its terms. It knew of no conversations which might give a different effect to the contract than the obvious purport of its language. This proposition cannot be maintained. When the corporation ratified and adopted the contract made for it by its president it took it cum onere. The ratification itself affords conclusive proof that the president had authority to negotiate such contracts for the corporation. If no previous authorization existed, the ratification is the equivalent of a previous authorization. If the corporation ratified without adequate knowledge of the facts, or if unauthorized representations were made without the knowledge of the principal, it might, under some circumstances, refuse to be bound by the contract, and seek a rescission; but it cannot insist upon its contract rights, and repudiate the unauthorized representations of the agent, which, to some extent, constituted the inducement to make the contract on the part of the other party. *Gribble v. Brewing Co.*, 100 Cal. 71, 34 Pac. 527; *Mundorff v. Wickersham*, 63 Pa. St. 87; *Bennett v. Judson*, 21 N. Y. 238. In these cases numerous authorities are cited to the same effect. The rule that the principal will not be held to a ratification unless he act with full knowledge of all the facts has no application here, for the principal is insisting upon the contract. But, if full knowledge was necessary, it must be presumed that the corporation had full notice of all the facts which were known to its president. The president of a corporation is a proper person to whom notice, which is to affect a corporation, is to be given. The corporation has no eyes, ears, or understanding save through its agents. The president is considered the head of the corporation, and it is his duty to report to the trustees information affecting the interests of the corporation. And the presumption is that he does so. Usually this is a conclusive presumption. *Thomp. Corp.* § 5228.

Appellant's counsel seems to appreciate the force of this rule, but contends that it ought not to be applied to this case. "It would destroy all safeguards and all protection to corporate property, at least to the extent wherein the power of making, authorizing, or ratifying contracts is reserved to the board of directors." Corporate property is no more sacred than any other property, and some corporations can only be reached through their agents. It behooves them to be especially careful in regard to the conduct of their agents. In no other way can knowledge be conveyed to the fictitious entity, or negotiations be had with it. It is not usual for parties dealing with a corporation to be brought before the directors to negotiate their contracts. Instead of seeing any reason for excepting this case from the rule, it seems to be exactly the case in which justice requires its application. If the contract were made with an individual, it would be construed in

the light of the oral declarations. It would be an injustice to allow a more favorable rule to a corporation. Having had the benefit of the inducement, without which the contract would not have been made, it cannot retain the contract, and escape the construction which the court would give the contract in the light of the representations made by its agent. Counsel in his zeal forgets his case. There is no attempt to destroy the contract, or to enforce one it has not made. On the contrary, the design is to enforce the contract exactly as it is written. We are trying to find out what the contract as written means, not to modify it and make another.

This court on the former appeal said that the construction contended for by plaintiff was reasonable; that it violated no rule of construction; that without the evidence offered the contract is ambiguous. I do not admit, nor do I think it can fairly be said to have been admitted on the former appeal, that without the testimony in question the contract should be construed in favor of appellant. The basis of the former decision is that it is a matter of doubt. The payments are to be made after the water is brought upon the land. The corporation was not required to bring the water even to the land; much less was it required, or even authorized, to bring it upon the land. The contract expressly provided that plaintiff might do so. It says: "The party of the second part will construct a ditch," etc. The first payment was to be made "on the first Monday in September, after the water has been brought upon said land." I think the most natural interpretation of this language is that it refers to the bringing of the water upon the land as expressly provided in the contract.

As I read the case, this is not contrary to the decision in *Irrigation Co. v. Dunbar*, 80 Cal. 530, 22 Pac. 275. It was there held that as soon as the water company had brought the water and constructed its gate it had fully performed its contract. There the contract was that the landowner shall pay after the water has been brought to the land. The language differs much from that in the contract involved here. The real question here is, was the landowner required by his contract to construct his distributing ditches at once? If so, he should not be allowed to defeat the claim of the water company for payment by refusing to perform that part of his contract. As to this the contract is silent or of doubtful import.

We need not follow the argument as to the construction of the contract, in view of the evidence. Counsel's real contention is that the contract is not ambiguous, and the oral declarations contradict its terms, and that all propositions and counter propositions during the negotiations were merged in the written contract subsequently entered into. These were all important and weighty considerations upon the former appeal, but are not of interest upon this appeal. The former conclusion has

become the law of the case. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

123 Cal. 379

MITROVICH v. FRESNO FRUIT-PACKING CO. (Sac. 317.)

(Supreme Court of California. Jan. 24, 1899.)

SALES—NOVATION—PLEADING—AGENCY—INSTRUCTIONS.

1. Plaintiff contracted to sell and deliver fruit to a firm. Previous to its delivery, the partners formed a corporation with other persons which succeeded the business of the firm. The corporation received the fruit, and assumed the duties of the firm in relation thereto. *Held* not essential to plaintiff's right to recover the price that there should have been a formal novation of the corporation in the contract and a release of the firm from liability thereon; hence such novation and release need not be alleged.

2. A firm contracted with plaintiff for the delivery of fruit to be sold on commission, with the privilege of purchase at the market price. The partners formed, with others, a corporation which succeeded to the rights of the firm under the contract. In an action against the corporation for fruit delivered, which defendant, it was alleged, had elected to buy, an instruction that if one D. represented the corporation in dealing with plaintiff, and did not disclose to plaintiff any limitation on his authority, and contracted to purchase, the jury should find for plaintiff, is erroneous, since mere silence by an agent as to limitations on his authority cannot render the limitations ineffective.

3. If such instruction was designed to convey information as to the "holding out" of D. as an agent with authority to purchase, it was misleading, since the jury could infer that he possessed any power whatever which he might assume to exercise.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county.

Action by S. M. Mitrovich against the Fresno Fruit-Packing Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

L. L. Cory, for appellant. S. S. Wright and C. Scribner, for respondent.

BRITT, C. Four certain persons were co-partners, and in that capacity, on June 27, 1895, entered into a contract in writing with Mitrovich, the plaintiff in this action, whereby he agreed to deliver to them the crop of figs to be obtained that season from a certain orchard, and authorized them to pack and sell the same on his account for specified compensation; the duties of which employment they on their part undertook to discharge. Said contract contained also a provision allowing to said partnership "the privilege of purchasing said described figs at time of delivery at the agreed market value." About August 21st following, three of said partners, together with two other persons, formed a corporation under the same name which had been the partnership designation, —Fresno Fruit-Packing Company. This is an action against said corporation. Plaintiff's complaint contains three counts. In the first it is alleged,

among other things, that defendant "succeeded to all business relations, interests, and liabilities of said partnership; and, in pursuance of the terms of said contract, exercised its privilege and option to, and did, buy of and from said plaintiff, and plaintiff sold and delivered to said defendant corporation," 21,254 pounds of said figs at certain prices agreed upon, for which a balance specified remains unpaid. There was a verdict in plaintiff's favor for a few dollars less than the aggregate of the sums demanded on his several alleged causes of action, and judgment was rendered accordingly. The evidence at the trial concerning plaintiff's right to recover on the second and third counts was conflicting, and they are of little or no consequence in the appeal. The matters for our consideration concern the first count of the complaint, which was the foundation of the greater part of the recovery.

Defendant claims that said first count (to which he demurred) is bad both in form and substance, in that it does not show with certainty or at all a novation of defendant for the partnership of the same name in the contract of June 27, 1895; that there could be no novation without a release of the partnership from the obligations of the contract; and that no such release is averred. But, as we read the pleading, it alleges a sale and delivery of the figs by plaintiff directly to defendant at agreed prices. The averments regarding the previous contract with the partnership, and the relation of defendant to that contract, are but evidentiary matter, and might as well, and better, have been omitted. If, therefore, any uncertainty exists in the pleading, it is in a particular not at all material to the cause of action, and the demurrer was properly overruled.

The principal disputed question of fact is whether there was a sale by plaintiff to defendant, as alleged by him. Defendant contends that whatever goods it received from plaintiff were to be sold by it on commission, and that they had not been sold when this action was brought. The evidence for plaintiff under the first count related to two distinct lots of the fruit. The first lot consisted of 10,000 pounds of figs, which he delivered on or about August 29, 1895. The second contained 11,254 pounds, and was delivered about September 19th following. The negotiations concerning the goods included in the later delivery occurred between plaintiff and one A. F. Tenney, the managing agent of defendant. The evidence was conflicting as to whether they were sold outright to defendant, or bailed to it for sale on commission, and we need not notice that transaction further. But the first lot of 10,000 pounds was, according to the contention of plaintiff, purchased by defendant through the instrumentality of one Dunlap, a subordinate agent, who was in the employ, first, of said partnership, and afterwards of the corporation.

In our opinion, there was evidence from which the jury might infer that the corpora-



tion undertook to fulfill the obligations of the partnership under the said contract of June 27th. It succeeded directly to the business of the partnership. Mr. Tenney, who was manager of the business of both concerns, testified that the partnership had made no contracts to handle fruit during 1895, prior to September 3d, except the contract with Mitrovich, and that "all the goods under that contract had not been delivered at the time the corporation was formed, and the corporation took charge of the balance of it." The fact seems to have been that none of such goods was delivered prior to August 29th, and the corporation was formed a week earlier. There was other evidence tending in the same direction,—to show, that is, that the defendant received the goods and assumed the duties of the former partnership in relation thereto, and also that this arrangement was in effect when plaintiff delivered the first lot of figs. This being the situation of the parties, it was not essential to plaintiff's right of action now asserted that there should have been a formal novation of the corporation in said contract and a release of the partnership from liability thereon. *Malone v. Transportation Co.*, 77 Cal. 38, 44, 18 Pac. 858; *Paper-Bag Co. v. Van Nortwick*, 52 Fed. 752; Civ. Code, § 2794, subd. 3, last clause.

But, although there was some evidence from which the jury might find that Dunlap received the first delivery of figs as the agent and servant of defendant, it remained to determine whether defendant elected, through him, to purchase the goods under the option allowed by the contract of June 27th, and this necessitated an inquiry as to the scope of his agency. Defendant contends that he had no authority for any such purpose, even if he attempted to exercise it, which is also denied. Viewing the evidence touching the extent of Dunlap's power in the light most favorable to plaintiff, all that can be said is that it was conflicting. In this state of the case, the court instructed the jury as follows: "If you should find from the evidence that Dunlap was employed by the defendant and the co-partnership as an agent to represent them in dealing with the plaintiff, and that said Dunlap did not disclose to the plaintiff any limitations upon his authority to contract with the plaintiff, and the plaintiff did not know that he was not authorized to contract with reference to the purchase of the figs, and you should find from the evidence that said Dunlap did make the contract for the purchase of the figs on behalf of the co-partnership or the defendant, then you should find for the plaintiff." This instruction was clearly erroneous, and can scarcely have failed to prejudice the case of defendant. As an agent cannot bind his principal by any express definition of his agency (Civ. Code, § 2322), so he certainly cannot, by mere silence concerning limitations on his authority, render such limitations ineffective. If the instruction was designed to convey to the jury in-

formation on the subject of a "holding out" of Dunlap by defendant as an agent having authority to purchase, it was very misleading. Virtually, from the fact that he was an agent to represent either defendant or its predecessor, the partnership, in some undefined dealing with plaintiff regarding the figs, they were allowed to infer that he possessed any power whatever in that behalf which he might assume to exercise. See *Robinson v. Bank*, 81 Cal. 106, 22 Pac. 478; *Bergtholdt v. Porter Bros. Co.*, 114 Cal. 681, 46 Pac. 738; *Walsh v. Hunt*, 120 Cal. 46, 52 Pac. 115.

Some other points are made, but it is believed that, so far as we can safely go without anticipating unnecessarily the effect of evidence likely to be produced on another trial, they are sufficiently covered by the foregoing remarks. Because of the error in the charge to the jury, the judgment and order denying a new trial should be reversed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

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## MEMORANDUM DECISIONS.

**AIKMAN v. MURPHY et al.** (L. A. 370.) (Supreme Court of California. Dec. 13, 1898.) In bank. Appeal from superior court, Los Angeles county. Action by William Aikman, administrator, against Simon J. Murphy and others. From a judgment for plaintiff, and an order denying a motion for a new trial, defendants appeal. Reversed. For opinion in division, see 52 Pac. 729. Works & Lee, for appellants. C. L. Batcheller, for respondent.

**PER CURIAM.** The facts involved in this appeal differ in no material respect from those presented in the case of *Glock v. Howard & Wilson Colony* (Sac. 367; this day decided) 55 Pac. 713, excepting that in the present case the lower court found that the defendant Murphy had rescinded the agreement of purchase with the plaintiff, Aikman; but as to this finding there is no competent evidence in the record to sustain it. The case is, therefore, upon all fours with the one above referred to, and upon the authority of that case the judgment and order appealed from are reversed.

**GEORGE v. GABRAL et al.** (S. F. 995.) (Supreme Court of California. Dec. 29, 1898.) Department 1. Action by Henry C. George against John Gabral and Henry Pierce. There was a judgment for plaintiff, and from an order denying a new trial defendant Pierce appeals. Reversed.

**PER CURIAM.** This action in all respects is similar to that of *George v. Pierce* (S. F. 883; this day decided) 55 Pac. 775. The appeal in this case involves the same questions that were there involved. Upon the authority of that case the order denying a new trial is reversed, and the cause remanded.

**GEORGE v. HAYDEN et al.** (S. F. 884.) (Supreme Court of California. Dec. 29, 1898.) Action by Henry C. George against D. L. Hayden and others. There was a judgment for plaintiff, and from an order denying a new trial defendant Henry Pierce appeals. Reversed.

**PER CURIAM.** This action in all respects is similar to that of *George v. Pierce* (S. F. 883; this day decided) 55 Pac. 775. The appeal in this case involves the same questions that were there involved. Upon the authority of that case the order denying a new trial is reversed, and the cause remanded.

**KELSEY v. MERCED COUNTY. SHAFFER v. SAME. HALEY v. SAME.** (Sac. 405, 407, and 408.) (Supreme Court of California. Dec. 13, 1898.) Department 2. Separate actions by G. P. Kelsey, R. Shaffer, and J. W. Haley against Merced county. Judgment for defendant, and plaintiffs appeal. Reversed.

**PER CURIAM.** The pleadings, proceedings, facts, and questions of law in each of these cases cannot be distinguished, except as to the names of the parties plaintiff, the amounts claimed, and the amounts of the several judgments, from the case of *Nelson v. Merced Co.* (Sac. 406; this day decided) 55 Pac. 421, and all were submitted in this court upon the briefs filed in that case; and upon the authority of that case the judgment appealed from in each of the above-entitled causes is reversed.

**MCDONALD v. PETERS et al.** (S. F. 904.) (Supreme Court of California. Dec. 20, 1898.) Department 1. Appeal from superior court, city and county of San Francisco. Action by

one McDonald against one Peters and others. From an order sustaining a demurrer to the petition, plaintiff appeals. Affirmed. J. C. Bates, for appellant. J. Brooks Palmer, for respondents.

**PER CURIAM.** The questions involved in this appeal have been considered in the case of *Ede v. Cuneo* (S. F. 905; recently decided) 55 Pac. 388, and upon the authority of that case the judgment is affirmed.

**WORDEN v. BEAR VAL. IRR. CO. et al.** (L. A. 304.) (Supreme Court of California. Dec. 5, 1898.) In bank. Action by P. B. Worden against the Bear Valley Irrigation Company and others. From a judgment for plaintiff, defendants appeal. Reversed.

**PER CURIAM.** On the authority of *Slocum v. Irrigation Co.* (L. A. 305; this day decided) 55 Pac. 403, the judgment and order appealed from are reversed, and the cause remanded.





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TONER et al. v. MEUSSDORFFER et al.  
(S. F. 790.)

(Supreme Court of California. Feb. 7, 1899.)  
EXECUTORS — FRAUD — LIABILITY OF ESTATE —  
PLEADING.

1. An estate is not liable for the executor's fraud.

2. In an action against a landlord for deceit in stating unqualifiedly that premises were safe, the complaint alleged that defendant knew of the defect during the tenancy, and that he made the assertion in the absence of knowledge or information as to its truth; that the defect was inherent, and not apparent on exterior view; and that plaintiff occupied the premises five months without learning of it. *Held*, that it did not make out a case of fraud.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Hugh Toner and others against Caroline Meussdorffer and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

Dunne & McPike, for appellants. Lloyd & Wood, for respondents.

TEMPLE, J. This is an action for damages, brought by the heirs of Mary E. Toner, deceased. The defendants are the executors of Charles Meussdorffer, deceased, and, in their representative capacity, leased certain premises to the plaintiff Hugh Toner, who was the husband of Mary E. Toner, deceased, and is the father of the other plaintiffs. In the action it is sought to recover for the death of the said Mary E. Toner, which it is charged was caused by deceit and fraud practiced upon Hugh Toner by the defendants. The action, if it could be maintained at all, is properly brought against defendants in their individual capacity; for in no event could the estate be charged with damages for the fraud of the executors. Judgment was for the defendants upon the pleadings, and the question to be decided is, therefore, whether the complaint states a cause of action.

After the averment of the letting of the premises, and a description of them, it is alleged in the complaint as follows: "During all the time of the aforesaid occupancy of said hired premises by said Hugh Toner and his

family, the fence of said rear gallery was attached to the said hired premises on the north—that is, to the said closet—by nails, and was attached to an upright post on the floor of said gallery at the south also by nails. Said nails and posts were, at the time of said hiring and at all the times of the aforesaid occupancy, insecure, defective, rotten, and insufficient to hold said fence in place, and were at all of said times suffered to remain in such condition by the said defendants; and such condition, during all of said time, was known to the said defendants, and unknown to the said occupants, namely, the said Hugh Toner and his said family; and the said defendants, during all of said times, allowed the said occupants to be and remain in the said premises in ignorance of their said condition. (5) At the time of the aforesaid hiring by the said Hugh Toner of the said hired premises, the defendants, with intent to induce him to hire the same, asserted to him positively that the said premises were entirely safe and in perfectly sound condition. This assertion was not true when made, or at any time during the aforesaid occupancy; and it was made in a manner not warranted by the information of the said defendants,—that is to say, positively and without qualification, and in the absence of any knowledge or information on the part of the defendants as to the truth of the assertion. The said Hugh Toner believed the said assertion to be true when made, and upon the faith thereof, and induced thereby, hired the said premises as aforesaid; and at no time during the period of the aforesaid occupancy, until the happening of the accident hereinafter mentioned, did the said Hugh Toner, or any of his family, have any other knowledge or belief upon the subject, except as conveyed by the said assertion; and in this behalf these plaintiffs aver that the aforesaid condition of the said rear gallery was inherent, and not apparent upon exterior view, and was not disclosed to the said Hugh Toner, or any of his said family, until the happening of the said accident.” The allegation of knowledge on the part of the defendants is that, while the plaintiff and his family were occupying the premises, the defendants knew of their condition. But in the next paragraph it is alleged that the defendants asserted positively, and without qualification, that the premises were entirely safe and in a perfectly sound condition, in the absence of any knowledge or information on the part of the defendants as to the truth of the assertion, and that the defect was inherent and not apparent upon exterior view. Furthermore, it is stated in the complaint that the plaintiff and his family had occupied the premises continuously from the 2d day of April, 1895, until the 3d day of September of that year, and the defects were “not disclosed to the said Hugh Toner, or any of his said family, until the happening of the said accident.”

It affirmatively appears, therefore, that the

assertion was made in good faith, without any knowledge of the defect, and was warranted by the appearance of the premises. The defect was so latent that none of the plaintiff's family discovered it during five months' occupation. Certainly, this was not a fraud upon the part of the defendants, unless, before making such a declaration, they were called upon to make such an examination as would have led to the discovery of the defect. The complaint does not discuss the character of the examination that would have been required. The assertion is little more than what would be called “simplex commendatio,” rather than a representation, had defendants themselves been the landlords. The duty of making an examination rested as much upon the lessee as upon the landlord, and to all such transactions the rule of caveat emptor applies. It is not averred that the lessee abstained from making an examination because of the representations; and clearly he would not have been justified in refraining from so doing in reliance upon such an assertion. I think the defendants cannot be charged with fraud for an assertion which they believed to be true, and which seemed to be amply justified by their information, because of the existence of an unsuspected defect which it is not made to appear they ought to have known.

There are other objections to the complaint which I do not deem it necessary to discuss. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

123 Cal. 417

SWINERTON v. OREGON PAC. R. CO. et al.  
(S. F. 794.)

(Supreme Court of California, Jan. 30, 1899.)

STATE AND FEDERAL COURTS—COUNTY—GARNISHMENT—FUNDS IN COURT.

1. Where a United States district court in California, having seized and sold, to pay maritime claims, a vessel belonging to a receiver appointed by the court of another state, intends to return the surplus, and the jurisdiction to determine conflicting claims to it, to the state court, and, in compliance with its decree, its clerk prepares checks to mail to the receiver according to his direction, the latter is, in effect, an officer of the federal court in the transmission of the fund; and hence garnishment will not lie against the clerk to subject the fund to other debts, on the theory that there was a delivery to the receiver, and that the federal court had parted with its control.

2. Comity requires a state court to be bound by a federal court's determination as to when the latter's possession and control of property of which it first acquired jurisdiction cease.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by W. A. Swinerton against the Oregon Pacific Railroad Company and others. There was a judgment for plaintiff, and from orders withdrawing general authority of a receiver appointed at plaintiff's instance to collect moneys and demand and receive checks belonging to defendant, and limiting



the receiver's powers to proceedings before the United States district court, and instructing him to dismiss a suit in the superior court against the clerk of the United States court seeking to compel him to surrender a check and to enjoin him from sending it away, plaintiff appeals. Affirmed.

Henry E. Monroe, for appellant. Page, McCutchen & Eells, for respondents.

TEMPLE, J. On the 4th day of June, 1894, the appellant recovered a judgment in the superior court of San Francisco against the respondent the Oregon Pacific Railroad Company for \$15,363.78 and costs. Execution was issued thereon, proceedings supplementary to the execution instituted; and Southard Hoffman, who had been previously garnished under the execution, was cited to appear and be examined before Judge Seawell concerning any property, moneys, or credits in his hands due, owing, or belonging to the Oregon Pacific Railroad Company. Upon his examination it appeared that the Oregon Pacific Railroad Company had been the owner of a steamship known as the "Willamette Valley"; that in the business of the railroad company this steamship plied between the port of Yaquina, Or., and the port of San Francisco; that upon one of her voyages to the port of San Francisco, and while in that port, she was seized by the United States marshal under admiralty process issued out of the district court of the United States for the Northern district of California, upon a libel in admiralty filed therein against the steamship by R. D. Chandler. Such proceedings were had in this libel suit that the steamship was, by order of the court, duly and regularly sold, and the proceeds paid into the registry of the United States district court where the libel was filed. At the times of the libel proceedings, the sale of the steamship, and the further proceedings hereinafter mentioned, Southard Hoffman, the garnishee, was clerk of the United States district court, and he deposited the proceeds of that sale in the subtreasury at San Francisco. The ultimate issue of the Chandler libel suit was a decree in favor of Chandler and other libelants and interveners against the steamship Willamette Valley for her condemnation and payment to the libelants and interveners of certain amounts found by the court to be due to each of them. After all the moneys so found due to the libelants for whom the ship and her proceeds were held in custody by the United States district court were paid under its decree, there remained in the registry of the court, undisposed of, \$23,950.85. Prior to the seizure of the steamship Willamette Valley in the libel suit, a receiver over the property of the Oregon Pacific Railroad Company was appointed by the circuit court of Benton county, in the state of Oregon; and such receiver took possession of all the property of the corporation found in Oregon, including

the steamship Willamette Valley. In the latter part of the year 1895 a number of persons (among them the receiver appointed by the circuit court of Benton county, in the state of Oregon), claiming an interest in the remnant of the proceeds of the sale of the steamship, then still lying in the registry of the court, filed petitions in the United States district court, as provided by the rules and practice of the federal courts, praying for a distribution to them of this surplus or remnant. After hearing had upon these petitions, the judge of the court made and gave a decree in the matter on the 9th day of June, 1896, dismissing all of the petitions except that of the Oregon receiver, and directed the clerk of his court to pay the moneys then in the registry of the court to that receiver, or to his proctor. In compliance with this decree, Southard Hoffman, as clerk of the United States district court, on the 28th day of September, 1896, prepared two checks,—one for \$19,918.29, in favor of Charles Clark, receiver of the Oregon Pacific Railroad Company, and one for \$3,606.16, in favor of Charles Page, who was the proctor of the Oregon Pacific Railroad Company and of Charles Clark, the receiver. These two checks Mr. Hoffman took to Judge Morrow, judge of the said United States district court, for his signature. The judge signed them, and returned them to Mr. Hoffman for delivery and his signature, and Hoffman then signed them. Both of these checks were drawn on the United States subtreasury at San Francisco. On or about the 18th day of June, 1896, Charles Page, as proctor for the Oregon Pacific Railroad Company and the Oregon receiver, instructed and requested Mr. Hoffman that when the decree became final he should prepare two checks,—one for \$19,918.29, in favor of the Oregon receiver, and one for \$3,606.16, in Charles Page's favor,—and that Mr. Hoffman should mail the larger check of the two to Charles Clark, the receiver, at Corvallis, Or., and inclose it in a letter previously written by Mr. Page to Mr. Clark, and which was left by Mr. Page with Mr. Hoffman for transmission through the mails. The decree did not become final until September 28, 1896. Mr. Hoffman, in pursuance of the instructions received from Mr. Page, did on the 28th day of September, 1896, after the same was signed, place the larger check inside of Mr. Page's letter, and put these in an envelope, which he sealed and addressed to Charles Clark, Corvallis, Or.; but, before he could deposit the letter in the United States post office or a mail box for delivery, and while the check so signed and countersigned and letter were in his possession, the sheriff levied a garnishment on Mr. Hoffman, under and by virtue of a writ of execution issued out of the superior court of the city and county of San Francisco, under the judgment recovered in this action. At the same time Hoffman was served with an order in supplementary proceedings to appear before Hon. J.

M. Seawell and be examined; also, an injunction and a subpoena duces tecum to bring into court the check drawn in favor of the foreign receiver. Upon the hearing Mr. Hoffman declined to produce the check; claiming to hold it in his possession in his official capacity as clerk of the district court of the United States, and that all his acts in relation to the placing of the check inside of Mr. Page's letter addressed to Clark, receiver, sealing the letter, addressing it, and the intended deposit thereof in the United States mail for transmission to Oregon, were official acts as such clerk. The superior court then made an order appointing one Forsyth receiver of the defendant's property, in which order it was recited that this check was in the possession and under the control of Southard Hoffman, apparently as an individual, and not as clerk, and that the check represented property, in the state of Oregon, of the Oregon Pacific Railroad Company. The order further authorized the receiver to collect all moneys by suit or otherwise, and to demand and receive checks to which the defendant was entitled. Thereupon the plaintiff moved for an order upon Southard Hoffman directing him to deliver the check in his possession to Forsyth, the receiver appointed by that order. The court denied the motion. Immediately upon obtaining this order, Forsyth, as receiver, brought an action in the superior court against Hoffman to compel him to surrender the check, and enjoining him from sending it away. This fact having been brought to the attention of Judge Seawell, he on the 23d of October modified his previous order by setting aside all its provisions and recitals, except the order appointing Forsyth as receiver, and by limiting his powers to the taking of such proceedings as he might be advised, before the district court, and not elsewhere. On the 30th of October the court made still a new order, slightly changing the modification heretofore set forth, and finally instructing the receiver to dismiss the suit which he had brought in the superior court, and to confine his proceedings to the court of which Hoffman was clerk. From these two orders this appeal is taken.

The respondent Hoffman was permitted by the court in bank (52 Pac. 1132) to supplement the record in this case by proof of the following facts, among others, to wit: That Forsyth, receiver, appeared in the district court of the United States, and prayed that Hoffman be required to deliver to him the check in controversy. That the matter was litigated in that court, and that the United States district court rendered an opinion in which it was held that the check was in the custody of that court for the satisfaction of its own decree; that the attempt of the petitioner to have process issuing from a state court to control property in the possession of a federal court was void, and the petition of Forsyth, receiver, should be dismissed. Furthermore, that on the 6th day of Febru-

ary, 1897, Charles Clark, receiver of the Oregon Pacific Railroad Company, applied to him (Hoffman), as clerk, for delivery to him of the check in question, and that, upon referring the matter to the district judge, the judge ordered him to deliver the check in accordance with the terms of the decree theretofore entered by the court, which order, as clerk, he obeyed, and the check in dispute is no longer in the possession of Hoffman, as clerk or otherwise.

Of course, appellant does not contend, and never has contended, that the fund can be reached while in custodia legis, or that the officers of the United States court can be interfered with in the discharge of their official duties. His contention was and is that the money had been, as matter of law and fact, distributed by the court, and actually paid to the receiver appointed by the Oregon court, or to his proctor, and, since such receiver had no official standing in this state, he could be regarded as receiving it only as the agent of the appellant's debtor, to wit, the Oregon Pacific Railroad Company; and, further, being assets of the debtor found in this state, it was subject to be adjudicated upon only by the courts of this state, and could not be sent or taken out of this state simply to give jurisdiction over it to the courts of another state. The real answer to this contention is that the United States district court intended to transfer the fund, and the jurisdiction to determine conflicting claims to it, to the receiver's court in Oregon, and in doing this the Oregon receiver and his proctor were, in effect, officers of the United States court in the execution of its decree in the transmission of the fund. In my opinion, a federal court cannot rightfully transfer property from one state to another for the purpose of giving the courts of the state to which it is transferred jurisdiction to distribute such property under its decree to claimants, thereby depriving the courts of the state from which it is taken of such jurisdiction. This would constitute a serious assault on the sovereignty of the state and the jurisdiction of its courts. This was not done, however, in this case, under the view of the matter entertained by the learned judge of the United States district court. His views are fully explained in *Chandler v. Willamette Valley*, 76 Fed. 838, where the court considered and determined all the claims to the surplus then in the registry of that court. It is there stated that, to entitle a claimant to the fund, he must show a vested interest in or a lien upon the fund. It is then shown that no claimant except the Oregon receiver has such a lien or interest. It is then stated that the vessel was in the possession of the receiver when seized to satisfy the maritime liens, and it is said: "The fact that this court took possession of the vessel while she was engaged in commerce between the state of Oregon and the state of California, being operated as a part



of the road of the corporation, did not affect or impair the prior equitable right of the state court of Oregon to the surplus proceeds. The proceedings in admiralty in this court simply operated to suspend, not to divest, the action or control of that court as to the surplus." Consequently the surplus was restored to the jurisdiction of that court.

But, whatever may be the right of the United States district court to take the surplus money in its registry from the jurisdiction of our courts, it is apparent that such surplus cannot now be reached in any suit which can be instituted here by the receiver in the proceedings supplementary to execution. The property is not in this state, and such receiver would have no standing in Oregon. To reverse the orders appealed from here, therefore, would be followed by no consequence whatever. But, independently of this consideration, we think nothing should be done. The mere claim on the part of the federal court that Hoffman was still in possession of the money as an officer of that court should prevent our interference. Not conceding any superior authority in that court, except such as accrued to it from being first in possession of the subject of litigation, yet, since the two jurisdictions are independent, to avoid unseemly conflict that court must be left to determine when its possession and control of the property have ended. We cannot apply here the doctrine of *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 26 Pac. 518. As to co-ordinate courts of the state, there is a common appellate jurisdiction which can settle and compose all such questions. There is no such common arbiter between the state and federal courts. Comity therefore becomes a necessity. It is a law which must not be disregarded. The orders appealed from are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

123 Cal. 424

JOOST v. BENNETT. (S. F. 880.) 1

(Supreme Court of California. Jan. 30, 1899.)

#### RECEIVERS—LIABILITIES.

Where the president of a corporation in the hands of receiver assists the receiver, with services and advice, in superintending the trust property, an action at law against the receiver, as such, by such president, will not lie for the services rendered, as it was the duty of the receiver himself to perform them.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Behrend Joost against Sanford Bennett, receiver of the San Francisco & San Mateo Railway Company. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Mullany, Grant & Cushing, for appellant. Reddy, Campbell & Metson and Robt. A. Friedrich, for respondent.

<sup>1</sup> Rehearing denied March 1, 1899.

TEMPLE, J. This is an appeal by the plaintiff from the judgment, and from an order refusing a new trial. The action was brought and prosecuted, by leave of the court in which the receiver was appointed, against the defendant herein, as such receiver, for causes alleged in the complaint. The complaint contains two causes of action. In the first, after showing the due appointment of the defendant, it is averred: "That plaintiff herein was employed by, and rendered services to, said Sanford Bennett, as such said receiver, at his request, in the necessary and proper services and management of the property, business, and operations of said San Francisco & San Mateo Railway Company, and in the defense of its interests, and in the prosecution of its rights and claims, in numerous proceedings and actions at law, and in the preparation for the trials of said actions, and in becoming informed upon and regarding the same, and in settling and adjusting the claim and demands made in and by said actions against said San Francisco & San Mateo Railway Company and its property, and by the parties and persons who were and are prosecuting their said claims against said railway company and its property through and by said actions. That said services were performed by plaintiff for and at the request of defendant, as aforesaid, from or about the 1st day of September, A. D. 1894, to the 1st day of March, A. D. 1896, and were so performed in and concerning and pertaining to the rights, property, and interests of said San Francisco & San Mateo Railway Company under the charge, direction, and management of said defendant, as such said receiver, in the following causes and proceedings, viz.: In consulting, advising, and operating with and instructing said defendant, receiver, and his legal counsel and attorneys, in the following actions and causes, and the property, claims, and affairs involved therein, viz." Then follows the enumeration of 38 different actions, by their titles, then pending against the said corporation; also, the statement of a controversy between said corporation and the Market Street Railway Company in regard to protecting the franchise for railroad purposes on Frederick street; also, the controversy with the same street-railway company as to mutual accommodations of their respective railways on Valencia and Fourteenth streets, Castro and Eighteenth, Mission and Fourteenth, and Sixth and Harrison streets, Sixth and Bryant streets, and Fifth and Bryant streets, in said city and county of San Francisco; also, in arranging controversy between the corporation and said Market Street Railway Company, on Stanyan street, between Waller and Frederick; also, in resisting attempts made by and on behalf of the board of supervisors, and certain members composing said board, of the city and county of San Francisco, to declare and order vacated the franchise for railroad purposes granted to the said corporation. Then follows an averment as to the

value of the said services. The second cause of action stated in the complaint is for the rent of seven certain lots of land alleged to belong to the plaintiff. It is charged that defendant, as receiver, "for the purposes of carrying on the traffic of the railroad of said railway company, or of maintaining its railroad for the purpose of carrying passengers thereon, and maintaining a way for its rolling stock, railroad, cars, and trains," rented, hired, occupied, and used these lots. Defendant, in his answer, denied all the material allegations of the complaint, except as to his official character. At the trial a jury was waived, and the court found, in effect, that the plaintiff did not render the services charged, at the request of the receiver, but that such services as he did render were rendered in his character as president of the railroad corporation. As to the second cause of action, the court found that the defendant did not rent any of the land from plaintiff, and did not contract to pay him rent therefor. This finding is abundantly supported by the evidence. Whatever claim Joost may have for the use and occupation of the land, he certainly had no claim for conventional rents.

The action against the receiver, as such, for the services which it is averred were rendered by plaintiff, cannot be maintained. The service, it will be seen, was not that required in continuing and carrying on the business of the corporation, but was to aid and supplement the superintendence, which was due from the receiver himself. It is presumed from his acceptance that the receiver was competent for his position. If he was not, and needed such advice as is charged in the complaint he received from the plaintiff, he should have paid for it himself; and the court, in the settlement of his accounts, would be justified in refusing to allow credit for such disbursements. It appears that the receiver was allowed \$12,000 for 23 months' service as receiver, and for his attorney he was allowed \$16,000 more. The entire property was sold for \$800,000. We are not in a position to say that the allowance was unreasonable, but it was a good deal to pay for superintendence. But in no possible case could such a suit be maintained. Neither Joost, for services of this character, nor the attorney for the receiver, had any claim directly against the property in the hands of the receiver. If the allowance had been made, it would have been made, not to Joost, but to the receiver, for moneys properly expended by him. *Smith, Rec. § 129; Stuart v. Boulware*, 133 U. S. 78, 10 Sup. Ct. 242. The charges of the plaintiff for services are, in this respect, exactly like the expenses of administration incurred as an administrator. See, on this subject, *Gurnee v. Maloney*, 38 Cal. 85; *Firebaugh v. Burbank*, 121 Cal. 186, 53 Pac. 560; *In re Kason's Estate*, 119 Cal. 489, 51 Pac. 706; *In re Kruger's Estate* (Sac. No. 532, filed Jan. 25, 1899) 55 Pac. 1056. It may be that a case might arise where such an allowance would be prop-

er, but that is a matter to be determined in the first instance by the court whose officer the receiver is and when an allowance is made, as already stated, it will not be to the attorney or the other counsel who have aided the receiver by advice, but to the receiver, as a proper expenditure made by him. The trial court found that such services as were rendered by plaintiff in regard to the litigation set out in the complaint were rendered by him as president of the corporation. This may be so. Upon the statement found in the record, it is difficult to determine this matter. It is said the receiver was appointed at the instance of creditors. If those creditors had liens upon the property, the receiver would not have been interested in pending suits for damages against the corporation, wherein personal judgments only could have been recovered. If the receiver represented unsecured demands, he would be interested; but in no case should the receiver have undertaken the defense of suits pending when he was appointed receiver, unless directed or authorized to do so by the court. It was for the court, and not for the receiver, to determine what actions against the corporation the receiver should defend at the charge of the fund which he held for the court. It does not appear that the receiver was directed to defend any of these suits. Many of them are shown to have been actions for damages which were pending when the receiver was appointed. That the receiver was interested in them is not shown, except as to one case; but the stockholders certainly were interested, and Joost, as president of the corporation, was interested. Upon the other ground, however, it is evident that this suit cannot be maintained. Judgment and order affirmed.

We concur: MCFARLAND, J.; HENSHAW, J.

123 Cal. 403

PEOPLE v. COMPTON. (Cr. 487.)  
(Supreme Court of California. Jan. 25, 1899.)

ACCOMPLICE—CORROBORATION—EVIDENCE OF CO-CONSPIRATOR—CREDIBILITY OF WITNESS—PROVINCE OF JURY—INSTRUCTIONS—FORGERY—DELIVERY TO ACCOMPLICE—PRINCIPALS AND ACCESSORIES—JUDGES—DISQUALIFICATION THROUGH BIAS—HOW DETERMINED.

1. The question whether a witness is an accomplice is for the jury.

2. Code Civ. Proc. § 1870, subd. 6, providing that after proof of a conspiracy the act or declaration of a co-conspirator shall be admissible, is not mandatory; and, where it is otherwise difficult to present the evidence, the court may, in its discretion, admit the testimony of the accomplice first.

3. An instruction that the jury is not at liberty to disregard the testimony of a witness corroborated by other competent evidence is erroneous, because, if "disregard" be used as synonymous with "refuse to consider," it implies that the testimony of an uncorroborated witness need not be considered.

4. The question of what degree of credibility shall be given to a witness, or whether his testimony is to be entirely rejected, is for the jury,



under Code Civ. Proc. § 1847, making the jury the sole judges of the credibility of a witness.

5. Mere delivery of a forged instrument to one knowing it to be a forgery, with intent to have it uttered or passed as genuine, with intent to injure another, is insufficient to constitute forgery, under Pen. Code, § 470, making a person who attempts to pass a forged instrument as true and genuine, with intent to cheat or injure another, guilty of forgery.

6. A corroboration of an accomplice which tends to connect accused with the crime only by being considered in connection with the accomplice's testimony is insufficient, under Pen. Code, § 1111, requiring the corroboration to be by evidence which, without the aid of the accomplice's testimony, tends to connect accused with the commission of the offense.

7. To be guilty as a principal, a person must both aid and abet, under Pen. Code, § 971, declaring guilty as principals all persons who aid and abet in the commission of a crime.

8. Under Code Civ. Proc. § 170, as amended in 1897, providing that when it appears, from the affidavits on file, that either party cannot have a fair trial before any judge, because of such judge's bias, the judge shall forthwith secure some other judge to preside, and providing that the adverse party may file counter affidavits, does not entitle a litigant who has filed the proper affidavit to a trial by another judge as a matter of course.

9. The existence of such bias must be determined from the affidavits filed, and the judge cannot use his own knowledge of the matter; hence, it is error to refuse to call in another judge where it appears from uncontradicted affidavits that the judge is biased.

Department 2. Appeal from superior court, Los Angeles county.

Charles Compton was convicted of forgery, and from the judgment, and from an order denying a new trial, he appeals. Reversed.

W. H. Shinn, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. The defendant, with others, was charged with the forgery of a deed, with intent to injure and defraud the Columbia Savings Bank. Upon a separate trial he was convicted, and appeals from the judgment, and from the order denying him a new trial.

One Ware, who was charged with the offense jointly with Compton, was a witness for the people. He is a self-confessed accomplice, conspirator, and participant in the crime. The scheme, as outlined by his testimony, was the following: Compton secured the description of a piece of land, the title to which stood in L. H. Greene, who was a resident of an Eastern state, and was not in California. Ware procured a certificate of title showing the land to be free from incumbrances. Compton prepared a forged deed of this land, naming Ware therein as grantee. The deed was to have been placed upon record, and upon the strength of this record title a loan secured by mortgage upon the land was to be effected. Ware objected to being named as grantee in the forged deed, upon the ground that he could not obtain his wife's signature to a mortgage, but offered to procure, and did procure, one A. E. Davis, for a consideration agreed upon with Ware,

to take part in the conspiracy. Compton thereupon destroyed the first deed, and prepared or caused to be prepared another, in which Davis was named as grantee. Compton, in the presence of Ware, signed Greene's name to this deed, and Ware signed the name of Williams as witness to the signature of Greene. Compton then left the room with the deed, and returned shortly after with the acknowledgment of a notary attached. The deed was given to Ware. It was placed upon record. Davis made application for a loan, obtained a loan of \$1,000 upon the security of a mortgage of the property executed by himself and his wife, cashed the check which had been given to him at the bank, retained \$250 as his share, and delivered the rest of the money to Ware, who met Compton in a saloon, and who there divided with Compton the remainder of the plunder. Ware's testimony implicates as participants in the conspiracy, besides himself and Compton, Mrs. M. L. Reinholds, who sent Davis with a letter of introduction to secure the loan; J. H. Shields, who procured the certificate of title; P. E. King, the notary public who took the acknowledgment to the false deed; A. E. Davis and Ida M. Davis, his wife, who executed the mortgage. Ware's testimony being admittedly that of an accomplice and of a conspirator, it became necessary, before Compton could be convicted of the forgery, that this testimony should be corroborated by other evidence "which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." Pen. Code, § 1111. And, before he could be convicted of the forgery with the intent to defraud the corporation named, it became necessary to establish by evidence, independent of that of Ware, the existence of a conspiracy to defraud, and the fact that Compton was a member of that conspiracy. *People v. Irwin*, 77 Cal. 502, 20 Pac. 56; *Barkly v. Copeland*, 86 Cal. 483, 25 Pac. 1. The independent evidence upon both of these points is, at the best, extremely slight. The only evidence besides that of Ware which can be fairly said to tend to connect the defendant with the crime was that of one M. B. Howard. Howard testified that he had given to Compton, upon the back of a card, a brief description of the lot of land, the deed to which was forged. This card appears in evidence, apparently coming from the possession of Ware, who testifies that Compton gave it to him as an aid to securing the certificate of title. Howard further testified that, seeking to borrow \$100 from Compton about the time that the false mortgage had been put of record, Compton told him he would let him have a hundred dollars in a few days; "that he was about to turn a mortgage trick for a thousand dollars." Afterwards Compton told him "that the parties had run off with the money. He mentioned a man by the name of this man Davis. I suppose he meant A. E. Davis.

He didn't mention his initials." He also said that "he had not been able to find them, and he guessed they had skipped the country." The witness, however, explained that the phrase "turning a trick" was a common expression of Compton, used by him to indicate any deal or transaction in land or securities by which he realized or expected to realize moneys. He further testified that there was never any conversation between them concerning any fraudulent dealings had or to be had with the land; that Compton expressed great surprise when informed that a forged deed and a false mortgage had been made, and insisted that he knew nothing about the matter, and did not receive any money from the transaction. It is urged that this evidence, also, was the evidence of an accomplice with Ware, and is not of the independent character required to establish proof of the existence of a conspiracy, or of a defendant's participation in it. But, though Howard was stoutly impeached as to his general reputation, and though proof was made of admissions from which the jury might well have believed that he, and not Compton, was a prime mover in the crime, still the question whether or not he was an accomplice was one of fact for the jury, and by their verdict it is to be concluded that they held he was not. But, considering his evidence as independent evidence, untainted by participation in the conspiracy, it is at least doubtful if it be adequate and sufficient, standing alone, to show Compton's participation in the crime of forgery, or to show that Compton was a co-conspirator with the others named. One other piece of evidence, however, should be considered in this connection. Exemplars of defendant's handwriting were admitted in evidence, and presented to the jury for inspection. They compared this writing of the defendant with the signature to the forged deed, and a witness testified that Compton had told him of his skill in imitating handwriting. But, while all this evidence is unquestionably slight, considered either as independent evidence in proof of the conspiracy, or as independent evidence tending to connect defendant with the commission of the crime of forgery, we do not deem it necessary to decide whether or not it was legally insufficient, in view of the fact that upon a new trial, which must be ordered, a different state of facts may be presented.

Appellant complains that the testimony of Ware was admitted in advance of proof of the conspiracy, and insists that it was erroneous for the court to receive evidence of the acts and declarations of a conspirator until after the conspiracy, and defendant's participation in it, had been proved by independent evidence. And upon this proposition he relies upon the express provision of the Code of Civil Procedure that the acts or declarations of a conspirator against his co-conspirator, relating to the conspiracy, may be received only after proof of the conspiracy.

Code Civ. Proc. § 1870, subd. 6. It has, however, been too often decided that this rule as to the order of the evidence is not mandatory, to warrant a reconsideration of the question; but this much should be said, that since, in general, the order of proof is entirely within the discretion of the trial judge, if the law-makers did not design by this section to limit the exercise of that discretion in this particular, then the section itself is without force. It is the exceptional case which justifies the court in departing from the salutary provision of the Code. Considering that the facts expected to be proved by the people are usually—indeed, almost invariably—set before the jury in the opening statement of the prosecution, it can seldom happen that the jury will need the evidence of the conspirator in advance of the proof of the conspiracy. The practice has become too common for the trial court in such cases to take the testimony of the conspirator or accomplice before proof of the conspiracy, upon a promise of the prosecution "that they will connect it," or that "it is offered out of order for the better understanding of the jury," or that "it may be stricken out, if independent corroborative proof be not subsequently furnished." The regular and ordinary method of procedure, and the one expressly declared by the law, is that the conspiracy should first be established by independent proof to the satisfaction of the court, and only after it has been so established can the court fairly and intelligently rule upon the admissibility of the offered evidence of the co-conspirator. In the present case, while the course pursued by the court is not one which may be declared error, it is only to be resorted to in extreme cases, when the facts from which the conspiracy is to be inferred are so intimately blended with other facts going to constitute the crime that it is difficult to present the evidence in intelligible form without first admitting the testimony of the accomplice. *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678. However, a new trial must be ordered for several reasons.

The court instructed the jury "that you are not at liberty to disregard the testimony of a witness, where you may believe from the evidence that such witness is corroborated by other competent evidence and the circumstances in proof in the case." If "disregard" is here used as synonymous with "refuse to consider," so that the sense of the instruction is that the jury is not at liberty to refuse to consider the testimony of a witness when corroborated, then the instruction is misleading, for the implication which it carries, that they are at liberty to refuse to consider such testimony, if not corroborated; for it is the duty of the jury to consider and weigh all of the admitted evidence whether corroborated or not. But if, as seems probable, "disregard" is used in the sense of "reject," then there is a clear trespass upon the domain of the jury. "The word 'competent,' when re-



lating to a witness, implies a legal capacity to testify, and, when applied to evidence in law, means having the legal capacity or fitness to be heard in court, as designated from credibility or sufficiency. \* \* \* Thus, a witness may be competent, although unworthy of belief. Evidence may be competent, although not alone sufficient, even if believed." Cent. Dict. "Competent." Though the jury may believe the witness to be lying, though his story may appear to them incredible, though he may have been successfully impeached, yet by this instruction the court lays down a rule that they may not reject the testimony of such a witness, provided only it be corroborated by other competent evidence. The corroboration may not even be upon material matters. The competent evidence may itself be discredited by the jury. Yet the court attempts to declare to the jury the degree of credibility which they are to accord to such testimony, notwithstanding the fact that, under the law and the express provisions of the Code (Code Civ. Proc. § 1847), they are the sole judges of that credibility, and of the weight to be accorded to a witness' testimony. *People v. Eckert*, 16 Cal. 111; *People v. Ybarra*, 17 Cal. 166; *People v. Gibson*, 53 Cal. 601; *People v. Messersmith*, 61 Cal. 246; *People v. Gordon*, 88 Cal. 422, 26 Pac. 502; *People v. Choynski*, 95 Cal. 640, 30 Pac. 791; *People v. Stanton*, 106 Cal. 139, 39 Pac. 525.

Again, the court instructed the jury that they should find the defendant guilty, if they believed from the evidence, beyond a reasonable doubt, that the defendant falsely and feloniously uttered, published, or passed the instrument described in the information as a true and genuine instrument, knowing it to be forged, with intent to cheat and defraud the Columbia Savings Bank, "or delivered said instrument to any one, knowing it to be forged, with intent to have it uttered, published, and passed as a true and genuine instrument, with intent to cheat," etc. Section 470 of the Penal Code, under which this information is drawn, makes a forgery of any one or all of three different kinds of acts: First, the crime of forgery is committed if one falsely makes, alters, counterfeits, etc., an instrument with intent to defraud another; and, second, the crime is committed by one who utters, publishes, or passes as true and genuine any of the specified forged or counterfeited matters or papers, knowing the same to be false, forged, and counterfeited, with intent to injure another; and, third, the crime is committed if he so attempt to pass such counterfeited matters, etc. In criminal law an attempt to pass a false instrument as genuine is an uttering, even if the attempt fail. But the codifiers, for clearness, have specifically declared that an attempt to pass shall constitute the crime. The portion of the instruction above quoted is directed to the third class of acts; that is to say, to the attempt to pass. By it the jury was told

that if one having a forged instrument in his possession, knowing it to be forged, delivers it to another, with intent to have it uttered, published, and passed as genuine, he is guilty of forgery. But such was not the common law, and such is not the law under our Code. In general, before an attempt to commit a crime can be made out, some overt act towards the commission of the crime, other than a mere act of preparation for its commission, must be established. In *People v. Stites*, 75 Cal. 570, 17 Pac. 693, the question of attempt is considered with some fullness, and we need not here pause to elaborate upon it. Now, the essence of the third class of forgeries is the attempt to injure an innocent person by foisting upon him a known false instrument. As is aptly said in *People v. Rathbun*, 21 Wend. 509, where the subject is learnedly and exhaustively considered: "'Uttering' implies two parties,—a party acting and one acted upon. If it be by way of sale, there must be a vendee; if by pledge, there must be a pledgee; if by offer, there must be some one present to hear the offer; and, if it simply declare its goodness, there must be some one addressed as reader or hearer." Therefore, if one deliver to his agent a false instrument, with the design that the agent shall utter or pass it, the crime of uttering or attempting to pass is not complete until after some overt act done by the agent to this end; for, until this shall come to pass, in contemplation of law the paper is still within the control of the principal, and all the steps are but steps of preparation. Equally true is it that if A. and B. should conspire to commit the crime, and A. should deliver a forged instrument to B., by whom it was to be uttered, and B. should destroy the paper without attempting to pass it, the crime of uttering or attempting to pass would not have been committed; for there would have been no effort to foist it upon an innocent person, and, as has been said, if the uttering is by offer, the offer must be made to some one. The instruction under consideration announced an opposite rule, and was therefore erroneous.

The court instructed the jury "that, while it is true that a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence tending to connect the defendant with the commission of the offense, yet I charge you that such corroborative evidence need not tend to establish the precise facts testified to by the accomplice. It is sufficient if such corroborative evidence tends in any way to connect the defendant with the commission of the crime charged." Elsewhere the court correctly charges the jury upon the law as laid down in section 1111 of the Penal Code. This instruction fails to take account of the essential character necessary to the corroborative evidence, which is that, standing alone, or, as it is phrased in the Code, "without the aid of the testimony of the accom-

plíce," it must tend to connect the defendant with the commission of the crime. Here the jury was told that it is sufficient if such corroborative evidence tends in any way to connect the defendant with the commission of the crime. Such is not the law. It could tend to connect him with the crime, by considering it with the testimony of the accomplice; yet, if it is necessary so to consider it, it would not be legally sufficient. It is legally sufficient only if, standing alone, it tends so to connect him. In giving this instruction the court seems to have had in mind the case of *People v. Cloonan*, 50 Cal. 449; but there the opinion merely lays down the indisputable rule that the evidence which, standing alone, is sufficient as tending to connect the defendant with the crime, need not be corroborative of the precise acts and facts related by the accomplice. But there is nothing in this case, nor in any other, which justifies the elimination from the instruction of the vital circumstance that the evidence, independently considered, must be sufficient for the purpose.

The court further instructed the jury "that the distinction between an accessory before the fact and the principal in case of a felony is abrogated, and all persons concerned in the commission of a felony, whether they directly committed the act constituting the offense, or aided or abetted in its commission, though not present, shall be prosecuted, tried, and punished as principals." As to this instruction, it is sufficient to say that it charges in the disjunctive that one who either aids or abets is guilty, when the language of the Penal Code (section 971), in consonance with justice, requires that one shall both aid and abet. This precise error has been recently considered in the case of *People v. Dole*, 55 Pac. 581.

The defendant presented to the court his motion that the judge of the department before which he was tried should transfer his cause to another department and to another judge, or should call in some other judge to sit in his place. The ground of the motion was the alleged bias and prejudice of the judge. The defendant supported his motion by his affidavit, stating that he could not have a fair and impartial trial before the judge, by reason of his prejudice and bias, and, upon information and belief, alleged facts tending to show that the judge had formed and expressed an opinion of the guilt of the defendant. No counter affidavits were filed, but the motion was denied. While at civil law the bias or prejudice of a judge against a litigant was a valid ground of recusal, as it was a valid ground of challenge against a juror, it was not so at common law; nor has it been so in this state, until the change effected by a recent amendment to the Code. *People v. Williams*, 24 Cal. 31. Section 170 of the Code of Civil Procedure, as amended in 1897, provides that no justice, judge, or justice of the peace shall

sit or act as such in any action or proceeding: " \* \* \* (4) When it appears from the affidavit or affidavits on file that either party cannot have a fair and impartial trial before any judge of a court of record about to try the case, by reason of the prejudice or bias of such judge, said judge shall forthwith secure the services of some other judge of the same or another county to preside at the trial of said action or proceeding." The section provides for the filing of counter affidavits, and that a party may have but one such change of judges. But, while this modification of the common-law rule is thus new to our state, we are not without like statutes, from other states. Indeed, as to justices of the peace, a somewhat similar provision has long been upon the statute books. It was found in section 582 of the practice act, and has been re-enacted in subdivision 2 of section 833 of the Code of Civil Procedure. The place of trial, where the action is commenced in a justice's court, must be changed when either party makes and files an affidavit that he believes that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice, or bias of the justice. Under this law it has always been held that the filing of an affidavit in conformity with the provisions of the law makes it the duty of the judge to transfer the cause. *People v. Hubbard*, 22 Cal. 34. It seems to have been contemplated by the legislature, in framing the statute applicable to the justice's court, that the justice shall be relieved from the very delicate and trying duty of deciding upon the question of his own disqualification, and that the mere fact that a suitor in his court makes affidavit as to his belief that the justice is biased against him renders it imperative upon the justice to transfer the cause to some other disinterested officer. We should unhesitatingly say that this same salutary rule was in the mind of the legislature when it amended section 170 of the Code of Civil Procedure by providing that the litigant shall have a new judge, or a transfer of his cause, "when it appears from the affidavit or affidavits on file that either party cannot have a fair and impartial trial, by reason of the bias or prejudice of the judge." But the succeeding portion of the amendment seems to militate against this view, for it is therein provided that counter affidavits may be filed. It would be useless to permit the filing of counter affidavits, unless they could be considered and weighed in determining the controverted fact of the judge's bias. But one thing, at least, is certainly clear,—that the provision contemplates that the question shall be determined upon affidavits, and that the facts found are to be found from the affidavits, and that the judge is neither to be called upon, nor to be permitted, to use his own knowledge of the matter. If in fact he knows himself not to be disqualified, it is not for him to deny the motion, if the contrary



"appears from the affidavit or affidavits on file." In this case the defendant brought himself within the letter and the meaning of the provision. He made it appear by the facts set up in his affidavit (however ill-founded the affidavit may have been in truth) that the judge was biased and prejudiced against him. No counter affidavits were filed. There was, then, not even a conflict upon the facts. The duty of the trial judge was plain. The defendant having made it appear by affidavit, in conformity with the requirements of the statute, that the judge was biased or prejudiced against him, his motion should have been granted. *McGoon v. Little*, 7 Ill. 42; *Witter v. Taylor*, 7 Ind. 110; *Rines v. Boyd*, 7 Wis. 155; *Walsh v. Ray*, 38 Ill. 30; *Cass v. State*, 2 G. Greene, 353; *Griffin v. Leslie*, 20 Md. 15; *Mix v. Kepner*, 81 Mo. 93. The judgment and order are reversed, and the cause remanded.

We concur: TEMPLE, J.; McFARLAND, J.

(123 Cal. 437)

SLATER v. McAVOY et al. (S. F. 1,319.)<sup>1</sup>  
(Supreme Court of California. Feb. 2, 1899.)

ADMINISTRATORS DE BONIS NON—DECEASED ADMINISTRATOR—FAILURE TO ACCOUNT—ACTION AGAINST BONDSMEN—PARTIES—JURISDICTION—SURETIES' LIABILITY—PRESUMPTION.

1. Code Civ. Proc. § 1586, provides that an administrator may maintain an action in his own name for the benefit of the estate on the bond of a former administrator. *Held* that, under this statute, an administrator de bonis non was authorized to sue the bondsmen of a former deceased administrator to recover assets unaccounted for, though he could not do so at common law.

2. The superior court, as a court of equity, has jurisdiction of a suit by an administrator de bonis non to compel an accounting of assets of the estate not administered, against bondsmen of the former administrator.

3. In a suit against a deceased administrator's bondsmen for an accounting of goods not administered by him, it will be presumed that no administration has been issued on such administrator's estate, in the absence of an allegation to the contrary, under Civ. Code, § 3530, providing that what does not appear to exist must be regarded as if it did not exist.

4. Where an administrator dies without accounting for funds in his hands, suit for an accounting may be maintained against his bondsmen, without joining his personal representatives, under Code Civ. Proc. § 383, authorizing any or all sureties to be sued in the same action, at plaintiff's option.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county.

Suit by Clara J. Slater, administratrix de bonis non of John Evoy, deceased, against H. B. McAvoy and others. From judgments sustaining demurrers to plaintiff's complaint, she appeals. Reversed.

E. Crisp, for appellant. J. R. Glascock and Fitzgerald & Abbott, for respondents.

BRITT, C. One Howard Shaw was administrator of the estate of John Evoy, deceased.

<sup>1</sup> Rehearing denied March 3, 1899.

As such, he obtained leave of court to sell certain lands of the estate, and thereupon gave a bond required by the court, and provided by statute preliminary to exercising the authority to sell. Code Civ. Proc. § 1389. The defendants in this action became sureties in such bond,—which was executed in January, 1886,—and thereby obligated themselves severally, and also jointly with Shaw, that he, "as such administrator, shall faithfully execute the duties of his trust according to law." The sale was made, and afterwards, on April 17, 1888, Shaw rendered an account of his administration, showing that he had in his hands an unexpended balance of the proceeds of said sale amounting to \$3,958, which account was, a few days later, allowed and settled by the court. On January 9, 1895, Shaw died, leaving the estate unadministered, and having never accounted further for the said balance held by him in April, 1888. Thereupon the plaintiff here was appointed administratrix of the estate of Evoy in his stead. The matters above stated appear, among other things, from the plaintiff's original complaint. The prayer was for judgment against defendants for said sum of \$3,958, "or so much thereof as shall be unaccounted for," with interest, etc. Certain defendants demurred to the complaint, on the ground that it stated no cause of action, and the demurrers were sustained by the court. Judgments final were rendered for the demurrants severally, and plaintiff has appealed therefrom. There was an amended complaint served on one only of the defendants, to which a demurrer on the same ground as before was again sustained. All the respondents contend that the amended pleading added nothing to the force of the original, and we shall not notice it further.

"An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the estate." Code Civ. Proc. § 1586. Under this statute, plaintiff has the right to proceed for the recovery of the assets described in her complaint, though at the common law she would have had no capacity to maintain the action. *Woerner*, Adm'n, §§ 351, 352, 536; *Balch v. Hooper*, 32 Minn. 158, 20 N. W. 124; *Giles v. Brown*, 60 Ga. 658. Now, it may be allowed that the complaint is insufficient to support a recovery of the balance of the money in the hands of Shaw on the settlement of his account in 1888, for the reason that it does not allege such settlement to have been final, or otherwise show that the defendants thereupon became liable for that precise sum, irrespective of the necessities of Shaw's further administration. But the complaint does show that Shaw remained accountable for that sum, and that he died without accounting for it. In this state of the case, jurisdiction to compel an accounting from the proper parties vested in the superior court, as a court of equity. *Chaquette v.*

Ortet, 60 Cal. 594; Bush v. Lindsay, 44 Cal. 125. The defendants are undoubtedly proper parties to a suit for such accounting. Payne v. Hook, 7 Wall. 425. Compare Powell v. Powell, 48 Cal. 234. But they contend that, before suing them, plaintiff ought to have pursued the personal representative (administrator or executor) of Shaw, and have compelled from him a statement and settlement of Shaw's account; at least, that they cannot be brought to account without the presence of Shaw's representative as a party defendant. These objections are untenable. Defendants, as shown above, being proper parties to a suit in equity for a settlement of Shaw's account with the estate of Evoy, of course it cannot be necessary that the account be settled in some other forum or in some other action before proceeding against them. It is unnecessary to decide whether, if administration of the estate of Shaw had been granted, and the complaint so alleged, his executor or administrator would appear to be an indispensable party to this action, nor whether, if that proposition were ruled affirmatively, the demurrers of defendants, which do not go on the ground of any defect of parties, were sufficient to raise the question; for it does not appear from the complaint whether any executor or administrator of Shaw was ever appointed, or, indeed, that he left any estate to be administered. "That which does not appear to exist must be regarded as if it did not exist" (Civ. Code, § 3530); and we must assume that he has no personal representative who may be compelled to state his account with the estate of Evoy.

The case is, then, that defendants are severally liable as sureties on a bond conditioned for the performance of a trust undertaken by their principal, which included the duty to account. The principal is dead; there is no administration of his estate; and the account is unstated. It is provided by statute that parties severally liable upon an instrument, including sureties, may all or any of them be included in the same action at the option of the plaintiff. Code Civ. Proc. § 383. Under these circumstances, the right of plaintiff to enforce, against defendants, an accounting of the transactions of their deceased principal, seems to us clear, both in reason and authority. In such a case the sureties are the proper parties to make the settlement. Tudhope v. Potts, 91 Mich. 490, 51 N. W. 1110; Same v. Avery, 106 Mich. 149, 63 N. W. 969; Farrington v. Secor, 91 Iowa, 606, 60 N. W. 193; Fulgham v. Herstein, 77 Ala. 496; Moore v. Armstrong, 9 Port. 697; State v. Porter, 9 Ind. 342; Curtis v. Bailey, 1 Pick. 198; Woerner, Adm'n, § 352. See, also, People v. Jenkins, 17 Cal. 500; Com. v. McDonald, 170 Pa. St. 221, 32 Atl. 410; Martin v. Ellerbe's Adm'r, 70 Ala. 326. We have examined the several cases in this court cited by defendants, but do not find that they at all conflict with our conclusion. The judgments should

be reversed, and the cause remanded, with directions to the court below to overrule the demurrers.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgments are reversed, and the cause remanded, with directions to the court below to overrule the demurrers.

6 Cal. Unrep. 220

WHITNEY v. AMERICAN INS. CO. et al.  
(S. F. 840.)

(Supreme Court of California. Jan. 30, 1899.)

INSURANCE—PROOFS OF LOSS—CHANGE OF TITLE  
—NOTICE—REINSURANCE.

1. A notice of a change of title may be given to the person who signed the policy as insurer's agent when the policy was issued, where insured had no knowledge that such person had ceased to be insurer's agent.

2. Under a clause, in a policy insuring a mortgagee, providing that the insurance should not be invalidated by the mortgagor's neglect, provided the mortgagee notified insurer of any change of ownership coming to his knowledge, and had permission for such change indorsed on the policy, a change of ownership to the mortgagee's knowledge does not invalidate the policy, if the change did not increase the risk, though he gave insurer no notice thereof, the provision respecting the giving of notice by him being merely directory.

3. An insured may make proofs of loss to one who had assumed insurer's liabilities, where insurer had authorized him to receive them, and had withdrawn all its own agencies from the state.

4. A contract of a company to pay losses under policies issued by another company as promptly as losses under its own policies is not a contract of reinsurance, under Civ. Code, § 2646 et seq., and hence the company is directly liable to the insured.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by A. L. Whitney against the American Insurance Company and another. From a judgment for plaintiff, and an order denying a motion for new trial, defendants appeal. Affirmed.

Jas. A. Watt and John R. Aitken, for appellants. Mullany, Grant & Cushing, for respondent.

McFARLAND, J. This is an action upon a fire insurance policy, in which the loss is payable to the plaintiff, as mortgagee of the land upon which the building insured was situated. Judgment was for plaintiff in the superior court, and from the judgment, and an order denying a new trial, the defendants appeal.

There is no charge of fraud or of any misconduct by the respondent which was material to the risk, and there is no apparent reason on the face of the record why, upon principles of justice and fair dealing, the loss should not have been paid. Appellants contend that they are shielded from payment by certain asserted legal defenses. These asserted defenses are substantially as follows:



First, that before the fire there was a transfer of the title of the property insured, without notice thereof to appellants; second, that proofs of loss were not made to the proper party; and, third, that the Northwestern National Insurance Company was a mere reinsurer of the American Insurance Company, that there was no privity of contract between the respondent and the Northwestern, and that, therefore, respondent was not entitled to judgment against the Northwestern Company. We do not think that either of these grounds for a reversal is tenable.

1. The policy in question was issued by the appellant the American Insurance Company on September 6, 1893. (For convenience, we will call one of the appellants the "American," and the other the "Northwestern.") The premises insured were situated in Los Angeles, Cal. At the time of the issuance of the policy the legal title to the land was in James E. Gordon, who had purchased it from J. F. Sullivan, a resident of San Francisco. The amount of the policy was \$1,000, and at this date the respondent held a mortgage on the premises, executed by said Sullivan, for a greater amount than \$1,000; and the loss, if any should occur, was made payable to the respondent, as mortgagee. There was a mortgage clause in the policy, which provided "that this insurance, as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, or by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy: \* \* \* provided, also, that the mortgagee or trustee shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have permission for such change of ownership or increase of hazard duly indorsed on this policy." There was no provision that a failure by the mortgagee to give such notice should avoid the policy. In December, 1893, Gordon conveyed the property back to Sullivan, and assigned the policy to him, and this transfer and assignment were approved by the company. On May 19, 1894, the building insured was destroyed by fire. A short time prior to that event, to wit, on the 9th of May, 1894, one Beach, who was a tenant occupying the premises insured, had some negotiations with Sullivan, in San Francisco, looking to an exchange of some of his property with Sullivan for the insured property at Los Angeles; and, as a result of those negotiations, Beach requested Sullivan to make a deed of the insured premises to one Taylor, who lived at Los Angeles. Beach expected that Taylor would accept a deed of these premises in satisfaction of certain claims which Taylor had against Beach. Sullivan executed the deed to Taylor, and Beach sent it to the county recorder at Los Angeles, who recorded it; but Taylor repudiated the transaction, and refused to accept the deed. A day or two afterwards, Sullivan

wrote to the respondent that he had made the deed to Taylor. Thereupon the respondent looked over the records in Los Angeles, and could not find that any such deed had been recorded. Respondent informed J. K. Mulkey, who was the agent of the American Company at the date of the issuance of the policy, and who signed the policy as such agent, and who respondent had every reason to believe was still the agent of such company, of the letter which he had received from Sullivan about the sale of the premises to Taylor; and Mulkey told the respondent that he thought no change would be advisable, as there was no evidence of the actual transfer. Mulkey had also received a notice from Beach that the property had been deeded to Taylor. Under these circumstances, we see no reason whatever for holding that the policy had been forfeited on account of respondent's conduct with respect to notice of the transfer. Owing to the refusal of Taylor to accept the deed, it is doubtful if any transfer of the title ever took place, although it is not necessary to absolutely determine that point. Respondent, at all events, gave all the notice which he could be fairly expected to have given. The provision in the policy that respondent should inform the insurance company of such transfer of the property as should come to his knowledge is only directory, and his failure to do so is not declared to be such a violation of the policy as would avoid it; and his failure to give such notice would have been material only where it would have caused prejudice or increased risk to the insurance company, and there is no pretense of such a thing here. It may be observed, as appellant seems to attach some importance to the fact, that, although Beach held a general power of attorney from Taylor, the transaction between Beach and Sullivan was one which Beach entered into on his own behalf, and not in his capacity as attorney in fact for Taylor.

2. On the next day after the fire, respondent called on said Mulkey, as agent of the American Company, and informed him of the fire. Thereupon, for the first time, Mulkey stated that he was no longer agent of said company, that said company's policies on this coast had been assumed by the Northwestern Company, and that Betts & Silent, of Los Angeles, were the agents. Soon afterwards Mr. T. A. Nerney sought out the respondent, and informed him that he was the agent and adjuster of the Northwestern, and took him to the office of Betts & Silent, and there prepared and caused proof of loss to be made in due form, which proof of loss he sent to George W. Turner, at San Francisco, who was the general agent for the Northwestern; and he (Nerney) assured respondent that the money due for the loss by fire would be paid. It is a fact that Nerney was the agent and adjuster of the Northwestern at Los Angeles, and that Turner was the general agent of the Northwestern. The American and Northwestern were both foreign corporations. These further

facts appear: In March, 1894, a written contract was entered into between the American and the Northwestern, by which, in consideration of certain money and property given by the former to the latter, and in consideration of the payment by the American to the Northwestern of certain pro rata unearned premiums under each and every policy of the American in force in certain states and territories, including California, the Northwestern assumed all the liabilities of the American upon all its policies, among which it is admitted the policy in question in this action was included. By that contract the Northwestern covenanted that it "will make as prompt adjustments and payments of loss, if any, under any and all of its policies of the said American Insurance Company, as it would under its own policies, if issued direct to said assurer." Thereafter all the agencies of the American Company in California were revoked, and the Northwestern took the entire control and management of all matters arising out of said policies, and the adjustment of losses in cases of fire, and the American practically disappeared from the business. Several years before that, the American Company had filed in the office of the insurance commissioner of this state a designation of one Ed. E. Potter as its agent; but, a few days after the fire, Sullivan went to see Potter, who informed him that he was no longer agent of the American, except perhaps for the purpose of settling with the Northwestern Company. The proofs of loss above referred to were made within five days after the fire, and were directed formally to the American Company, but were sent, as above stated, to Turner. Turner testified that, after the contract between the Northwestern and the American above noticed, "I had charge of the business covered by that contract, including the risk of policy sued for here, and now before this court." He also testified that Nerney was the agent of the Northwestern, and had charge at Los Angeles, and that, "as to this policy sued on, I began to handle it about a week or ten days after the fire. Just as soon as I received the proof of loss from Mr. Nerney, I went to work on the subject, and called on Mr. Sullivan." He further testified that "Mr. Potter had called in all the agencies of the American Insurance Company before the fire occurred for the loss for which this action is prosecuted," and that the Northwestern, "through its agents and under my general agency, had been attending to the affairs under the policies of insurance issued by the American Insurance Company's agents under this agreement since about April 1, 1894, and it was under that agreement, and in the duty and in the pursuance of the duties which were assumed under that agreement, that I went to see Dr. Sullivan in regard to this policy; and Mr. Nerney attended to the taking of the proofs of loss on behalf of the American Insurance

Company in Los Angeles from A. L. Whitney, the plaintiff herein. I, as agent of the Northwestern National Insurance Company, had authority to receive the proofs of loss under this policy of the American Insurance Company. I am aware that the fire occurred on May 19 or 20, 1894, under the policy sued on in this action." But, after Turner "began to handle" the matter, he learned from Sullivan that the latter had made a deed to Taylor, Sullivan supposing at that time that the title had passed from him to Taylor through the deed which he had executed to the latter; and thereafter Turner returned the proofs of loss, and the defenses set up in this case seem to have been determined upon. We have stated these facts somewhat fully here, because they are applicable to the third point made by the appellants. Upon these facts, we think that the proofs of loss were properly made.

3. Appellants have argued the third point as though the contract above referred to between the two insurance companies, and their subsequent action carrying it out, amounted to nothing more than the dry, naked contract of reinsurance, under section 2646 et seq. of the Civil Code. But the facts hereinbefore stated show a contract much broader than a mere technical reinsurance. The Northwestern, under the situation here shown, was directly liable to the plaintiff, upon the principle declared and illustrated in *Morgan v. Mining Co.*, 37 Cal. 534; *Flint v. Cadenasso*, 64 Cal. 83, 28 Pac. 62; *Lockwood v. Canfield*, 20 Cal. 126; *Arnold v. Lyman*, 17 Mass. 400. As was said in *Morgan v. Mining Co.*, supra, "the companies agreed, and the plaintiff manifests his assent by bringing the action." In *Arnold v. Lyman*, supra, the court said: "The promise being not to Hutchins expressly, but general in its form, the assent of the creditors made them parties to the promise; and this assent is sufficiently proved, as respects the plaintiffs, by their bringing an action upon the contract." "The law creates the privity necessary" for the maintenance of this action.

Appellants make some points as to the insufficiency of the evidence to justify some of the findings; but the findings attacked are either unimportant, under the views above expressed, or the objections thereto have been substantially noticed above. The finding which is most objected to is the one to the effect that Sullivan remained the owner of the property; but, as hereinbefore stated, that matter is unimportant. The finding "that plaintiff has duly performed all the conditions and covenants on his part to be performed under said policy of insurance" is fully sustained by the evidence as hereinbefore stated. The other objections to the findings are unimportant and immaterial. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.



(123 Cal. 172)

GEORGE v. MATONNI et al. (S. F. 883.)  
(Supreme Court of California. Jan. 30, 1899.)

PLEDGE—STATUTE OF FRAUDS.

A pledge of personal property is invalid as against the pledgor's creditors, where no delivery is made, and no actual, open, and unequivocal possession is taken.

In bank. On rehearing. Affirmed.

For opinion in department, see 55 Pac. 775.

GAROUTTE, J. In view of the citation of a number of new cases in the petition for a rehearing, wherein it is claimed that the law is so declared that, under the facts of the present case, the conclusion of the department is wrong as to the insufficiency of the actual and continued change of possession of the cows involved in this litigation, the following is submitted:

In *Stevens v. Irwin*, 15 Cal. 503, the court said as to the true construction of this provision of the statute of frauds: "A delivery must be made of the property. The vendee must take the actual possession. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous,—not taken to be surrendered back again; not formal, but substantial." This has been the law from that day to this day, unquestioned and unchallenged by bench or bar. Hundreds of cases have stood or fallen tested by this canon of construction. In *Rothschild v. Swope*, 116 Cal. 678, 48 Pac. 911, we find the statement: "This court, thirty-seven years ago, in *Stevens v. Irwin*, supra, gave an interpretation to the statute which has stood unassailed ever since." That case is immediately preceded by *Levy v. Scott*, 115 Cal. 48, 46 Pac. 892, and *Byxbee v. Dewey* (Cal.) 47 Pac. 52, where *Stevens v. Irwin* is cited and approved. Indeed, at every milestone in the long road leading from volume 15 of the California Reports to volume 121, some case may be found indorsing, either by title or in principle, the doctrine of *Stevens v. Irwin* upon the sufficient delivery of personal property as against the claims of attaching creditors. As illustrative of these cases, we cite *Engles v. Marshall*, 19 Cal. 329; *Cahoon v. Marshall*, 25 Cal. 201; *Godchaux v. Mulford*, 26 Cal. 316; *Woods v. Bugbey*, 29 Cal. 472; *Hesthal v. Myles*, 53 Cal. 624; *Bell v. McClellan*, 67 Cal. 283, 7 Pac. 699; *Kelly v. Murphy*, 70 Cal. 563, 12 Pac. 467; *Bunting v. Saltz*, 84 Cal. 172, 24 Pac. 167; *Etchepare v. Aguirre*, 91 Cal. 295, 27 Pac. 668; *Murphy v. Mulgrew*, 102 Cal. 547, 36 Pac. 857. Upon an examination of the aforesaid authorities, it will be found that the law of *Stevens v. Irwin* stands impregnable and unassailable. In some exceptional cases presenting hard law, the

court, in its construction and interpretation of the facts, may have leaned a little too far towards the administration of substantial justice; but beyond this it has never gone, and the law of this question stands to-day exactly as it did 38 years ago.

(123 Cal. 456)

POPPER v. BRODERICK, County Auditor.  
(S. F. 1006.)<sup>1</sup>

(Supreme Court of California. Feb. 4, 1899.)

MUNICIPALITIES—ORGANIZATION—CONTROL—CONSTITUTIONAL LAW.

Const. art. 11, § 6, as amended in 1895, authorizes cities theretofore organized to organize under the general laws, and provides that cities theretofore or thereafter organized, and all charters thereof framed or adopted by authority of the constitution, except "in municipal affairs," shall be controlled by general laws. Act March 8, 1897, regulates salaries of firemen and policemen in cities of the first class. Held, that the act relating to municipal affairs did not apply to the county and city of San Francisco, which did not incorporate as authorized by the constitution, but under private charter.

In bank. Appeal from superior court, city and county of San Francisco.

Action by Max Popper against William Broderick, as auditor of the city and county of San Francisco. From an order sustaining a demurrer to the complaint, and from a judgment dismissing the action, plaintiff appeals. Reversed.

Raymond Robins, for appellant. Garber & Garber and G. W. McEnerney, for respondent.

VAN DYKE, J. At the session of the legislature in 1897, an act was passed, approved March 8th, to regulate the salaries of certain officers of the police department within municipalities of the first class, as follows: "In every municipality of the first class in this state, salaries shall be allowed and paid to the following officers of the police department of such municipality, as in this act provided: To the chief of police, five thousand dollars per annum; to the captain of detectives of the police department, three thousand dollars per annum; to six (6) captains of police, twenty-five hundred dollars per annum each; to the clerk of the chief of police, and board of police commissioners, twenty-five hundred dollars per annum; to the property clerk of the police department, twenty-five hundred dollars per annum; to fifteen (15) police officers, who shall be known and designated as detectives, detailed as such by the chief of police, of the police department of such municipality, to perform detective duty, one thousand eight hundred dollars per annum each. \* \* \* All of the salaries provided for in this act shall be paid at the same time and in the same manner, and out of the same fund as they have been paid to members of the police department prior to the passage of this act." By another act relating to fire departments of municipalities of

<sup>1</sup> Rehearing denied March 6, 1899.

the first class, approved March 3d, it is declared: "In municipalities of the first class the following officers of its fire department shall receive the following salaries: Chief engineer, five thousand dollars; assistant chief engineer, three thousand six hundred dollars; secretary, or clerk, three thousand dollars; assistant engineers, two thousand one hundred dollars each; veterinary surgeon, one thousand eight hundred dollars. Said salaries shall be paid in the same manner as is now provided by law." St. 1897, pp. 54-72. Said acts, by their terms, were to take effect immediately.

On the 30th of March following, this action was brought, for the purpose of enjoining the defendant, as auditor of the city and county of San Francisco, from auditing or paying these increased salaries. The complaint, after setting forth in substance the provisions of these two acts, alleges that the salary payable to each of such officers in the city and county of San Francisco is as follows: "President of the board of police commissioners, two hundred and fifty dollars per month; police commissioners, one hundred dollars per month; chief of police, four thousand dollars per annum; captains of police, one hundred and twenty-five dollars per month; clerk of chief of police and board of police commissioners, one hundred and twenty-five dollars per month; chief engineer of fire department, two hundred and fifty dollars per month; assistant chief engineer, two hundred dollars per month; assistant engineers, one hundred and fifty dollars per month; clerk, one hundred and fifty dollars per month; veterinary surgeon, sixty dollars per month." It is further averred in the complaint that the defendant, as the auditor of the city and county of San Francisco, is determined to, and will, audit the demands of the said officials of the fire and police departments of said city and county of San Francisco for the increased amount of their several salaries alleged to be authorized by said acts of the legislature before mentioned, and that such determination by the said auditor is set forth in the communication from said defendant auditor to said plaintiff, in the words and figures following: "Auditor's Office, City and County of San Francisco, City Hall, San Francisco, March 26, 1897. Max Popper, Esq.: In answer to yours of March 24th, wherein you say that you believe the bills passed by the legislature increasing the salary of certain police and fire department officials are unconstitutional, and you desire to know if it is my purpose to audit demands based thereon, I beg to say that from inquiry I am informed that the governor, before signing said bills, gave the question of their constitutionality careful consideration, and, unless prevented by process of law, I purpose to audit the demands on the 31st of March, as all other demands for salary will be. Respectfully yours, [Signed] W. Broderick." Plaintiff further avers that the defendant threatens to, and

will, unless restrained by the order of the court, proceed to audit and authorize payment from the treasury of said city and county of San Francisco of said alleged increase of salaries of said officials of the police and fire departments of said city and county, a large sum of money, to wit, \$5,000, on the 31st day of March, 1897; and the plaintiff further avers that the defendant, unless restrained, will audit and authorize the payment from the treasury of the said city and county of San Francisco, after said 31st day of March, from time to time, large sums of money, to wit, \$5,000 monthly, to pay such alleged increase of salaries of such officers of the police and fire departments of said city and county of San Francisco, amounting in all to a large sum of money annually, to wit, \$60,000, all of which expenditures are unnecessary and illegal, and will be, if permitted to be made, a charge against the city and county of San Francisco, and a burden on the plaintiff and all taxpayers therein. To this complaint a general demurrer was interposed. The court below denied the plaintiff's motion for an injunction, sustained the demurrer, and dismissed the action. From such judgment and order the case comes to this court on appeal. In this court the cause was, by stipulation, submitted on briefs, and the last brief of counsel was only filed December 28, 1898.

The legislation here in question, raising the salaries of certain officers of the police and fire departments of the city and county of San Francisco, is sought to be sustained on two grounds: First. That section 6 of article 11 of the state constitution does not apply to the city and county of San Francisco; secondly, that such acts or laws complained of do not fall within the class of prohibited legislation, under the terms of section 6 as amended in 1895.

Respondent's counsel embody in their brief the opinion of the court below, filed there in this case, from which it appears that the learned judge who tried the case relied upon respondent's first proposition. He says: "My conclusion is that the legislature has, since the adoption of the amendment of section 6 of article 11 of the constitution, the same power, by means of general laws, to control cities which have not framed and adopted a charter as it had before." Section 6 of article 11 of the constitution, containing the amendment proposed at the session of the legislature of 1895 (St. 1895, p. 450), and adopted by the people at the ensuing election of 1896,—the amended portion being in italics,—reads as follows: "Sec. 6. Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever



a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, *except in municipal affairs*, shall be subject to and controlled by general laws." While this case has been pending here on appeal, this court, sitting in bank, expressly held, in *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644, that the clause or portion of section 6 of the constitution containing the inserted amendment does apply to the city and county of San Francisco. In that case an order or ordinance of the board of supervisors of said city and county was challenged as being illegal, on the ground, among others, that the said order or ordinance lacked the signature of the mayor of said city. Such signature of the mayor in terms was required by the provisions of the act of the legislature of 1897 entitled "An act to require ordinances and resolutions passed by the city council or other legislative body of any municipality to be presented to the mayor or chief executive officer of such municipality for his approval." St. 1897, p. 190. Continuing, this court say: "Prior to the passage of this act it was not required. *Truman v. Board*, 110 Cal. 128, 42 Pac. 421. But before this act it had been believed by the legislature and by the people that it would be wiser to relieve charters of cities from the operation of general laws affecting municipal affairs, lest otherwise there would be danger of the charter provisions being entirely 'frittered away.' In accordance with this belief, an amendment to the constitution was adopted in 1895 (St. 1895, p. 450), providing that 'cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws.' \* \* \* The act of 1897 unquestionably deals with a municipal affair,—the mode and manner of the passage of ordinances and resolutions provided for in the charter. Under this constitutional amendment, such acts now apply only to cities and to their charters which have organized under the general scheme embraced in the municipal corporation act. St. 1883, p. 93. San Francisco is not one of such cities, and the act of 1897 has therefore no application to it."

Does the salary or pay of firemen and policemen belong to "municipal affairs"? If so, then these acts of the legislature attempting to raise and fix such salaries have no more force in the city and county of San Francisco than the act of the said session requiring the signature of the mayor to ordinances and resolutions; and in *Morton v. Broderick* it was held that such act had no binding force in said city and county, for the reason that it concerned municipal affairs, and therefore fell within the prohibition against such legislation. The government of the city and county of San Francisco may be said to be dual in its

nature; and in *Kahn v. Sutro*, 114 Cal. 316, 46 Pac. 87, this court distinguished and classified officers that were county and officers that were municipal; and the officers of the police and fire departments are designated as peculiarly and distinctively municipal officers. It may be taken as a matter of law that the people, in adopting the constitutional amendment under consideration at the election of 1896, did so in view of this definition of municipal affairs, as distinguished from county affairs, so decided in that case. The purpose of the amendment is apparent. It was to prevent the constant tampering with matters which concern only or chiefly the municipality, under the guise of laws general in form. "The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the people in adopting it." 6 Am. & Eng. Enc. Law (2d Ed.) 921. "Generally, it may be said that experience has shown the necessity of organic provisions more exactly defining and limiting the power of the legislature to enact laws which affect the local and private or distinctly corporate rights of chartered cities, and which involve expenditures of money, the creation of debts, and consequent pecuniary burdens, without the consent or against the will of the local authorities of the municipality, or the people thereof." Again: "In many of its more important aspects, a modern American city is not so much a miniature state as it is a business corporation; its business being to wisely administer the local affairs, and economically to expend the revenues of the incorporated community. As we learn this lesson, and apply business methods to the scheme of municipal government and to the conduct of municipal affairs, we are on the right road to better and more satisfactory results." Dill. Mun. Corp. (4th Ed.) §§ 12a, 15. We are not unmindful of the rule that gives to legislative acts the presumption of validity. At the same time, we are not to overlook the fact that the legislature is a co-ordinate department of the state government, and, like the other departments, its powers are limited and circumscribed by the constitution. In this respect our state legislatures are materially unlike the parliament of Great Britain, from which country our common law and many of our precedents are derived. That body neither owes its existence to a written constitution, nor is it limited or controlled by one. But, notwithstanding the presumption in favor of legislative acts, whenever the constitutional limits are crossed the acts of the legislature, as to such matters, are void, and what is written, although in form of law, is merely waste paper. We are of opinion that the pay of firemen and policemen clearly falls within the term "municipal affairs." Judgment reversed, with directions to the court below to overrule the demurrer to the complaint.

We concur: BEATTY, C. J.; HENSHAW, J.; TEMPLE, J.; HARRISON, J.

(123 Cal. 414)

**PEOPLE v. LOGAN. (Cr. 479.)<sup>1</sup>**

(Supreme Court of California. Jan. 30, 1899.)

**CRIMINAL LAW—REVIEW—VERDICT—EVIDENCE—  
RAPE—CONTINUANCE—JURY—PEREMP-  
TORY CHALLENGES.**

1. The supreme court's appellate jurisdiction is limited to matters of law alone, hence a verdict of guilty, supported by the evidence of the prosecuting witness, cannot be disturbed, unless such evidence is so incredible and false on its face that the court would deal with it as a matter of law.

2. Where a defendant neglected to apply for a continuance of a criminal case, on the ground of the illness of a material witness, until after the jury was impaneled, and then requested a continuance for two months, it was properly refused.

3. Pen. Code, § 1070, provides that, if the offense charged be punishable with death or life imprisonment, defendant is entitled to 20 and the state to 10 peremptory challenges; and section 671 authorizes the court to sentence a defendant convicted of rape to imprisonment for life. *Held* that, on a trial for rape, defendant was limited to 10 peremptory challenges.

**Department 1.** Appeal from superior court, Tuolumne county.

James Logan was convicted of rape, and he appeals. *Affirmed.*

J. B. Curtin and J. C. Webster, for appellant. Atty. Gen. Fitzgerald, for the People.

**GAROUTTE, J.** The defendant has been convicted of the crime of rape, and now appeals from the judgment and order denying his motion for a new trial.

It is first claimed that the evidence is too weak to support the verdict of the jury. If the evidence of the prosecuting witness be true, the verdict has full support therein, and its truth or falsity was a matter essentially for the jury's consideration. In criminal cases this court's appellate jurisdiction is limited to matters of law alone, and the truth or falsity of a witness' statement is essentially a matter of fact. It is possible that evidence might come before this court so incredible, so inherently improbable, so stamped with falsehood upon its face, that the court would deal with it as presenting a matter of law. But such a case would be a most exceptional one, and it is not presented by this record, although it may be said that the circumstances and conditions enveloping and forming the *res gestæ* of this particular offense are unusual, and not entirely convincing.

The prosecuting witness, a large, strong girl of 14 years of age, testified that she was sleeping with the wife of the defendant at the time she was raped. After the jury was impaneled, and before any evidence was introduced, defendant's counsel asked for a continuance upon the ground that Mrs. Logan, the wife, was sick and unable to be present at the trial. It further appeared by the showing that probably the witness would be sick and unable to testify for the period of two months. If this application had been made before the jury was impaneled to try

the case, we have no doubt but that the trial court would have granted it; and, in view of the importance of her testimony, it would have been an abuse of discretion upon the part of that court if it had not been granted. Defendant's counsel should have known the condition of their witness before the jury was impaneled, and should have made their showing at that time. If a continuance of one, two, or even three days, under the present showing, would have enabled the defendant to have secured the presence of this witness at the trial, the court should have granted that time, in view of the importance of her evidence; but here a continuance of two months was asked. Possibly, the jury might have been discharged, and the case again placed upon the trial calendar; but to continue a case for two months, and allow the jurors selected to hear the evidence and render the verdict to roam at large during that long period of time, cannot be countenanced in law. Such an order upon the part of the court would have been reversible error. *People v. Dinsmore*, 102 Cal. 381, 36 Pac. 661. On the other hand, if the jury had been discharged, and a second trial begun at some subsequent time, the question of once in jeopardy might have presented difficulty. Under these peculiar circumstances, we conclude the court was justified in refusing the continuance.

It is next claimed that the defendant was entitled, under the law, to 20 peremptory challenges, and was only allowed 10. When we consider the fact that section 671 of the Penal Code gives to the court authority to sentence a defendant to imprisonment for life upon conviction of the crime of rape, there seems much force in appellant's position. And, if the question of the construction of the statute pertaining to the number of peremptory challenges to which a defendant convicted of rape is entitled were now before us for the first time, the court might probably agree with defendant's contention. But this is not a new question, and the authorities of this state are the other way. *People v. Clough*, 59 Cal. 438; *People v. Riley*, 65 Cal. 107, 3 Pac. 413; *People v. Fultz*, 109 Cal. 259, 41 Pac. 1040. We feel that the law had best stand as it has been heretofore announced.

There is no merit in the remaining contentions of the appellant. For the foregoing reasons, the judgment and order are affirmed.

We concur: **HARRISON, J.; VAN DYKE, J.**

(123 Cal. 441)

**HECKLE v. SOUTHERN PAC. CO. (S. F. 746.)**

(Supreme Court of California. Feb. 2, 1899.)

**DEATH BY WRONGFUL ACT—RAILROADS—EVIDENCE  
—DECLARATIONS—RES GESTÆ—INSTRUCTIONS  
—CONTRIBUTORY NEGLIGENCE.**

1. Declarations of a person caught under the wheels of a car, as to the cause of the acci-

<sup>1</sup> Rehearing denied March 1, 1899.



dent, shortly after the accident, and before he was extricated, are admissible as part of the *res gestæ*.

2. In an action against a railway company for killing deceased at a crossing, it is error to instruct that the plaintiff must establish that "defendant had no knowledge" that the crossing was out of repair, and that such absence of knowledge, if any, was not due to defendant's negligence in examining the crossing.

3. Where plaintiff sues for damages for the killing of her son, she is not required to prove by a preponderance of evidence that deceased was free from contributory negligence.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Mary Heckle against the Southern Pacific Company, a corporation. From an order granting plaintiff's motion for a new trial, defendant appeals. Affirmed.

J. C. Campbell, for appellant. Delmas & Shortridge, for respondent.

McFARLAND, J. This action is brought by a mother to recover damages for the death of her son, who was killed by an accident on the railroad of the defendant. The jury found a verdict for the defendant, but the trial court made an order granting plaintiff's motion for a new trial, and the defendant appealed from that order. The motion for a new trial was made upon three grounds: First, that the court erred in sustaining defendant's objection to a certain question asked of the witness W. G. Dudley; second, that the court erred in giving a certain instruction to the jury; and, third, that the court erred in giving a certain other instruction.

1. Dudley was a witness for the plaintiff, and the questions asked him to which objections were sustained related to what Heckle, the deceased, told the witness at the time of the accident. He was asked this question: "At that time did he say anything to you?" and, also, "What did Heckle say to you? What did he say as to the cause of the accident?" It is contended by respondent that these questions were proper, because they were inquiries about declarations which were part of the *res gestæ*, and defendant claims that they were not admissible as part of the *res gestæ*. The court concluded that it had erred in sustaining objections to the questions, and the question here now is whether or not the court erred in granting a new trial for that reason. There is no great difficulty in stating the general principles which prevail in determining whether, in a given case, certain declarations or acts are parts of the *res gestæ*. A declaration, to be admissible on that ground, must be an undesigned part or incident of the occurrence in question. It must be, in a general sense, contemporaneous with the main occurrence; although, in case of a sudden accident or attack, the declaration would not be inadmissible merely because the blow or collision immediately preceded it. It must be the natural and spontaneous outgrowth of the main occurrence, and must exclude the notion of deliberation

or calculation, or the design to manufacture evidence for future purposes; and, if it be a mere narrative of past events, it then is clearly within the category of inadmissible hearsay, and must, beyond doubt, be excluded. The authorities cited by respective counsel, although apparently somewhat in conflict, will be found, on close inspection, to be based on the same general principle; and their apparent restrictions and extensions of the rule will be found, in the main, to be mere applications of the same doctrine to varying facts. The difficult task always is to apply established principles to the facts of the case in hand. In the case at bar we do not think that the court erred in holding that it should have overruled the objections to the questions asked. The evidence contained in the record makes rather a meager showing of the exact situation at the time of the declarations of the deceased, Heckle, to which the questions asked Dudley referred. It appears, however, that the deceased had been caught under a wheel of one of the cars, and was still under the wheel (held there firmly by the weight of the car) at the time he made the declarations sought to be introduced in evidence. It might be very well said, therefore, that the accident had not been completed, and the occurrence had not ended, at the time of the declarations inquired after. And it does not appear with any certainty how long it was after the deceased had been first caught by the car wheel until he had the conversation with Dudley, but it does appear that the time was very short. Dudley heard the cry of the deceased, and went to him immediately; and it appears that he ran only a short distance, to warn the conductor not to start the train, and immediately ran back to the deceased, when the declarations sought to be proven were made. It is possible that this time was so long that the declarations of the deceased, although he was still under the car wheel, may have been of the character of a narrative of past events; and it may have been that the declarations themselves, if they had been received in evidence, would have shown that they were a mere narrative, and it is possible that they may have been of such a character that it would have been the duty of the court to have stricken them out. Therefore, what we say here would be no guide to the court below, if, upon another trial, the facts should be more fully shown, and it should then appear that the declarations should not be received as part of the *res gestæ*. But, upon the facts as they here appear, answers to the questions ruled out might have been perfectly proper. We think, therefore, that the court erred in refusing to allow any answer to the questions asked, and did not err in granting a new trial for that reason.

2. As to the two instructions complained of by respondent as erroneous, the point is made by appellant that no exception was properly taken to the giving of said instruc-

tions. Before the jury retired, a colloquy took place between the court and counsel on both sides. Respondent claims that this colloquy constituted an exception to the giving of the instructions, and appellant contends that the effect of that colloquy was merely to give to respondent a right to take exceptions which he did not take. As the order must be affirmed on the point hereinbefore discussed, it is not necessary for us to determine whether or not the proper exceptions were taken to the two instructions. But, as the case will probably be retried, it is proper for us to say that both instructions were erroneous. The first instruction complained of, or at least that part of it which is material, is as follows: "Before you can find a verdict for the plaintiff, you must find that the plaintiff has established by a preponderance of all the evidence in the case \* \* \*. Fourth. That the defendant had no knowledge or notice that said crossing was out of repair, and that such absence of knowledge, if any, was not due to defendant's neglect in the matter of examining the crossing." Of course, if the plaintiff were compelled to prove this, she would have to prove that she had no case. Appellant contends that the word "no" before "knowledge" was a mere clerical mistake; but, if the word "no" were left out, the sentence would either have no meaning at all, or would be just as bad as it was before. By the other instruction complained of, the jury were told that the plaintiff must prove by a preponderance of evidence that the deceased was free from contributory negligence, which is not the law. The order appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

6 Cal. Unrep. 226

LINGARD et al. v. BETA THETA PI HALL ASS'N et al. (S. F. 832.)

(Supreme Court of California. Feb. 2, 1899.)

MECHANIC'S LIENS—PLEADING—ADMISSION.

In an action to foreclose a mechanic's lien, the complaint alleged the date of the completion of the building, and that the lien was filed on April 6, 1894, within 30 days thereafter. The answer denied "that within thirty days from and after the completion of said building, to wit, upon the 6th day of April, 1894, or at any other time, or at all," plaintiffs filed their claim of lien, containing a statement of their demand. *Held*, that the answer was but a denial of the time of filing the notice of lien, and of its sufficiency, and admitted the allegation of the time when the building was completed.

Department 1. Appeal from superior court, Alameda county.

Action by one Lingard and others against the Beta Theta Pi Hall Association and others to foreclose a mechanic's lien. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Garber, Boalt & Bishop and Wm. H. Jordan, for appellants. Thomas F. Graber, for respondents.

PER CURIAM. Action for the foreclosure of a mechanic's lien. The only point urged in support of the appeal is that the notice of a claim of lien was not filed in the recorder's office within 30 days after the completion of the building. It is alleged in the complaint that the building was completed on the 13th of March, 1894, and this allegation is not denied. It is also alleged that within 30 days of the completion of said building, to wit, on the 6th day of April, 1894, the plaintiffs filed for record their claim of lien, setting forth its contents. In their answer the defendants "deny that within thirty days from and after the completion of said building, to wit, upon the 6th day of April, 1894, or at any other time, or at all, plaintiffs did file for record their or any claim of lien, containing a statement of their demand," etc. This was but a denial of the time of filing the notice of lien, and of the sufficiency of its contents to create a lien, and cannot be construed as a denial of the allegation in the complaint of the time when the building was completed. This allegation must therefore be accepted as an admission upon the record of the date when the building was completed, and, as the court would not have been authorized to make a finding contrary to this admission, it is unnecessary to determine whether the evidence before it was sufficient to sustain its finding. The court finds that the notice of lien was filed on the 6th day of April, 1894, and the correctness of this finding is not disputed. The judgment and order are affirmed.

123 Cal. 447

WARD v. YORBA. (L. A. 372.)

(Supreme Court of California. Feb. 2, 1899.)

CONTRACT—REFORMATION—SPECIFIC PERFORMANCE—CONSIDERATION.

1. Plaintiff, seeking to reform a contract for the purchase of property, alleged that by mistake it was drawn so as to require a conveyance of the "property," whereas the agreement was for the conveyance of an "interest." Plaintiff proposed to sell only an interest, and his proposition was communicated to defendant's attorney, and assented to by him, but was not communicated to defendant. The attorney only represented defendant in reference to a contract to be made, and not in making a contract, and defendant's only offer was to purchase the property. *Held* insufficient to authorize a reformation of the instrument.

2. Plaintiff entered into an agreement with defendant for conveyance of land, title to which had been in L. Defendant had instituted suit against L., attached the property, and obtained a judgment, under which the land was sold to him. Previous to such judgment, another judgment was obtained in a pending suit against L., under which the property was sold, and plaintiff acquired title. *Held* that, as defendant's judgment related back to the date of the attachment, his was the prior lien, and, as plaintiff failed to redeem, he lost whatever interest he acquired; hence the agreement was without consideration.

3. Under Civ. Code, § 3391, specific performance cannot be enforced against a party to a



contract, if he has not received an adequate consideration.

Garontte and McFarland, JJ., dissenting.

In bank. For opinion in department, see 54 Pac. 80.

HARRISON, J. The parties hereto entered into an agreement in writing February 24, 1893, by which the plaintiff agreed to sell to the defendant, for the sum of \$4,750, certain property in the city of Los Angeles, and the defendant agreed to buy the same, and pay said sum of money within 30 days thereafter. The circumstances leading up to this agreement are as follows, viz.: The title to the property in question was originally in Francisca D. de Labracco, and in an action by Yorba, the defendant herein, against Labracco, the property was attached March 5, 1892, and judgment was rendered in his favor April 20, 1892. Execution was issued upon this judgment July 10, 1892, and on August 20th the property was sold by the sheriff to Yorba. Prior to March, 1892, an action had been commenced against Labracco by one Bacon, in which a judgment was docketed against Labracco March 31, 1892, and under this judgment the property was sold to one Jarvis, and a sheriff's deed issued to him January 27, 1893. Jarvis immediately took possession of the property, and on January 30, 1893, conveyed the same to Ward, the plaintiff herein. By this conveyance the plaintiff became at its date vested with Labracco's title to the property, subject to whatever rights Yorba had acquired therein by the attachment and subsequent proceedings in his action against Labracco. Prior to February 24th negotiations on behalf of the plaintiff and defendant had been had for an adjustment of their claims to the property, and on the morning of that day Mr. Munday, as attorney for Yorba, and in company with him, visited the office of Mr. Meserve for the purpose of completing the negotiations and purchasing the property from Ward. Munday had previously advised Yorba that Ward's claim was superior to his own, and that his best course was to buy the property; but he saw on that morning that he was mistaken, and it was also conceded by Meserve, after an examination of the abstract, that Yorba's claim was paramount to that of Ward. As a result of the negotiations upon that morning an instrument setting forth the above agreement was prepared and signed by the plaintiff and the defendant. Before the expiration of the 30 days, Yorba was advised that he was not bound to carry out the contract, and gave to the plaintiff a notice of rescission, and afterwards declined to make the payment provided in the instrument. Thereupon the plaintiff brought the present action. In his complaint he alleges that the written instrument does not express the actual agreement which was made, and that, by a mistake of the scrivener, it is drawn so as to require a conveyance of the property, whereas the agreement itself was for a purchase and transfer of merely his

right, title, and interest therein; and he asks that the instrument be reformed accordingly, and that he have judgment against the defendant for its performance as so reformed. The court found in favor of this claim, and rendered judgment accordingly. This finding and the judgment thereon are assigned by the defendant as error.

1. The plaintiff was not entitled to have the instrument reformed as he had asked, unless he should show by satisfactory evidence that the agreement between him and the defendant was as he had alleged, and was so understood by both the defendant and himself when they signed the instrument. The court could not make a new contract for the parties, but could only cause their actual agreement to be expressed according to its terms; nor could it reform the instrument according to the terms in which Ward understood it, unless it should be shown that Yorba also had the same understanding of its terms. The terms of the written instrument which they signed would prevail over their previous negotiations, unless it should be shown that, by reason of a mutual mistake, it did not express their actual agreement. At the time the instrument in question was signed, Ward was represented by Mr. Meserve as his attorney, and was himself in an adjoining office, and Yorba was represented by Mr. Munday. Yorba could neither speak nor understand English, and the negotiations for the purchase were in fact conducted between Meserve and Munday; Meserve consulting with Ward from time to time, and Munday communicating with Yorba through an interpreter. There is evidence in the record that Ward proposed to sell only his interest in the land, and that this proposition was communicated to Munday, and was assented to by him; but it does not appear that the proposition was communicated by Munday to Yorba, or that it was agreed to by the latter. Munday was Yorba's attorney for the purpose of advising him in reference to the contract to be made, but he did not represent him for the purpose of making the contract. He had no authority from Yorba to make a contract for him, and evidence of his agreement with Ward to purchase his "interest" in the land would not bind Yorba, unless Yorba himself assented thereto. Munday had advised Yorba that he must either buy the property from Ward, or have a lawsuit on his hands, and Meserve testified that they came to his office that morning "with the proposition to buy and close out this property." While there, Yorba authorized Munday to offer \$4,500 "for the property," and, after making this offer, it was increased by Munday to \$4,750. Neither Meserve nor Ward had any direct communication with Yorba, and there is no evidence that a proposition for the purchase by Yorba of Ward's "interest" in the land, as distinguished from a purchase of the land itself, was ever communicated to him. On the other hand, Yorba and Sanchez, the interpreter, both testified that the negotiations

on the 24th, and the offer by Yorba, were for a purchase of the "property." In seeking a reformation of the instrument, it was not sufficient for the plaintiff merely to show that Munday had assented to his proposition. It was also necessary to show that this proposition was communicated to Yorba and was assented to by him; for the court can reform the instrument only for the purpose of having it express the understanding and agreement of Yorba, and not that of Munday. Under these considerations, it must be held that the evidence before the court did not authorize it to direct a reformation of the instrument.

2. Upon the facts as found by the court, Yorba's title to the land at the date of the agreement was superior to that of Ward. His purchase at the sheriff's sale related to the date of the attachment in the action in the judgment under which the sale was made, and antedated the lien of the judgment under which Ward's purchase was made. By this sale to him he acquired all the title that Labracco had at the date of that attachment, subject to redemption within six months from his purchase. The period of this redemption expired February 20th, so that on the 24th his right to the land had become absolute. For the purpose of vesting him with the evidence of his title, he had still to procure the sheriff's deed; but Ward had lost all right or interest in the land by failing to redeem from this sale within the six months, and whatever right in the land he acquired by his purchase at the sheriff's sale was extinguished. Under the agreement with the plaintiff, Yorba would therefore acquire nothing from Ward to which he was not already entitled, and his promise to pay \$4,750 was without any consideration. As, under the law, Ward would be under obligation to surrender the property upon the execution of the sheriff's deed, such surrender could form no consideration for the promise of Yorba. The court finds, however, that the consideration to the defendant for the agreement was the compromise of a claim that the attachment under which his purchase was made was invalid. There is no evidence, however, that there had been any question between the plaintiff and the defendant of the validity of the attachment under which Yorba claimed the land prior to the trial of the present action. The only dispute between them at the time of the contract was as to the priority of their respective liens, but the record fails to show that there was any question of the sufficiency of either. At the trial herein the plaintiff attempted to show that the attachment in Yorba's suit was defective, and did not create a lien, but the court found against him on this issue. There was no evidence, however, that any claim of this defect was brought in question prior to entering into the contract of February 24th. No such claim is made in the complaint herein, and the finding of the court that there was is without any evidence to support it.

3. Section 3391, Civ. Code, declares: "Specific performance cannot be enforced against a party to a contract in any of the following cases: (1) If he has not received an adequate consideration for the contract." This provision, however, is but an affirmation of the doctrine by which courts of equity were previously governed. *Bruck v. Tucker*, 42 Cal. 354. As the defendant was the owner of the land at the date of the contract, and as the interest of the plaintiff therein had been extinguished by reason of his failure to redeem from the sale to the defendant, under this section of the Civil Code, the plaintiff is not entitled to the relief he seeks. The judgment and order are reversed.

We concur: TEMPLE, J.; HENSHAW, J.

BEATTY, C. J. I concur in the judgment, and generally in the opinion of Justice HARRISON. It seems proper, however, to add, with respect to the alleged mistake in the written contract, that the evidence is, in my opinion, sufficient to sustain the view that Yorba fully understood at the date of the contract that he was not bargaining for a perfect title to the property, but only such interest as Ward had acquired by his deed from Jarvis, and that he was to take that title subject to the Davilla claim and the lien of the Bacon judgment, both of which incumbrances he was to take care of. On the other hand, it is clear that, up to the time the parties met to conclude the contract, they all believed that the Ward title was prior and superior to the Yorba title. On that occasion Mr. Munday, Yorba's legal adviser, discovered for the first time that Yorba's title, by reason of this attachment, was prior to the Ward title. This fact he communicated to Yorba's interpreter, but it seems probable that neither Yorba nor the interpreter was made to understand the change thus wrought in the situation; for, notwithstanding the discovery that Ward apparently had nothing to sell, Yorba was still willing to give him a round price for his conveyance. This willingness of Yorba to buy finds its explanation in his assertion that he did not know then, or for nearly a month afterwards, that his own title was the better. If this explanation is rejected, some other reason must be found for his agreement to pay Ward \$4,750 for the Jarvis title. The superior court finds that there was a question as to the validity of Yorba's attachment, and therefore, and because Ward was in possession, Yorba was willing to pay this large sum to buy his peace. But there is no evidence in this record that there was then any question as to the attachment, and it is now found that it was regular and valid. It is true, Ward was in possession of the land; but if he exacted an agreement to pay him \$4,750 to yield a possession which it was his duty to yield without compensation, he can hardly expect a court of equity, on that showing, to reform a mistake in the



contract in order that it may be specifically enforced. Disregarding, then, the mere fact of Ward's possession, and the power of annoyance which that gave him, it appears that Yorba was induced by some mistake to agree to give \$4,750 for a worthless title. Aside from the mistake, there was no consideration for his promise, and in such a case equity will not lend its aid to enforce performance.

I dissent: GAROUTTE, J.

McFARLAND, J. I dissent, and adhere to the conclusion reached at the first hearing. 54 Pac. 80. I think that the judgment and order appealed from should be affirmed.

123 Cal. 445

ANDERSON v. ANDERSON. (L. A. 583.)<sup>1</sup>  
(Supreme Court of California. Feb. 2, 1899.)

JUDGMENT FOR ALIMONY—ENFORCEMENT—SUPERSEDEAS BOND—AMOUNT—STAY OF EXECUTION.

1. A judgment for alimony, which provides for the appointment of a receiver of defendant's real estate, to collect the income thereof and apply it in payment of the judgment, cannot, after a receiver has been appointed, be enforced by execution against other property of the debtor.

2. Under Code Civ. Proc. §§ 941-949, providing that the giving of an undertaking in the sum of \$300, conditioned to pay all damages and costs awarded against the appellant on the appeal, shall stay all proceedings on the judgment or order appealed from, except that an appeal from a judgment or order directing the payment of money shall be stayed only by an undertaking in double the amount of such judgment or order, an appeal from a judgment for alimony, which is to be enforced by the appointment of a receiver, to collect the income of defendant's real property, is stayed by an undertaking in the sum of \$300.

3. An undertaking in the sum of \$300 stays proceedings on the judgment, even though an appeal from the order appointing a receiver had been taken, since the latter does not affect the appeal from the judgment.

4. Under Code Civ. Proc. § 941, an execution on a judgment is stayed by giving the required undertaking on appeal, it being a proceeding thereon.

In bank. Appeal from superior court, Riverside county.

Action by Henrietta Anderson against William H. Anderson for divorce. Heard on an application by defendant for a writ of superseas to stay execution on a judgment awarding plaintiff alimony. Writ granted.

Chas. R. Gray and E. R. Annable, for appellant. E. B. Stanton, for respondent.

HARRISON, J. Motion for a writ of superseas. In an action for divorce, brought by the plaintiff, the court rendered its judgment, denying the divorce, but awarded to her, for the support of herself and two children, the sum of \$1,800 per annum, payable in monthly installments of \$150 each, declaring the same to be a lien upon all the real estate of the defendant within the state of California, and directed that a receiver be appointed, to take

<sup>1</sup> Rehearing denied April 17, 1899.

the said real estate into his possession and management, and out of the net income thereof to pay to the plaintiff the amount of said alimony as it should accrue. Thereafter, on the same day, an order was made appointing a receiver of said real estate, with such instructions and authority. The defendant appealed from the judgment, and also from the order appointing a receiver, giving a bond of \$300 in each appeal, and also an undertaking in the sum of \$15,000 for the purpose of staying the execution of the order appointing the receiver. Some months afterwards the plaintiff caused a writ of execution to be issued upon the judgment, and levied upon certain moneys owing to the defendant, and the court, having refused, upon the application of the defendant, to recall the execution, the present application is made to stay the proceedings for the enforcement of the judgment pending said appeal.

The plaintiff, having caused the judgment awarding alimony to her to be collected and paid to her through a receiver appointed by the court for that purpose, is not entitled to have the judgment enforced by writ of execution against other estate of the defendant. The judgment does not direct the payment by the appellant of any money to her, but provides that the amount awarded her shall be collected by a receiver out of the rents and profits of the defendant's real estate, and paid over to her by him as the same shall accrue. The case, therefore, falls within the provisions of section 949, Code Civ. Proc., by which the giving of an undertaking in the sum of \$300 "stays proceedings in the court below upon the judgment or order appealed from." *Pennie v. Superior Court*, 89 Cal. 31, 26 Pac. 617; *McCallion v. Society*, 98 Cal. 442, 33 Pac. 329; *Painter v. Painter*, 98 Cal. 625, 33 Pac. 483; *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383. The fact that an appeal has been taken from the order appointing a receiver does not enlarge the rights of the plaintiff. That appeal, and the effect thereof, are independent of the appeal from the judgment. The attempt to collect the alimony by a writ of execution is a "proceeding upon the judgment," and pending the appeal, is stayed by giving the undertaking required by section 941, Code Civ. Proc. The application for the writ is granted.

We concur: BEATTY, C. J.; GAROUTTE, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.





123 Cal. 466

**In re BACHELDER'S ESTATE. (S. F.  
1,237.)**

(Supreme Court of California. Feb. 9, 1899.)

**ESTATES — ADMINISTRATION — WIDOW'S APPLICATION—ABATEMENT—APPEAL.**

Proceedings by a widow to have the whole of an estate set aside to her without administration, as authorized by Code Civ. Proc. § 1469, abate on her death, where there are no minor children; and hence, where she dies pending an appeal from an order denying her application, the appeal will be dismissed.

**Department 1. Appeal from superior court, Sonoma county.**

Application by Louise Bachelder for an order assigning to her the whole estate of her deceased husband, Joseph Bachelder, without administration. From an order denying her application she appealed, but died pending appeal, and a motion to dismiss same was made on that ground. Granted.

T. J. Butts and J. M. Thompson, for appellant. Thos. F. Bachelder, for respondent.

**PER CURIAM.** Upon the return of the inventory in the estate of the above-named decedent, and it appearing therefrom that the entire value of the estate was less than \$1,500, Louise Bachelder, claiming to be the widow of the deceased, made application to the superior court for an order assigning to her, for her use and benefit, the whole of the said estate, averring in her petition that there were no minor heirs of said estate. Upon the hearing the court denied her application, and she appealed therefrom to this court. Subsequent to the appeal she died, and the respondent has moved for a dismissal of the appeal upon that ground.

The provisions of section 1469, Code Civ. Proc., authorize the superior court to set aside the whole of an estate without administration for the use and support of the widow and minor children, but, if there is no widow or minor child, the power does not exist, and the estate is subject to administration. As there is no minor child in the present case, the widow was the only person for whose use and support the estate could be set apart, and by her death the court lost jurisdiction to make such an order. Her death pending the appeal from an order refusing to grant her application had the same effect upon the power of the court as if she had died before the application had been heard. This right of the widow does not survive to any one, and the proceedings therefore abated by her death. See *Kirschner v. Dietrich*, 110 Cal. 502, 42 Pac. 1064. The appeal is dismissed.

6 Cal. Unrep. 227

**PEOPLE v. DENOMME. (Cr. 425.)**

(Supreme Court of California. Jan. 30, 1899.)

**MANSLAUGHTER—EVIDENCE—INSTRUCTIONS—USE IN ARGUMENT—DISCRETION OF COURT.**

1. Deceased, who was drunk, approached accused, a stranger, in a saloon, making an insulting remark, which the latter took to be addressed to himself, and, after pushing deceased away, on his second approach struck him with his fist, once in the face, and several times over the heart. Deceased was unarmed, but accused testified he had his right hand closed, and accused struck him to protect himself, though there was no showing that deceased's manner was menacing, nor that accused's violence was justifiable. Deceased died in two hours of heart rupture, which the evidence showed the blows were sufficient to cause. *Held*, that the killing was manslaughter, under Pen. Code, § 192, making killing as the result of an unlawful act, committed without due caution and circumspection, such offense.

2. The use of the instructions in the argument to the jury is within the discretion of the court.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county.

Jeremiah Denomme was convicted of manslaughter, and he appeals. Affirmed.

W. D. Crichton, for appellant. Atty. Gen. Fitzgerald, for the People.

CHIPMAN, C. Defendant, Jeremiah Denomme, was charged by information with the

crime of murder, alleged to have been committed upon one C. B. Molbeck, at the county of Fresno. Upon his plea of not guilty a trial was had and a verdict of guilty of manslaughter returned, upon which he was adjudged to punishment for five years in the state prison. This appeal is from the judgment, and from an order denying defendant's motion for a new trial.

1. Appellant claims that the evidence does not justify the verdict. The homicide occurred in a saloon. Deceased was quite drunk, although able to walk. Shortly before the assault he had been drinking at the bar with two other men, when some trouble arose, and the bartender knocked one of the party down. Defendant was not one of those three, but was in the saloon at the time. Just after this occurred, deceased started to go towards the rear of the saloon, and on his way passed near defendant, who was standing near a safe, talking with another person. A witness, who was sitting at a card table at the time, facing the bar and the parties, saw deceased as he approached defendant, and testified to what deceased said, as follows: "It is a—" I couldn't tell whether he said, 'You are a son of a bitch,' or whether he said, 'It is a son of a bitch of a shame for to hit a man like that.' Something like that. I know the 'shame' was brought in. I don't know whether he called this man [defendant] a son of a bitch, or whether he said it to himself. That was the first time he went over there. This defendant reached up his hand, and he pushed him to one side. He says: 'Go on. I don't want to have no trouble.' Molbeck [deceased] got a couple of steps back, and he walked up towards the man again; and, with this, defendant grabbed him by the neck and hit him. Molbeck was good and drunk. Then defendant came up and hit him like this hard [illustrating over the heart], and Molbeck started back; put his hands up this way over his face. Then the defendant kept hitting him, hitting him like that [illustrating over the heart], I should say about four or five times." Other persons witnessed the assault at different stages. Deceased had no weapon in either hand, and did not strike defendant at any time. One witness asked defendant why he struck deceased, who replied that he stepped on his toes and called him a son of a bitch. Defendant testified that deceased came up to him, and asked the way to the water-closet, and, being told, deceased replied, "You bastard son of a bitch! I know where the water-closet is as well as you do," whereupon defendant pushed him away. He testified: "He came back—he had this hand shut and this open—towards me, and when I see he was near to me I strike him. I strike him in the face. \* \* \* I struck him twice on the body. \* \* \* I was afraid he might hurt me bad or get something." At another place he testified: "I didn't see anything in his hands. He had his left hand open." He also testified that he



struck the deceased to protect himself. He was asked if he noticed the condition of deceased, and answered: "Well, I thought the man might have a little liquor in him, but not right drunk, seemed to me. I didn't pay much attention to the man, never having seen him before." Defendant did not testify that the manner of deceased was menacing or threatening, nor did it appear from any of the evidence that defendant was in the slightest degree justified by any conduct of deceased in making so violent an assault under the reasonable belief that his own life or limb was in danger. The reason for the assault given by defendant furnished no justification. The deceased was placed in a chair shortly after the assault, and died in about two hours at the saloon. The autopsy disclosed rupture of the heart, from which death ensued, and the evidence was that blows such as deceased received at the hands of defendant were sufficient to have caused death from rupture of the heart. There was no evidence of defendant having any ill will towards the deceased, or even any previous acquaintance with him, and defendant no doubt spoke the truth when he testified that he had no intention of killing deceased when he struck him, and the circumstances rebut the imputation of malice towards the defendant. But the killing was the result of an unlawful act committed without due caution and circumspection, and, although involuntary, it was manslaughter. Pen. Code, § 192.

2. Appellant assigns error in not allowing defendant's attorney, Mr. Crichton, to argue the law to the jury. The facts are brought to our attention by affidavits and counter affidavits. It appears that the court, on its own motion, interrupted counsel, when about to read an instruction which counsel supposed had been previously settled by the court. It does not seem necessary to state fully the facts set forth in these affidavits. There is nothing in them to distinguish the case from other cases which have arisen and have been decided by this court. In some of the superior courts of the state the practice is to settle the instructions, as far as possible, before argument to the jury, and to allow counsel unrestricted use of these instructions in arguing the case. This practice is by no means universal, however, and is not at all obligatory. It is discretionary with the court whether counsel shall be permitted to use the instructions before the jury. *Boreham v. Byrne*, 83 Cal. 23, 23 Pac. 212. In *People v. Carty*, 77 Cal. 213, 19 Pac. 490, it was held that the court properly refused to permit counsel to argue the law to the jury in his opening address. The orderly procedure in criminal trials is laid down in title 7, Pen. Code. It is the duty of the district attorney and the counsel for the accused to place the evidence before the jury, and at its conclusion they may or may not, as they wish, "argue the case to the court and jury." "The judge may then charge the jury, and must do so on

any points pertinent to the issue if requested by either party; and he may state the testimony and declare the law." Id. § 1093. Except on a trial for libel, "questions of law are to be decided by the court, questions of fact by the jury; and although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down by the court." Id. § 1126. "In charging the jury the court must state to them all matters of law necessary for their information." Id. § 1127. There can be no doubt that the theory of the procedure is that the law which is to govern the jury must come from the court alone. And while it has been held here to be objectionable, either in civil or criminal actions, to read law to the jury (*People v. Anderson*, 44 Cal. 65), it has been also held not to be reversible error to permit it to be done, as the matter is wholly within the discretion of the court (*People v. Treadwell*, 69 Cal. 226, 10 Pac. 502). In *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655, it was held not error to refuse to allow defendant's counsel to read law books, or make an argument on the law of the case, or to state what he claimed to be the law, to the jury. In *People v. Wheeler*, 60 Cal. 581, it was held error to allow the district attorney to read from "*Browne's Medical Jurisprudence of Insanity*," against the objection of defendant. It will thus be seen that the contention of defendant cannot be sustained. In the argument to the jury there are certain universally accepted principles of law which naturally and almost necessarily find their way into an argument upon the facts, and the fairness and intelligent discrimination of the court may be relied upon to hold counsel under just and proper restraint in the illustration of facts by calling attention to pertinent principles of law. But, as we have seen, the decisions leave with the court the discretion to limit counsel to a discussion of the facts; and we think this discretion may be exercised by the court upon its own motion, as was done in the present case. The rights of defendant are fully conserved by the provisions of the statute (Pen. Code, §§ 1093, 1127). The judgment and order should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(123 Cal. 467)

FAULKNER v. HENDY. (S. F. 767.)<sup>1</sup>

(Supreme Court of California. Feb. 9, 1899.)

ESTATES—CLAIMS—PRESENTATION—DEATH OF PARTY—SECOND APPEAL—LAW OF THE CASE.

1. On the death of defendant, one other than plaintiff filed a claim against the estate, the body of the claim showing it had been assigned to the claimant, but the affidavit thereto being made by plaintiff "for the reason that he was

better informed as to the facts concerning the claim than claimant." The affidavit on the reverse side of the claim showed the sum claimed was justly due to claimant, and the claim was stated to be an interest in the property held by the decedent at his death. The action was based on a money judgment founded on an alleged indebtedness of deceased. The claim stated that it was being litigated in an action between the parties. *Held*, that it was not a proper presentation of a claim against defendant's estate by plaintiff, within Code Civ. Proc. § 1502, requiring plaintiff to present his claim to defendant's estate in like manner and authenticated as in other cases, where defendant dies pending suit, in order to recover on the claim in the action.

2. On a former appeal the court said, "That the claim of plaintiff was one which would require presentation [to defendant's estate], plaintiff does not deny." *Held*, that the decision that the claim required presentation was the law of the case on the subsequent appeal.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by J. W. Faulkner (E. T. Steen substituted) against Joshua Hendy (executors substituted). There was a judgment for defendants, and plaintiff appeals. Affirmed.

Wm. H. Jordan, for appellant. Boyd & Fifield, W. H. H. Hart, and Nowlin & Fassett, for respondents.

McFARLAND, J. This is an appeal by E. T. Steen, substituted as plaintiff in place of J. W. Faulkner, from a judgment in favor of the executors of Joshua A. Hendy, deceased, who were substituted as defendants in place of said deceased. This case has been in litigation for many years, and has been several times on appeal to this court. In *Falkner v. Hendy*, 80 Cal. 636, 22 Pac. 401; *Faulkner (Steen substituted) v. Hendy*, 103 Cal. 15, 36 Pac. 1021, and *Falkner (Steen substituted) v. Hendy*, 107 Cal. 49, 40 Pac. 21, 386, the history of the litigation and the facts of the case are very fully set forth, and they need not be restated here. In appellant's brief in the case at bar much complaint is made that justice has not been done the appellant; but it is to be observed that under the decisions of this court in the two cases above referred to in 80 Cal., 22 Pac., and 103 Cal., 36 Pac., appellant could have had judgment for the principal sum, which was found to be something over \$10,000, and which appellant actually received, and compound interest thereon, which would have amounted to nearly three times as much as the principal sum found due. He refused to accept that amount, however, but contended that in lieu of compound interest he should recover for alleged profits, the amount of which could never be ascertained.

The question involved in the case at bar which is determinative of the case is whether or not there was a presentation of plaintiff's claim to the executors of Hendy, deceased, as required by section 1502 of the Code of Civil Procedure, which is as follows: "If an action is pending against the decedent at the time of his death, the plaintiff must in

like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required." The original defendant, Joshua Hendy, having died, and his executors having been appointed, they made objection to any further proceedings, because there had been no presentation of the claim. It is contended by appellant that there was such a presentation, and the question is whether or not a certain document introduced in evidence constituted such a presentation of the claim as is required by law. The judgment of the court below went upon the theory that this document was not a presentation, and there is no warrant for saying here that the ruling of the court in this respect was erroneous. Many objections are made by respondents to the sufficiency of the document introduced as a presentation of a claim within the meaning of the Code, but it is not necessary to notice all of these objections. In the first place, it is clearly not the claim of the appellant, but the claim of one John Rathgeb, Sr., and he is the claimant. The opening words of the document are these: "John Rathgeb, Sr., creditor of Joshua Hendy, deceased, presents his claim against the estate of said deceased, with the necessary vouchers, for approval, as follows, to wit: 'Estate of Joshua Hendy, deceased, to John Rathgeb, Sr., Dr.'" The body of the claim also shows that it had been assigned to Rathgeb. The character of the claim as one made by Rathgeb is not changed by the fact that the affidavit to it was made by Steen, who says in the affidavit that it is made by him "for the reason that he is better informed as to the facts concerning the claim than the said John Rathgeb, Sr." The affidavit indorsed upon the reverse side of the claim also states that "the sum of four hundred and sixty-five thousand (\$465,000) dollars (estimated) is justly due to the said claimant, John Rathgeb, Sr." Moreover, the claim itself attempted to be presented is stated to be "an interest in the property and estate held by the said Joshua Hendy, at the time of his death, in his own name and in the name of the Joshua Hendy Machine Works, a corporation of the state of California, of the estimated value of four hundred and sixty-five thousand (\$465,000) dollars"; while the real claim of the appellant, as it appears throughout the litigation, is not "an interest in the property" held by Hendy at the time of his death, but a claim for a money judgment against Hendy founded upon an alleged indebtedness of Hendy to the appellant; and the character of the claim as thus presented is not changed by the statement that the claim is "being litigated in an action" between the parties. For these reasons we are of opinion that the court below did not err in holding that there has been no presentation of the claim to the ex-



ecutors of Hendy. See *McGrath v. Carroll*, 110 Cal. 79, 42 Pac. 466. Appellant makes contention at this late day that, owing to the nature of the claim, no presentation thereof to the executors was necessary; but that contention cannot, upon principle, be maintained, and, moreover, it was determined otherwise, as the law of the case, in *Falkner v. Hendy*, 107 Cal. 49, 40 Pac. 21, 386, where the court say: "That the claim of plaintiff was one which would require presentation, respondent [now appellant] does not deny. The matter was fully considered by this court in *Lathrop v. Bampton*, 31 Cal. 17, and in *Rowland v. Madden*, 72 Cal. 17, 12 Pac. 226, 870." The judgment and order denying a new trial are affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

(123 Cal. 470)

BLAKE v. NATIONAL LIFE INS. CO.  
(S. F. 868.)<sup>1</sup>

(Supreme Court of California. Feb. 10, 1899.)

NEW TRIAL—SPECIFICATIONS—LIFE INSURANCE—  
CONSTRUCTION OF POLICY—FORFEITURE FOR  
NONPAYMENT OF PREMIUMS—WAIVER.

1. In an action on an insurance policy, where in the defense was forfeiture, and plaintiff alleged a waiver, there was a general verdict for plaintiff. *Held*, that the verdict did not involve two propositions, viz. authority of the agent to waive the condition, and the fact of waiver, but the facts as to the agent were merely probative; hence the specification in the motion for new trial as to the insufficiency of the evidence was sufficient, without pointing out such propositions as the particulars in which the evidence was insufficient.

2. Life policies were, in terms, to be forfeited by failure to pay premiums on the very day they should fall due. Pursuant to directions, the agents, in their monthly reports, marked as canceled those delinquents whose premiums they deemed uncollectible, while the other delinquents were marked simply as in arrears. If these latter paid their premiums before the next monthly report, and produced a health certificate, they were reinstated. *Held*, that there was no waiver of the forfeiture, where a delinquent who was transferred to the arrearage sheet died before the next monthly report, without having produced a health certificate and paid the premium.

3. Where life policy provides that failure to pay a premium when due shall work a forfeiture, but that, after three annual premiums shall be paid, the company guaranties: First, without any action by insured, a paid-up policy for a certain sum; second, on surrender of the policy within a certain time, a cash value of a certain sum; and, third, on application within a certain time, to extend the insurance for the full amount of the policy for a certain period,—the policy of a delinquent does not remain in force for the full amount until he exercises an option as to the three provisions, or until the time for exercising it expires.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Martha Foster Blake against the National Life Insurance Company. There was a judgment for plaintiff, and from an order denying a new trial defendant appeals. Reversed.

Metcalf & Metcalf, for appellant. Rodgers & Paterson, for respondent.

TEMPLE, J. The defendant appeals from an order refusing a new trial. The action was upon a policy of life insurance issued by defendant December 26, 1889. The defense was that the policy had been forfeited for the nonpayment of premium which fell due December 26, 1893. It was stipulated in the policy that failure to pay any premium, or any part thereof, or any note given therefor when due, should cancel the insurance and contract, and that agents were not authorized to receive premiums after the day when they were payable, and could not give credit or waive forfeiture. The complaint contains two counts or causes of action. In the first full performance of all conditions on the part of the insured is alleged. In the second it is admitted that there was a failure to pay the annual premium which became due December 26, 1893, and it is averred that the condition was waived, and credit was given to the insured.

A preliminary objection is made on the part of respondent that in defendant's motion for a new trial there is "no sufficient specification of the particulars in which the evidence is alleged to be insufficient." The trial was by jury, which rendered a general verdict for plaintiff. It is said the jury must have found that defendant waived the payment and extended the time. This, it is contended, involved two propositions,—authority on the part of the agent to waive the conditions, and the fact of waiver. But the verdict involved no finding in regard to the agent, but simply that the condition was waived by the corporation. The facts in regard to the agent are merely probative, showing through what means the defendant made the alleged waiver. The specifications are sufficient.

There was no conflicting evidence in the case, the only witnesses being the agent and employes of the defendant. They testified very emphatically that the annual premium due on the 26th day of December, 1890, was not paid, and payment was not waived. Respondent contends, however, that credit had been given to the insured, and the contention is based mainly upon these facts: Dr. Blake was medical examiner for defendant. His fee was \$5 for each certificate, and was paid by the corporation. He was not paid in cash in each case, but received credit on the books kept by the agent at San Francisco. He had taken out two insurance policies, on each of which the annual premium was \$365. It seems that he never did, during the existence of his insurance, pay at one time the amount of his annual premiums. The agent had been in the habit of taking his notes for some portion, and crediting him with cash payments. The notes were paid partly in cash and partly by the amounts due Dr. Blake from the corporation. On two occasions the

<sup>1</sup> Rehearing denied March 11, 1899.

corporation itself had taken his notes for a portion of the premiums due. On the day before the premium fell due, Dr. Blake called upon the agent, and proposed to give the "premium note," as he called it. The agent told him positively that the company would not take his note, and he (the agent) could not carry him. On the 29th of the month, which was the last day before the report of delinquents was sent to the home office, the doctor said he could not pay, but would have to let the report go, and he would fix it up as soon as possible. On the very day of his death, which occurred on the 17th of the succeeding month, Dr. Blake again called upon the agent, and endeavored to arrange the matter, and was again told that no credit would be given. Although the policy was in terms forfeited by failure to pay the annual premium on the very day on which it fell due, the practice of the company was, if the insured paid up within a reasonable time, and produced a new health certificate, to reinstate the insurance; and it seems that the agent was directed in his report to mark some as canceled, and others as simply being in arrears. In explanation of this, the agent said: "Dr. Blake was transferred and reported by us to the company on the arrearage sheet. Others were put on the cancellation sheet, and so reported to the company. We transfer premiums to the arrearage sheet when they are not paid, and we make our report, and we think we can collect them by holding them to our next report, the parties giving a health certificate. If an account is transferred to that sheet, before a person can be reinstated and the premium be accepted, he will have to give a health certificate." The company was in the habit of sending to the agents "renewals" in case the premiums were paid before the next monthly report. The insured died without having paid the premium, and without having furnished a new health certificate. There was clearly no agreement to extend the credit of Dr. Blake. The report was a private communication between the agent and his principal. If it could be considered an agreement with Dr. Blake, it could only be a contract to renew if he complied with the conditions. This he did not do.

The policy contained a stipulation that, although failure to pay an annual premium when due would cancel a policy, still, "after three full annual payments have been paid, the company guaranties—First, without any action on the part of the insured, a paid-up policy for one thousand and eighty dollars; second, upon surrender of his policy within two months, a cash value of five hundred and thirty dollars and twenty cents; third, upon application within two months, to give extended insurance for the full amount of this policy for three years, two hundred and fifty-eight days." Necessarily, these were alternative propositions. Dr. Blake took neither, as, no doubt, his fixed intention was to have his policy renewed. It might be plausibly argued

that, upon his failure to pay, the policy was at once transferred into a paid-up policy for \$1,080; but I see no plausibility whatever in the contention that, until Dr. Blake exercised his option, the policy remained in force for the full amount. The order appealed from is reversed, and the cause remanded for a new trial.

We concur: HENSHAW, J.; McFARLAND, J.

123 Cal. 434

### PEOPLE v. SCOTT. (Cr. 478.)

(Supreme Court of California. Jan. 31, 1899.)

HOMICIDE — COMPETENCY OF JURORS — INSTRUCTIONS—SELF-DEFENSE—REASONABLE DOUBT.

1. The ruling of the trial court on a challenge to a juror for bias cannot be disturbed unless the testimony adduced on the *voire dire* is so clear that the court can say, as a matter of law, that the juror is disqualified.

2. An instruction under which the jury cannot acquit on a plea of self-defense, unless they believe from the evidence certain facts, is erroneous, since it eliminates the right to acquit if they have a reasonable doubt as to whether or not defendant acted in self-defense.

3. An instruction that if the jury believe that deceased was the aggressor, but he had in good faith endeavored to decline any further trouble before defendant shot him, there was no self-defense, is erroneous, since the aggressor must not only decline further strife, but must make known such declination to his adversary.

Department 2. Appeal from superior court, Kern county.

L. A. Scott was convicted of manslaughter, and he appeals. Reversed.

J. W. Ahern, Laird & Packard, and W. A. Harris, for appellant. Atty. Gen. Fitzgerald, for the People.

HENSHAW, J. The defendant, informed against for the crime of murder, was convicted of manslaughter, and appeals from the judgment and from the order denying him a new trial.

Objection is first made to the court's disallowance of challenges for actual bias interposed by defendant to two of the jurors. While this court may review an order denying a challenge to a juror upon this ground, it may only do so when the question presented is one of law, over which questions alone this court in criminal cases has appellate jurisdiction, under the constitution. A reading of the testimony taken upon *voire dire* discloses, as is usual, conflicting and contradictory statements by the jurors. They had formed opinions touching the guilt or innocence of the defendant. They would carry those opinions with them into the jury box. It would take evidence to remove them. Nevertheless, they could and would give to the defendant a fair and impartial trial. They could and would be governed by the law as delivered by the court, and by the evidence as received in court. It is the state of facts commonly presented where, upon the ques-



tion of bias, the evidence would have justified a finding either way. Under such circumstances, we are powerless to disturb the ruling of the trial court. *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944. We recognize that, with the increased facilities for the dissemination of news, it is far more difficult than formerly it was to obtain a jury of men ignorant of the circumstances of the charge which they are called upon to try. But, because of the attendant difficulty, the judge should be the more careful to see that the jurors are in fact unprejudiced and unbiased; for it is as much a defendant's right now to be tried by such a jury as it was when Lord Coke delivered his famous aphorism that a juror "should stand indifferent as he stands unsworn." But, unless the testimony adduced upon *voire dire* is so clear upon the question of actual bias that this court can say, as matter of law, that the juror is disqualified for that reason, we cannot disturb the ruling of the trial court.

Certain objections are urged to the court's rulings in admitting and rejecting evidence. We have examined them, and are convinced, after such examination, that the rulings were not erroneous, nor to the prejudice of the defendant.

But upon the instructions given the court fell into errors which necessitate a reversal of the judgment. The jury was instructed: "Before you can acquit the defendant upon the ground of self-defense, you must believe from the evidence that at the time of the firing of the fatal shot (if you find that the fatal shot was fired by defendant) that the defendant honestly believed that his life was in danger and that he was about to receive great bodily injury from the deceased." By this the jury was instructed that the defendant could not be acquitted upon his plea of self-defense unless the jury believed from the evidence certain facts. But this eliminates, to defendant's great disadvantage, his right to an acquittal if the evidence, even though the jurors did not believe it, yet created within their minds a reasonable doubt as to whether or not he had acted in self-defense. Even without the belief, if that doubt existed, the defendant was entitled to an acquittal.

Again, the court instructed the jury as follows: "If you believe from the evidence beyond a reasonable doubt that the defendant and Charles Richards engaged in an altercation at or near Scott's tent, and that in said altercation the defendant was the aggressor, or even if you believe from said evidence that the deceased, Richards, was the aggressor, and if you further believe from said evidence beyond a reasonable doubt that said Richards had honestly and in good faith endeavored to decline any further trouble before the fatal shot was fired, then I instruct you that the evidence shows no self-defense." This instruction, too, was erroneous and prejudicial to the defendant, in that it failed to recognize the proposition that the first aggressor must

not only decline further strife, but must make known his declination to his adversary. See *People v. Button*, 106 Cal. 628, 39 Pac. 1073; *People v. Hecker*, 109 Cal. 451, 42 Pac. 307.

We note no other alleged errors that call for a special consideration, but, for the reasons given, the judgment and order are reversed, and the cause remanded.

We concur: McFARLAND, J.; TEMPLE, J.

123 Cal. 428

PACIFIC PINE LUMBER CO. v. WESTERN UNION TEL. CO. (S. F. 902.)

(Supreme Court of California. Dec. 31, 1898.)

TELEGRAPH MESSAGE—ACTION FOR DELAY—COMPLAINT—SUFFICIENCY—DAMAGES.

1. A complaint alleged that, owing to defendant's delay in delivering a telegraph message from a customer accepting plaintiff's offer of a vessel to carry a cargo of lumber, his customer suffered a loss, payment of which he demanded from plaintiff, and for which he also threatened to sue. *Held* insufficient, since it did not show that plaintiff was injured.

2. Civ. Code, § 3283, providing that "damages may be awarded in judicial proceedings for detriment resulting after the commencement thereof, or certain to result in the future," has no application to the facts alleged, since no detriment certain to result in the future could be inferred therefrom, and the other detriment referred to in said section relates to cases, such as for personal injuries, where expenses may be incurred after action brought for medical attendance, nursing, and the like.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by the Pacific Pine Lumber Company against the Western Union Telegraph Company. From a judgment for defendant, entered on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Wm. H. Jordan, for appellant. R. B. Carpenter, for respondent.

CHIPMAN, C. Action for damages to plaintiff, alleged to have resulted from defendant's negligence in failing to deliver a message with due promptitude. The complaint was twice amended. The court sustained the demurrer to the last amended complaint, without leave to further amend, and gave judgment for defendant, from which plaintiff appeals.

The complaint shows: That defendant is engaged in the business of transmitting and delivering messages and cablegrams for hire, and has an office in San Francisco, near the plaintiff's place of business, which was and is well known to defendant by reason of plaintiff's registering with defendant its address; and that defendant agreed to deliver to plaintiff promptly all messages coming over defendant's wires directed to plaintiff. On August 18, 1894, plaintiff telegraphed one Snethlage, a customer of plaintiff at Shanghai, China, offering him a vessel to convey a

cargo of lumber from Puget Sound to Shanghai upon certain terms. On August 19, 1894, Snethlage replied by defendant's wires, accepting plaintiff's offer. By reason of the gross and inexcusable neglect of defendant, Snethlage's message was not delivered to plaintiff until September 13, 1894. On the receipt of plaintiff's message by him, Snethlage sold the cargo of lumber at a price netting him \$1,071; but that plaintiff, through defendant's said negligence, was ignorant of Snethlage's acceptance, and did not dispatch the vessel laden with said lumber, by reason of which Snethlage lost his sale, and the party to whom he had sold was obliged to purchase in the open market, thus causing a loss to Snethlage of \$1,071, which he demands from plaintiff, and that the payment of which he threatens plaintiff with suit. "That, owing to the facts set forth, plaintiff has no defense against such demand and threatened suit, and will be compelled to pay the same. That plaintiff has requested defendant to assume and discharge said liability to Snethlage, but defendant has refused so to do." The ground of demurrer relied upon by defendant goes to the sufficiency of the complaint.

Plaintiff claims that the action is founded upon tort, but it makes no claim for direct injury to it through defendant's alleged negligence. Its sole claim is that because Snethlage was damaged, and might by suit recover from plaintiff, therefore defendant is liable to plaintiff. It seems to me to be immaterial what plaintiff may call its damages,—whether founded upon tort or a contract; it must recover, if at all, because of plaintiff's contract liability to Snethlage, for it claims no other damage. The statute imposed a duty upon defendant to promptly deliver Snethlage's message to plaintiff (Civ. Code, §§ 2161, 2162); and the failure on defendant's part was an injury to Snethlage and to plaintiff. But no injury is alleged to have accrued to the latter, except that, as Snethlage was injured, he has a possible action against plaintiff, which he may in the future seek to enforce. Defendant's direct liability to plaintiff need not therefore be considered.

Appellant cites section 3360 of the Civil Code to show that, "when a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages," and hence argues that it was wrong to deny a trial even if plaintiff had not paid Snethlage,—citing, also, *Mentzer v. Telegraph Co.* (Iowa) 62 N. W. 1; *Parks v. Telegraph Co.*, 13 Cal. 422; *Treadway v. James*, 57 Cal. 137. Appellant's contention would have force if the alleged cause of action was for defendant's breach of duty to plaintiff, and damages were claimed as resulting from that breach. But, as we understand the complaint, nothing whatever is claimed except for plaintiff's breach of duty to Snethlage. Why, then, should plaintiff be permitted to go to trial to show damages where none are

claimed? It seems to me that plaintiff should be held to the manifest purpose and object of his suit, which is to recover for a liability incurred by plaintiff to Snethlage. Conceding, but not deciding, that under the provisions of Civ. Code, §§ 1565, 1582, 1583, when Snethlage sent his message of acceptance of plaintiff's proposal, the minds of the contracting parties from that moment must be deemed to have met, and the contract then become obligatory upon plaintiff, although the acceptance was not known to plaintiff, the complaint shows that plaintiff has not discharged its liability to Snethlage, nor has the latter taken any steps to enforce it, further than to make demand. He may never do so. Under such circumstances, we do not think that the complaint states a cause of action against defendant. The rule, generally stated, is that there must be actual loss before there can be actual compensation; and it cannot be said in the case we have here that actual liability is equivalent to actual loss. Snethlage has a right of action against defendant for his damage. He also has a right of action against plaintiff. But he cannot recover against both, for that would give him double the damage he has suffered. For the same reason that Snethlage cannot recover twice for his injury, the defendant cannot be subjected to payment twice for it.

Appellant contends that, as plaintiff's liability to Snethlage is the direct result of defendant's tort, it is wholly immaterial whether or not plaintiff has discharged this liability to Snethlage, because there is reasonable certainty of its having to pay. Section 3283 of the Civil Code is relied upon, which provides as follows: "Damages may be awarded in judicial proceedings for detriment resulting after the commencement thereof, or certain to result in the future." This section has no application. It cannot be said that a suit by Snethlage against plaintiff "is certain to result in the future"; and the other part of the section refers to a class of cases, such as for personal injuries, where expenses may be incurred by the plaintiff after action brought for medical attendance, nursing, and the like. Such was the case of *Wilson v. Southern Pac. Co.* (Utah) 44 Pac. 1040; *Donnelly v. Hufschmidt*, 79 Cal. 74, 21 Pac. 546; *Hicks v. Herring*, 17 Cal. 566; and other like cases cited by appellant. The rule, as stated by Mr. Greenleaf, is that the proof of damages in such cases may extend to all matters up to that period which are the natural result of the previous injury. 2 Greenl. Ev. § 268. The "detriment" complained of here was not "for detriment resulting after the commencement" of the action. *De Costa v. Mining Co.*, 17 Cal. 613, was an action to abate a nuisance and for damages, caused by digging a ditch on plaintiff's land. The trial court awarded as damages a sum sufficient to pay the expenses of filling up the ditch, and restoring the land to its original condition. It was held here that the basis was incorrect; that the



plaintiff could recover only for the injury sustained; and it was improper to award compensation for an expense which might never be incurred. In actions upon injunction bonds, it has been frequently held in this court that damages cannot be recovered for the fees of an attorney employed to resist the injunction, although the plaintiff is liable to his attorney, without showing actual payment to him. *Wilson v. McEvoy*, 25 Cal. 170, citing *Sedg. Dam.* p. 307, where, in speaking of liability on a bond, it was said: "The rule should be considered cardinal and absolute that actual compensation should be given for actual loss." Even where a bond expressly indemnified against "any liability incurred," and judgments had been obtained for breach of the bond, a complaint was held bad, on demurrer, because it did not allege that the judgment had been paid. *Gilbert v. Wiman*, 1 N. Y. 550. We perceive no reason why a different rule should be applied in the case before us; for, after all, plaintiff's alleged damage is none other than plaintiff's liability to pay Snethlage for breach of contract; and, until plaintiff has discharged this liability, how can it be said that defendant owes plaintiff anything, or that plaintiff has suffered loss?

Respondent claims that the case resolves itself into the question whether a plaintiff can recover against a defendant for injury done by the latter to a third person, although the injury causes a loss to the plaintiff by reason of his contract relations with or for such third person. Cases are cited in support of a negative answer to the question. One of these was where plaintiff, a life insurance company, sued a railroad company for wrongfully causing the death of a person insured by plaintiff. It was held that "in the absence of any privity of contract between plaintiff and defendant, and of any direct obligation of the latter to the former growing out of the contract or relation between the insured and defendant, the loss of plaintiff, although due to the acts of the railroad company, being brought home to the insured only through the artificial relation of contractors with the party immediately subject to the wrong done by the railroad company, was a remote and indirect consequence of the misconduct of the defendants, and not actionable." *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265.

Appellant claims that in the case here the statute made it the duty of, and the complaint alleges an agreement by, defendant to deliver to plaintiff any messages which might be received by it in its office at San Francisco, failing in which was the direct cause of plaintiff's liability to Snethlage, and therefore the case is taken out of the rule in cases cited by respondent. The question, however, need not be considered, for the reason that in no event is defendant liable to plaintiff until plaintiff shows that he has been injured, which we think it has not done by merely al-

leging a liability to Snethlage. The judgment should be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

123 Cal. 453

PATTERSON v. POLICE COURT OF CITY  
AND COUNTY OF SAN FRANCISCO  
CO et al. (Cr. 387.)

(Supreme Court of California. Feb. 3, 1899.)

JUDGE—DISQUALIFICATION—BAR TO PROSECUTION.

1. The causes enumerated by Code Civ. Proc. § 170, as amended in 1897, are the only ones disqualifying a judge; and hence the formation or expression of an opinion as to the merits of a matter he is to determine will not disqualify him, it not being included therein.

2. Pen. Code, § 999, provides that an order to set aside an indictment or information is no bar to a future prosecution for the same offense. Section 1387 provides that an order for the dismissal of an action before or after an indictment is a bar to any other prosecution for the same offense, if a misdemeanor, but not if a felony. *Held*, that several successive dismissals of informations against one charged with a felony, and a grand jury's neglect to consider the charge after investigation, are not a bar to a further prosecution for the same offense.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Petition by R. H. Patterson for a writ of prohibition against the police court of the city and county of San Francisco and Charles F. Conlan, judge thereof. From an order sustaining a demurrer to the petition, the petitioner appeals. Affirmed.

Wm. Hoff Cook, for appellant. Clarence Gray, for respondents.

GRAY, C. This is an appeal from an order sustaining a demurrer to a petition for a writ of prohibition. Appellant sets out in his petition that after three successive criminal proceedings had been instituted in the police court of the city and county of San Francisco, in each of which appellant was charged with the crime of assault with a deadly weapon upon one Barney Ward, and after one of these proceedings had been dismissed by the judge of the police court, and the two others had each successively culminated in an order of the superior court granting appellant's motion to dismiss the information in the same, and after the grand jury had investigated and ignored a charge against appellant of this same offense, a fourth complaint has been filed against him on this same charge in the said police court, and that, unless restrained from so doing, Judge Conlan will proceed with a preliminary examination of such complaint. The petition also states that the respondent declared in open court that his mind was so fully made up in relation to the charge set

forth in the complaint that he felt disqualified to act upon said charge.

It is contended by appellant that respondent is disqualified for the reason that he has a fixed opinion as to the merits of the case, and intends to hold him to answer. The fact that a judge of the police court has formed and expressed an opinion as to the merits of the matter that he is to determine does not disqualify him to hear and determine such matter. A judge is disqualified to act as such in an action or proceeding only (1) when he is a party to or interested in the action or proceeding pending; (2) when he is related to either party or to his attorney, or agent within the third degree; (3) when he has been an attorney in the action or proceeding; or (4) when it appears from affidavits that either party cannot have a fair trial before any judge of a court of record by reason of the bias and prejudice of such judge. "These are the only causes which work a disqualification of a judicial officer." *McCauley v. Weller*, 12 Cal. 524; *In re Jones*, 103 Cal. 397, 37 Pac. 385; Code Civ. Proc. § 170, as amended in 1897. Appellant's petition fails to disclose any of the foregoing causes of disqualification.

The dismissals of the various charges against appellant constituted no bar to a further prosecution against him. Pen. Code, §§ 999, 1387; *Ex parte Clarke*, 54 Cal. 415. The police judge therefore had jurisdiction of the last proceeding before him. The office of the writ of prohibition is to restrain a judicial officer or other person from doing that which he has no jurisdiction to do; and, it appearing that Judge Conlan had the power, as judge of the police court, to hear and determine the matter before him, the demurrer to the petition was properly sustained by the superior court. We therefore advise that the order appealed from be affirmed.

We concur: PRINGLE, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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(6 Cal. Unrep. 232)

PEOPLE v. CAPPOLA. (Cr. 497.)<sup>1</sup>

(Supreme Court of California. Feb. 13, 1899.)

ROBBERY — IDENTIFYING DEFENDANT — EVIDENCE.

There is evidence to identify defendant as the person who committed the robbery, prosecuting witness testifying that he was one of the persons who robbed him, though defendant and his witnesses testified that he cut off his mustache a month before the robbery, and had not worn one since, and prosecuting witness, who testified that he had seen defendant after, as well as a year before, the robbery, said that

<sup>1</sup> Rehearing denied March 15, 1899.



when he "previously met" him he wore a mustache; the jury being at liberty to hold that the time thus referred to was when he met defendant a year before the robbery.

Department 1. Appeal from superior court, city and county of San Francisco.

One Cappola was convicted of robbery, and appeals. Affirmed.

P. J. Mogan, for appellant. Atty. Gen. Ford, for the People.

PER CURIAM. The defendant was convicted of the crime of robbery, and has appealed from the judgment thereon upon the ground that the evidence was insufficient to identify him as the person who committed the robbery. At the trial the prosecuting witness testified that the defendant was one of the persons by whom he was robbed, and also testified that he had seen him on two occasions subsequent to the robbery; and, although the defendant and witnesses on his behalf testified that he was not present at the robbery, but was at that time in another place, the verdict of the jury shows that they gave credit to the prosecuting witness rather than to the others. The prosecuting witness also testified that he had met the defendant several times, a year or more before the robbery, and on cross-examination he testified that when he "previously met" him he wore a mustache. The defendant, and several witnesses on his behalf, testified that he cut off his mustache about a month prior to the date of the robbery, and had not worn one since, and it is urged that for this reason the testimony of the prosecuting witness as to his identity must be disregarded. The jury, however, were at liberty to hold that the time referred to by the witness in testifying that the defendant wore a mustache when he "previously met" him was the time when he met him the year before the robbery. The judgment is affirmed.

(126 Cal. 176)

FRANZ et al. v. BIELER. (S. F. 745.)

(Supreme Court of California. Feb. 13, 1899.)

ACTION ON CONTRACT—PLEADING—ANSWER—CONTRACT IN RESTRAINT OF TRADE—VALIDITY—DAMAGES.

1. Complaint in action on an agreement of defendant not to engage in business in certain territory, by which he bound himself to plaintiffs in the penal sum of \$2,000, as liquidated damages, should he fail to keep his agreement, must allege that he has not paid the \$2,000, thus entitling him to resume business.

2. Only a defective allegation of the complaint, not one entirely omitted, can be cured by the answer.

3. An agreement not to engage in business "within a radius of 10 miles in either direction" of a certain point, under penalty of \$2,000 liquidated damages, though void as to the part of the territory in a county outside that in which is the central point (Civ. Code, § 1674, allowing the restriction only as to "a specified county, city, or a part thereof"), described with sufficient definiteness the territory within the county embracing the central point, and is valid as to it.

4. The entire amount provided as liquidated damages for a person engaging in business within a certain territory, embracing parts of several counties, is recoverable for engaging in business in the part of the county within which is the place where he formerly conducted business, though the agreement is void as to the other counties.

Commissioners' decision.

Department 1. Appeal from superior court, Alameda county.

Action by Frank Franz and another against Frank Bieler. Judgment for plaintiffs. Defendant appeals. Reversed.

J. H. Smith and Mortimer Smith, for appellant. Alfred Fuhrman, for respondents.

HAYNES, C. Judgment was entered for the plaintiffs upon the verdict of a jury, and the defendant appeals therefrom on the judgment roll, contending that the complaint does not state a cause of action. The complaint sets out an agreement by which the defendant agreed with the plaintiffs that he would not engage in the wine and liquor business within the radius of 10 miles in either direction from 809 East Fourteenth street, in the city of Oakland, for the period of 10 years from the date of the agreement,—April 19, 1890,—and bound himself to the plaintiffs "in the penal sum of two thousand dollars, as liquidated damages," to be paid by the defendant "should he fail to keep these covenants and agreements." The complaint then alleges that on January 15, 1895, the defendant resumed the said wine and liquor business within the defined territory, to plaintiffs' damage in the sum of \$2,000, and judgment is prayed for that sum.

Defendant's obligation was to pay plaintiffs the sum of \$2,000 in case he should resume the designated business within the defined territory before the expiration of 10 years. It does not appear that he has not performed the condition upon which he was entitled to resume said business, viz. upon the payment of \$2,000; and such breach, the nonpayment of the money, must be alleged. See *Richards v. Insurance Co.*, 80 Cal. 505, 22 Pac. 939; *Grant v. Sheerin*, 84 Cal. 197, 23 Pac. 1094; and numerous other cases. This question being conclusively settled in this state, it is not necessary to examine the cases cited by respondents, all of which are from other jurisdictions.

Nor is this defect cured by the answer, as contended by respondents. A defective allegation of a fact may be aided by allegations in the answer; but here there is no allegation that the money has not been paid, and the defect is fatal. There was no allegation to be aided or cured. See *Grant v. Sheerin*, supra, and cases there cited.

It is also contended by appellant that the complaint does not state any consideration for the agreement set out in the complaint. It is true, the agreement set out in the complaint does not show any consideration to support it, or that it was made under such

circumstances as to give it validity under the provisions of sections 1673 and 1674 of the Civil Code; but I think the allegations immediately preceding the agreement as set out are sufficient to show a good consideration.

Appellant further contends that said contract is void for uncertainty, in that the territory "within a radius of ten miles in either direction" from the point named would include a part of Contra Costa county and a part of the city of San Francisco, as well as a portion of Alameda county, in which the central point is located. I think, however, that the description of the territory is good as to all of it that lies within Alameda county, such boundaries being capable of exact ascertainment, the Code permitting the restriction to extend to "a specified county, city, or a part thereof." Civ. Code, § 1674. In *Carpet-Beating Works v. Jones*, 102 Cal. 506, 36 Pac. 841, it was held that the covenant is divisible as regards space, and void only to the extent to which it departs from the provisions of the Code. In that case the covenant extended to three counties, and it was held valid as to the county in which the place of business was situated.

Appellant further says: "The contract embracing portions of three counties is not divisible so far as the amount of liquidated damages is concerned." The argument based upon this proposition is not quite clear, but it seems to be that as the restriction imposed upon the defendant was void as to a portion of the territory, and the penalty for a breach being indivisible, no recovery can be had either for the whole of the penal sum or any part of it. The question here presented is new, at least so far as the authorities in this state are concerned. It has been held, as we have seen, that the inclusion of territory greater than that sanctioned by the Code is void only as to the excess. In *Potter v. Ahrens*, 110 Cal. 674, 43 Pac. 388, there was no excess of territory, and it was held that the parties may properly stipulate a specified sum as liquidated damages for a breach of the covenant, and that the plaintiff is not required to prove anything more than a breach of the contract in order to recover such stipulated damages. In *Carpet-Beating Works v. Jones*, supra, the contract included three counties, and it was held that it was valid as to the county in which the business was conducted, and void as to the others; but in that case the plaintiff on the trial waived damages, on account of the insolvency of the defendant, and prosecuted the suit to obtain a perpetual injunction restraining the defendant from conducting the business in the city and county of San Francisco, and the judgment of the lower court granting such injunction was affirmed in this court, with a modification as to the time of its continuance. In *Brown v. Kling*, 101 Cal. 299, 35 Pac. 995, it was said: "The contracts which are here declared void are not declared unlawful. Certain contracts not made in a

certain mode are declared void by the statute of frauds, but they are not therefore illegal. This contract is not against public policy. At common law such a contract would have been valid. A contract restraining one from following a lawful trade or calling at all is invalid, because it discourages trade and commerce, and prevents the party from earning a living; but the right to agree to refrain from his calling, within reasonable limits as to space, may have the contrary effect. It encourages trade, for it gives value to a custom or business built up by making it vendible."

Here, however, there is an obligation fixing a specified amount as liquidated damages to be paid for a violation of a contract not to conduct the specified business within a given territory, which territory exceeds the limits prescribed by law. Doubtless, the parties entered into the principal contract supposing they had the right to include all the territory described, and that the prohibition extended to the whole of it, and it may be argued that the stipulated damages were fixed in view of that supposition. If the defendant resumed business within a portion of the described territory which is excluded from its operation by the statute, it is obvious that he would not have incurred any liability under his covenant, though within its express terms; but, if he resumed business within that portion of the territory described in the agreement to which the statute limits it, we see no sufficient reason why it should affect the stipulated damages, since it is not only within the letter of the covenant, but it is clear that the nearer the place where the defendant resumes business is to the place where he formerly conducted business, and to the place where plaintiffs still conduct the same business, the greater the actual damage they would sustain. The mere fact that the covenant embraces a larger territory than that authorized by the statute would not seem to justify us in holding that the stipulation as to damages for a breach should be held void, and that plaintiffs should be put to proof of their actual damages. In *Price v. Green*, 16 Mees. & W. 346, the covenant was that the covenantor would not carry on the trade of perfumer, toyman, and hair merchant "within the cities of London or Westminster, or within the distance of six hundred miles from the same respectively," and for the observance thereof bound himself in the sum of £5,000 as liquidated damages. The covenantor resumed the prohibited trade in London. It was held that, so far as regards the distance of 600 miles from said cities, the covenant not to engage in said business was void, but not illegal, and was good so far as London and Westminster were concerned. The court of exchequer chamber affirmed the judgment for the whole sum stated, saying: "Here, however, there is but one thing to which the five thousand pounds relates, viz. the restriction of trade, though extended to two different districts; and it is plain that the parties intended that, if the



restriction was violated in either district, the sum should be paid, and not that inquiry should be made as to the actual damage and loss sustained." Because of the insufficiency of the complaint, the judgment should be reversed, with leave to the plaintiffs to amend; and I so advise.

We concur: BRITT, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions to the court to sustain the demurrer to the complaint, with leave to the plaintiffs to amend.

123 Cal. 482

PEOPLE v. OWENS. (Cr. 461.)

(Supreme Court of California. Feb. 17, 1899.)

JURORS — COMPETENCY — CHALLENGE — CRIMINAL  
LAW — HOMICIDE — INSTRUCTIONS — OBJEC-  
TIONS — REVIEW — RECORD.

1. A challenge to a juror "for cause" merely, without specifying the ground, is insufficient.

2. A challenge to a juror, "under subdivision 2 of that section," is insufficient, there being nothing to show what "that" section was.

3. That one is exempt from jury duty is not cause of challenge to him.

4. Under Code Civ. Proc. §§ 198, 199, and Pen. Code, § 1072, requiring that a person, to be competent as a juror, must be assessed "on property belonging to him," it is enough that he and another, constituting a firm, were together assessed on the firm property.

5. The overruling of a challenge to a juror for "actual bias" is proper, the bias consisting in newspapers or on public rumor, and he stating that he could and would, notwithstanding such opinion, act impartially and fairly on the matters to be submitted to him; that is, would be influenced and guided solely by the law and evidence.

6. Allowing a challenge to a juror for actual bias can be reviewed only where there is such an absence of evidence to sustain the decision that the matter becomes a question of law.

7. That an instruction is indorsed by the court "Given as modified" does not show that part of it was refused, so as to require the court, as provided by Pen. Code, § 1127, in such case, to make an indorsement showing the part given and the part refused, as the modification may have consisted in something added by the court by way of correction or otherwise.

8. Irresistible impulse is not of itself a defense to a charge of felony.

9. An instruction that the fact that defendant attempted to commit suicide is to be taken as evidence of insanity is properly refused, as it makes such fact of itself evidence of insanity, whereas it is only one phase of the evidence, to be considered together with all the other evidence.

10. Objections to a dying statement because it was not read over to deceased after it was written, and was only the substance of the questions and answers, and because, after it was admitted, testimony was given tending to show that, when the statement was made by deceased, she did not have the sense of impending death, are not covered by an objection that it is "immaterial, irrelevant, and incompetent."

In bank. Appeal from superior court, Stanislaus county.

George C. Owens was convicted of murder, and appeals. Affirmed.

L. J. Maddux and P. H. Griffin, for appellant. Atty. Gen. Fitzgerald, for the People.

VAN DYKE, J. Defendant was informed against for the murder of his wife. He was tried, and convicted of murder in the first degree, the jury fixing the penalty of death. His motion for a new trial was overruled; and, being sentenced, he prosecutes this appeal from the judgment of conviction and the order denying his motion for a new trial. The story in reference to the commission of the crime is told by his daughter Mrs. Tiedeman, who was the only witness of the murder, excepting the defendant. She says: "George C. Owens is my father. I have been married about two months. My mother, Ruth E. Owens, had been living with me and my husband all but about one week of our married life. She came to live with us about a week after we were married. I was married at my sister's, Mrs. Charles Daunt. I was not married at home. My father always said he opposed my marriage. Prior to the time that my mother came to live with me, she had commenced proceedings for a divorce against my father. I saw my father on the 13th of December, 1897, in the morning. He came to my house. I first saw him as he came in the gate and up to the steps. My mother and myself were in the kitchen at the time. We were cooking breakfast. Nobody else in the house except me and my mother. My father came into the house. He came into the side door. I opened the door for him. There was a table in the room there; a small table in the kitchen. There is a window there, and the table was right between the table [window] and the door. My father sat right near the stove. The stove was in the corner of the room. At that time my mother was lifting the mush, and we both sat down to the table then to eat our breakfast. When my father came in, I said to him, 'Good morning, pa.' He said, 'Good morning.' He said it pleasantly, — seemed to. I removed his hat for him, and hung it on a nail back of him. He then began to talk to mamma; asked her if she was ready to go home to him. I had asked him before this to remove his overcoat, as it was a little warm in the room, and he got up, and took his overcoat off, and laid it down on his chair, and sat down again. Then he asked her if she had thought of coming back to him, and she said she had not been thinking of anything of that kind yet; and then I said to him I thought, being as they were both happier apart, I thought they had best live apart, and be friends, and live apart. I thought it would be better for them. They both looked better. I said that in as pleasant a way as I knew how. He jumped up then, and I thought he was going to slap me for what I had said, and I ran out of the back door. There was a screen over the door, and I had to open the screen to get out. It was a spring screen, and it slammed back.

Mamma and I both jumped up from the table, and I ran out of the door. I turned round to look, and he pulled his pistol, and commenced to shoot. He pulled his pistol from his pocket,—from his right side somewhere. I saw him pull his pistol, and mamma said, 'Oh, George, don't shoot!' and [he] did not pay no attention, and shot her through the stomach. He was right close to her. He held the pistol pretty near to her. She said, 'Oh, George, don't shoot!' She said that before he shot. After he fired, she said, 'Oh, George, how could you do that?' At that time I was out on the porch, looking in. He then came to the door, and fired at me,—fired at me the width of the porch; fired through the screen at me. It struck me through the left breast. It came out behind. The ball struck me about here, and came out behind about here (indicating). Then he commenced to load up his pistol again, and I thought— Well, mamma fell after he went back, and shot her a second time. He went back from shooting me, and shot her through the breast. I saw him put the pistol up to her,—right to her, right up close to her breast,—and fire, and then he commenced to load up again. He commenced to load before she fell; commenced to load as she fell. I thought she was dead, and I saw him commence to load, and I ran around on the side of the porch. She fell across the back door. She was coming towards me when she fell. She fell right up close to the door. She was attempting to come towards the back door when she fell, and, when she fell, I thought she was dead, and, seeing him load up again, I ran. I stood on the side porch, and jumped up and down for a while, and hollowed for help. Then I saw one of the ladies coming running, and that gave me courage to run, and, as I went out of the gate, he shot two more shots. I stood there after he had shot me, for my mother's sake. I could not run. I was sort of transfixed to the spot. After that I ran across the street, to Mrs. Reinhart's. I have now told everything that transpired before the shooting at the house,—everything that was said that I can remember of. My mother gave him no cause whatever to do the shooting. Nobody attempted to strike him or injure him in any way." The defense was insanity on the part of the defendant. The points urged for a reversal are technical, and do not go to the merits. Many of them are in reference to the impaneling of the jury, disallowing challenges on the part of the defense, and allowing challenges on the part of the prosecution.

It is claimed that the court erred in disallowing defendant's challenges to 10 of the jurors impaneled, to wit, Dudgeon, Delemater, Corson, Hill, Cogswell, Laughlin, Keaton Howard, Donkin, and McDonald. Juror Cogswell was challenged "for cause" merely. As to Laughlin the transcript shows, "There-

upon the defendant challenged him;" as to Keaton the transcript shows, "The defense thereupon challenged him for cause;" as to Howard, "Thereupon the defendant challenged him for cause." These challenges were manifestly insufficient. A challenge of a juror must specify the particular ground of challenge. *People v. Dick*, 37 Cal. 277, 279; *People v. Renfrow*, 41 Cal. 37, 38, 39; *People v. Buckley*, 49 Cal. 241, 242; *People v. Cotta*, Id. 166, 169; *People v. Cochran*, 61 Cal. 548, 549.

The challenge to Juror Delemater was, "We challenge the juror under subdivision 2 of that section." There is nothing in the transcript to show what "that" section was, and the challenge was not specific enough, and was properly disallowed, under the authorities already cited. If it was the intention, however, to challenge the juror for actual bias, as defined in subdivision 2 of section 1073 of the Penal Code, then the challenge is not sufficient, and was properly disallowed.

Juror Cogswell, in addition to the challenge for cause already stated, was challenged "on the ground of being an officer in the county, under section 200, Code Civ. Proc."; it appearing on his voir dire that he was a director of the Turlock Irrigation district. The section of the Code of Civil Procedure referred to relates to persons exempt from jury duty, to wit, a person holding a county, city, and county or township office. If a director in an irrigation district were considered as holding an office designated in said section of the Code, still "an exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted." Pen. Code, § 1075.

In addition to a challenge for "actual bias," Juror M. E. McDonald was challenged "upon the ground that his name does not appear upon the assessment roll,—last assessment of the county for property assessed to himself." It appeared that the assessment roll showed an assessment to J. R. and M. E. McDonald, and the juror was M. E. McDonald. The law requires that a person to be competent as a juror must be "assessed on the last assessment roll of the county or city and county on property belonging to him." Code Civ. Proc. §§ 198, 199; Pen. Code, § 1072. The challenge was based upon the fact that it did not appear by the assessment roll that the property was assessed to the juror separately. The law does not require the name of the juror to be separately placed upon the assessment roll, but requires that he should be assessed on the last assessment roll "on property belonging to him." The juror, as a member of the firm of J. R. and M. E. McDonald, was assessed on property belonging to him. "The interest of each member of a partnership extends to every portion of its property." Civ. Code, § 2402. See, also, *U. S. v. Hackett*, 29 Fed. 848.

Jurors Dudgeon, Corson, Hill, Donkin and McDonald were challenged for "actual bias."



"This court is only allowed to review an order denying a challenge to a juror upon the ground of actual bias when the evidence upon the examination of the juror is so opposed to the decision of the trial court that the question becomes one of law, for it is only upon questions of law that this court has appellate jurisdiction in criminal cases." *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944, and also *People v. Wells*, 100 Cal. 227, 34 Pac. 718. The transcript shows that from the examination of the jurors it appears that the bias complained of was opinions founded upon statements in public journals, or upon public rumor, and each juror in effect stated "that he could and would, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him; that is, that he would be influenced and guided solely by the law and the evidence. None of them were disqualified within the rule.

The court allowed the challenges of the prosecution to Jurors Bennett, Spencer, Gilbert, Cox, Bailey, Baer, Turpin, and Hutchins. Bennett testified, in substance, that, owing to his friendship for the defendant, he would be inclined to favor him "just as far as possible," and that he would be affected by that friendship to a certain extent. Gilbert was excused because he thought that his friendship for the parents of the defendant would influence him in arriving at a verdict. Cox testified that his friendship for certain members of the family of defendant (defendant's brothers) would influence him in arriving at a verdict. The same is true of Juror Bailey. Baer was an intimate friend of defendant's near relatives, and was certain that such friendship would affect his verdict. The court, after challenge, found that Juror Turpin was not upon the assessment roll of the preceding year. It was shown by the examination of Hutchins that he would disregard the instructions of the court on the law of irresistible impulse. This court can only review the decision of the lower court in allowing a challenge for actual bias where there is such an absence of evidence to sustain the decision that the matter becomes a question of law. *Pen. Code*, § 1170; *People v. Fredericks*, *supra*; and the other cases cited in connection therewith.

Juror Spencer was excused for cause after he had been sworn in to try the case, but before the completion of the jury. He voluntarily asked to be excused, giving the following among his reasons: "Well, for one or two reasons; the family—Mr. Owens' family—are members of the congregation where I preach quite often, and I might be somewhat favorable to them. And then, again, this feature of capital punishment. When it was asked me, if it was proved beyond the shadow of a doubt,—that doubt business there,—I was a little undecided about it yesterday, and still my mind is; yet at one time I said that I wasn't in favor of hanging a man if there was any possible way of getting around it. Of course, if it is a sure thing, and I know a

thing, why, then I would not be against it, of course." And upon further examination, conducted by the court and counsel, it was shown that the juror, in arriving at his verdict, would be influenced by his friendship for the relatives of the defendant. The court may for cause permit a juror to be challenged after such juror is sworn, and before the jury is completed. *Pen. Code*, § 1068; *People v. Durrant*, 116 Cal. 179, 197, 48 Pac. 75.

*Pen. Code*, § 1127, says: "Either party may present to the court any written charge and request that it be given. \* \* \* If part be given and part refused, the court must distinguish, showing by the endorsement what part of the charge was given and what part refused." It is claimed by counsel for the defendant that the court below violated this provision in instruction 3 requested by defendant, and instructions 3 and 9 requested by the prosecution. Each of these instructions was indorsed by the court "Given as modified." "Modified" does not necessarily import that part was given and part refused. The modification may have consisted in something added by the court by way of correction or otherwise, and, as every intendment in favor of the correctness of the court's action must be indulged, it may be presumed that these particular modifications did consist in something added, and not in refusing part and giving part.

It is also complained on the part of the defendant that the court erred in refusing instructions 7, 8, and 9 requested by the defendant. These offered instructions embody the doctrine of irresistible impulse, which is not recognized in this state. *People v. Pico*, 62 Cal. 54; *People v. Hoin*, *Id.* 120; *People v. Ward*, 105 Cal. 335, 343, 38 Pac. 945; *Marceau v. Insurance Co.*, 101 Cal. 340, 35 Pac. 856, and 36 Pac. 813. In the latter case it is said: "We cannot recognize the so-called 'plea of irresistible impulse' of itself as a legal defense to any charge of felony."

Instruction 11 requested by defendant, and refused by the court, is as follows: "You are instructed that the fact that the defendant attempted to commit suicide is to be taken as evidence of insanity." The case of *People v. Messersmith*, 61 Cal. 246, cited by defendant's counsel, does not support his contention. There it was said: "But where a court unqualifiedly tells a jury, as matter of law, that an assumed fact does not prove a fact in dispute, it is error. Such a charge should not be given when it is necessary to draw an inference of fact. An inference of fact, where it does not arise as a presumption of law, must be drawn by the jury whose duty it is to pass upon the insufficiency of the evidence." The instruction requested and refused was improper, as it made the mere fact of an attempt to commit suicide in itself evidence of insanity, whereas it is only one phase of the evidence, to be considered together with all the other evidence in the case.

Counsel for defendant contend that error was committed in the admission of the dying statement of the deceased, because it was not read over to her after it was written, and was only the substance of the questions and answers, and because the witness for the defense called after the admission of this statement gave testimony tending to show that, when the statement was made by the deceased, she did not have the sense of impending death. The only objection that was urged to the admission in evidence of the dying statement was "on the ground that it is immaterial, irrelevant, and incompetent." This does not cover any of the objections now urged against its admission. It was material, relevant, and, in the absence of any more specific objection, was competent. "We have repeatedly held that counsel must make their objections in such a manner as to leave no doubt as to the precise ground upon which it is placed. We do not think that that was done in the present case, and we do not think that we should be justified in reversing the judgment on this ground." *People v. Frank*, 28 Cal. 519. See, also, *People v. Mahoney*, 77 Cal. 532, 20 Pac. 73; *Satterlee v. Bliss*, 36 Cal. 507; *Mayo v. Mazeaux*, 38 Cal. 442; *Crocker v. Carpenter*, 98 Cal. 421, 427, 33 Pac. 271; *Water Co. v. Swartz*, 99 Cal. 278, 284, 33 Pac. 878. In *People v. Foo*, 112 Cal. 23, 44 Pac. 455, this court, after referring to a number of cases on the point in question, say: "The consensus of opinion, as illustrated by these cases and many others, is that, where the proffered evidence is imperfect by the lack of preliminary proof which may or may not be supplied by the party offering the evidence, the objector must specifically point out the defect by his objection; and, if he fails to do so, it is waived, and the general objections of 'immaterial, inadmissible, irrelevant, and incompetent,' made when the evidence is offered to the jury, are not sufficient to warrant an investigation on appeal of the insufficiency of such preliminary proof." There was no motion to strike out this dying declaration after the defendant's witness gave testimony tending to show that it was not made under a sense of impending death, which testimony, however, only had the effect to raise a conflict in the evidence as to the state of decedent's mind at the time referred to. This court cannot say that the ruling of the court below in this behalf was not correct.

From the examination of the whole record, we see no error on the part of the trial court, and the judgment and order appealed from are therefore affirmed.

We concur: GAROUTTE, J.; HARRISON, J.; TEMPLE, J.

McFARLAND, J. (concurring). I concur in the judgment of affirmance, and also in the opinion of Mr. Justice VAN DYKE, except that part thereof which discusses the

subject of the allowance of challenges of the prosecution to certain jurors. I do not object to the correctness of what is said on that subject; but the allowance of a challenge by the prosecution is not a subject of exception, under section 1170 of the Penal Code. That section gives no exception to a decision allowing a challenge; and although it was held in *People v. Wells*, 100 Cal. 227, 34 Pac. 718, following a concurring opinion in *People v. Wong Ark*, 96 Cal. 135, 30 Pac. 1115, that a defendant has a constitutional right to except to an order disallowing a challenge for actual bias interposed by him, still that ruling does not give him the right to except to an order of the court allowing a challenge by the prosecution. He is entitled only to a fair jury.

I concur: HENSHAW, J.

123 Cal. 491

LOUPE v. SMITH. (S. F. 757.)

(Supreme Court of California. Feb. 18, 1899.)  
STATUTES—IMPLIED REPEAL—MARRIED WOMEN—  
ACKNOWLEDGMENT OF DEEDS.

1. By Civ. Code, §§ 1186, 1191, a certain form of acknowledgment was required of a married woman to conveyances of her separate property. Section 1187 provided, "A conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner (except as mentioned in the last section, but such conveyance has no validity until so acknowledged)." Section 1093 provided, "No estate in the real property of a married woman passes by grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner prescribed by sections 1186 and 1191." By Act March 19, 1891, sections 1186 and 1191, and the parenthetical clause of section 1187, were expressly repealed. *Held*, that section 1093 was not thereby repealed by implication, and hence a married woman must acknowledge her deed.

2. Civ. Code, § 158, providing that either husband or wife may enter into any engagement with the other, or with any other persons, respecting property, which either might, if unmarried, does not dispense with the requirement of section 1093 that a married woman shall acknowledge a deed of her separate real property.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county.

Action by Amalia Loupe against Sidney M. Smith. From a judgment for plaintiff, defendant appeals. Affirmed.

Chickering, Thomas & Gregory, for appellant. J. J. Roche and W. A. Bowden, for respondent.

PRINGLE, C. Appeal from judgment. Action to quiet title brought by the respondent, a married woman. The appellant answers, and files a cross complaint, setting up a contract in writing between the parties for the exchange of the land described in the complaint for lands of his own, with bonus of \$15,000 to be paid by him. The consideration is the mutual covenants of the parties. The contract is signed by both parties; the husband



of the respondent signing her name as her attorney to the first contract, and the respondent affirming it by a supplemental agreement signed by herself. But the contract was never acknowledged by the respondent. The court below held for that reason that it was not her contract, and gave judgment in her favor. The case is an exceptional one, growing out of the transition state of the law in reference to married women, when the Code was gradually throwing off the disabilities which were meant as a shield for her, but were often used by her as a sword. The appellant by his cross complaint claims specific performance of the contract, and damages for its breach. But, deferring to the ruling of this court in the cases of *Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695, *Banbury v. Arnold*, 91 Cal. 606, 27 Pac. 521, and *Mathews v. Davis*, 102 Cal. 202, 36 Pac. 358, which denied the relief of a specific performance when there was no acknowledgment by the married woman, he urges now only his claim for damages. His contention is that a denial of the gracious equitable remedy of a specific performance does not necessarily involve a denial of the legal remedy in damages. His main contention, however, is that the cases above cited were decided before the amendments to the Civil Code of 1891, and that, as a result of those amendments, the necessity of any acknowledgment by a married woman was removed. The contract was executed in December, 1894, between the time of the amendments of March 19, 1891, and the amendment of March 14, 1895. The respondent's position is that the true effect of the amendments of 1891 was to repeal all the provisions requiring an acknowledgment by a married woman to a conveyance of her property. If he is right in this position, he would be entitled to a specific performance. The argument is based upon the implication of repeal attending the express repeals of 1891. The argument is necessarily technical; and, in order to appreciate the scope and intent of the repeals of 1891, it is best to put the sections before the eye as they stood before and after the repeals. Before 1891 they stood as follows (Civ. Code):

"Sec. 1186. The acknowledgment of a married woman to an instrument purporting to be executed by her must not be taken unless she is made acquainted by the officer with the contents of the instrument on an examination without the hearing of her husband; nor certified unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution.

"Sec. 1187. A conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner (*except as mentioned in the last section, but such conveyance has no validity until so acknowledged*).

"Sec. 1191. The certificate of acknowledgment by a married woman must be substantially in the following form." (Then follows

the special form of acknowledgment apart from the husband.)

"Sec. 1093. No estate in the real property of a married woman passes by grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner prescribed by sections eleven hundred and eighty-six and eleven hundred and ninety-one."

By this system a certain form of acknowledgment was required of a married woman to give validity to conveyances of her separate property. By the act of March 19, 1891, sections 1186 and 1191, and a part of section 1187, as italicized, were repealed. But section 1093 was left unrepealed and unamended. Undoubtedly there was careless legislation, for the effect was to leave section 1093 with references made wholly meaningless by the repeal of the sections referred to in it. But the question presented is whether the section was left without meaning when these references were left without meaning. That the legislation was careless and awkward is no reason why the courts should not seek for a meaning in the fragment left. If by reasonable interpretation there is any force or significance discernible in the section, there is no repeal by implication. If there is no meaning in what the express repeals have left standing, they must be held to have repealed it by implication. The argument of the appellant is that the repeals of sections 1186 and 1191 and of the latter part of 1187 leave no form or manner of acknowledgment provided for, and that the intention is apparent to require no acknowledgment at all. Consolidate the provisions which survive the repeals of 1891, and the sections will read substantially as follows:

"Sec. 1093. No estate in the real property of a married woman passes by grant purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her."

"Sec. 1187. A conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner."

By this collocation it is apparent that there is meaning left in section 1093, in spite of the amendment of section 1187, section 1187 as amended providing that a married woman may acknowledge, and section 1093 providing that no estate shall pass unless she does acknowledge, the instrument. Thus, section 1093 can well exist, and be read in conjunction with section 1187 as amended. A certain meaning, indeed, is obvious. The Code provides for the certification of an instrument, either upon acknowledgment by the party or upon proof by subscribing witness. It may be that in 1891 the Code, in gradually removing the obstructions by which the law had protected the conveyances of a married woman, still designed to require of her to appear before an officer and make her personal acknowledgment. That formality might assist

her to escape fraud, undue influence, or over-persuasion. It allowed some little locus poenitentiae before the instrument took effect. But, even if the effect of the amendments of 1891 were the result, not of design, but of careless legislation, the courts cannot amend what the legislature left unamended. So long as a definite and intelligible scheme is left, deduced from reading the two sections together, one does not efface the other. The position of the appellant that the repeal of the prescribed form of acknowledgment involves a repeal of the requirement of any acknowledgment is unsound; for section 1187 still provides that "a conveyance by a married woman, \* \* \* may be acknowledged," while section 1093 provides that no estate of a married woman passes "unless the grant or instrument is acknowledged by her." There is certainly no difficulty in reading the two together. We cannot relegate 1093 to the waste basket as the "lifeless fragment" the appellant calls it, when we find a decided meaning still surviving in it. By the amendment of 1895 section 1093 was made to read as follows: "A grant or conveyance of real property made by a married woman may be made, executed and acknowledged in the same manner and has the same effect as if she were unmarried." But this throws no light upon the question under consideration; for we cannot read the intention of the legislative repeals made in 1891 by the reflex light of a repealing act passed four years later. The appellant cites three New York cases which, he claims, have a bearing on the question: *Blood v. Humphrey*, 17 Barb. 660; *Andrews v. Shaffer*, 12 How. Prac. 441; and *Yale v. Dederer*, 18 N. Y. 271. But they will be found to have no analogy. The Revised Statutes contain the general provision that the acknowledgment of a married woman residing in the state shall not be valid unless taken apart from her husband, etc., and no estate shall pass unless so acknowledged. The statutes of 1848 and 1849 provide that any married woman may take by gift, grant, devise, or bequest from any person other than her husband, and hold and convey in the same manner and with the like effect as if she were unmarried. The cases hold that "when a married woman has received a grant in fee of lands since the passage of the act of 1848 and the amendment of 1849, she may convey the same in the same manner, and with the like effect, as if she were unmarried." It was simply the application of the new statute to property acquired and held under it. The conclusion thus reached in reference to the effect of these amendments must defeat the appellant's claim for damages, as well as for specific performance. He founds his claim for damages upon Civ. Code, § 158, which is as follows: "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried: subject, in transactions between themselves, to the general rules which con-

trol the actions of persons occupying confidential relations with each other, as defined by the title on Trusts." The purpose of this section is to release the wife from servitude to her husband, and to give her a larger power to contract than she had at common law. It is in the chapter on Husband and Wife, and not in the chapter on Transfers, and while the old forms of acknowledgments were in force this section was never held to relieve the wife from the necessity of complying with those forms in contracts affecting her real estate. It had its own existence, while the other sections had theirs. It has its application to the wife's capacity of contracting, while the others provided forms for the acknowledgment of her contracts. And since the repeals of 1891, section 158 does not dispense with the use of whatever forms survived those repeals, any more than it did before the repeals took effect. If the contracts of a married woman relating to her lands were invalid, unless she used the forms of acknowledgment prescribed by section 1191, they were invalid in 1894, unless she made the acknowledgment required by section 1093; and it must follow that the respondent's contract of December, 1894, was invalid for every purpose. I advise that the judgment be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(123 Cal. 497)

**TAYLOR v. MOTT et al. (S. F. 501.)<sup>1</sup>**  
(Supreme Court of California. Feb. 18, 1899.)  
**CONSTITUTIONAL LAW—GIFT OF PUBLIC MONIES—EXEMPT FIREMEN'S RELIEF FUND.**

St. 1895, p. 107, which requires every municipal corporation in which an exempt fire company exists to annually set apart a sum to be devoted to the relief of disabled exempt firemen residing therein, without restricting the benefits to such as have performed service in the particular municipality providing the fund, is contrary to Const. art. 4, §§ 31, 32, which prohibit the legislature from making or authorizing a gift of public moneys.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county.

Petition by George Taylor against F. K. Mott and others, as members of and composing the council of the city of Oakland, for a writ of mandate. From a judgment granting the writ, defendants appeal. Reversed.

W. A. Dow and J. K. Piersol, for appellants. Geo. E. De Golia, for respondent.

GRAY, C. Appeal from final judgment and order granting plaintiff's petition for a writ of mandate to compel appellants, in their capacity as the city council of Oakland, to set apart from the funds of that city money, not exceeding \$12,000, sufficient to pay all warrants issued by the board of trustees of

<sup>1</sup> Rehearing denied March 20, 1899.



the exempt firemen's relief fund, and audited by the auditor of said city. The action is based upon an act of the legislature entitled "An act to create an exempt firemen's relief fund in the several counties, cities and counties, cities and towns of the state and relating to the enrollment, formation into fire companies, and services as firemen of such exempt firemen," approved March 26, 1895. See St. 1895, p. 107. The case was tried on an answer to the petition, and the appeal is taken on the judgment roll, from which it appears that the court found that no incorporated exempt fire company existed in the city of Oakland on March 26, 1895, the date of the approval of said act, and the time when it took effect, and this is the first ground for reversal contended for by appellant. The second ground for a reversal of the judgment stated by defendant is that the act known as the "Exempt Firemen's Relief Fund Act" is unconstitutional. It will be best to examine this ground first, because the first ground stated by appellant involves an interpretation of the language of the act; and, if the act is decided to be unconstitutional, it may not be necessary to interpret its language in the respect pointed out in appellant's brief.

The act in question is mandatory in its terms, and requires the governing authority of any city and county, city, or county, or town of the state in which an incorporated exempt fire company exists to appoint five exempt firemen as a board of trustees of the exempt firemen's relief fund. Then it provides for the setting apart from the municipal funds of a sum not exceeding \$12,000 annually, to be devoted by such board of trustees to the relief of disabled, sick, injured, and infirm exempt firemen. It also provides for the enrollment of exempt firemen, and that they shall be assigned to and perform certain duties as firemen, in cases of great public emergency, under the direction of the chief of the fire department, without compensation therefor other than the relief in case of disability already mentioned. Sections 31 and 32 of article 4 of our constitution prohibit the legislature from making or authorizing the gift of any of the public moneys, state or municipal, to any person, association, or corporation; and it would seem that the provisions of the act in question are in conflict with these sections of our constitution. Section 3 of the act provides that: "The board of trustees of the exempt fireman's relief fund shall enroll every exempt fireman who has received, or may hereafter receive, a certificate under the laws of this state that he is an exempt fireman and who is a resident of the county, city and county, city or town, and who desires to avail himself of the benefits of this act and to render the services herein mentioned." Section 5 of the act provides further that "said fireman's relief fund shall be applied to the relief of such enrolled exempt firemen who, after

their enrollment as herein provided, shall become disabled from injuries, sickness or the infirmities of age to earn a livelihood, and said board shall grant relief from time to time to such enrolled member during the disability as it deems just," not exceeding \$25 per month. A careful inspection of this statute will disclose that it creates a liability on the part of a municipality where no legal liability existed before, and that by its terms the funds of such municipality may be disbursed among those who have never performed fire service, or any other service, for that particular municipality. Individuals become exempt firemen and receive certificates as such under the provisions of sections 3337 and 3338 of the Political Code, and they are now to be found residing on farms and in the towns all through the state. Some of them are already aged and infirm, and from that and other causes are unfitted to perform any service as active firemen; yet, if this act is upheld, all such from the four corners of the state might congregate in a single city, establish a residence there, compel the local governing authority to enroll them as exempt firemen, and, without ever doing anything as a legal consideration therefor, claim and receive a part of the funds of such city. A comparison of the act in question with an act passed for a similar purpose by the legislature of 1889, will direct the attention at once to the want of consideration for the gift contemplated by the act of 1895. See St. 1889, p. 108. This act of 1889 provides that no person shall be entitled to share in the funds of the municipality unless he shall have served in the fire department of that particular municipality for 15 years, or shall have received injury in the actual discharge of fire duty therein. No such condition or restriction as this is to be found in the act of 1895, but, on the contrary, all exempt firemen, by becoming residents and being enrolled, must be permitted to participate in the funds of the municipality when they become disabled, whether they have ever performed any service for such municipality or not. This constitutes a gift, and makes the statute subject to the constitutional objections already pointed out, and which have already been laid down by the supreme court in the following cases: Conlin v. Board, 99 Cal. 17, 33 Pac. 753; Patty v. Colgan, 97 Cal. 251, 31 Pac. 1133; Bourn v. Hart, 93 Cal. 321, 28 Pac. 951. The act on which the petition for the writ was based being unconstitutional and void, it follows that the judgment granting the writ must fall. For these reasons we advise that the judgment be reversed.

We concur: PRINGLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

(123 Cal. 513)

**HARDIN v. DICKEY.** (Sac. 301.)<sup>1</sup>

(Supreme Court of California. Feb. 20, 1899.)

**MORTGAGES—JOINT OWNERS—RIGHTS—NOTES—MATURITY—PAYMENT—FINDINGS—PREMATURE ACTION—JUDGMENT—RES JUDICATA.**

1. Plaintiff's assignor and defendant were joint owners of a mortgage, payable to defendant, who executed a note to the former for his interest, "to be paid pro rata out of any sum paid on said mortgage, and not to be paid until that time." With the consent and under direction of plaintiff's assignor, the mortgage was foreclosed, and defendant purchased the property in his own name, without any intention to profit thereby, but for the interest of both parties. A sheriff's certificate was executed to defendant, and he receipted for the purchase money, but nothing was in fact paid. *Held*, that as nothing was paid on the mortgage, and as the purchase and execution of the receipt did not constitute payment thereof, defendant was not liable on the note.

2. A receipt given an officer to make up his record in a foreclosure suit may be explained by parol evidence showing that no money was in fact received.

3. A finding that defendant did not collect a note in gold coin does not imply a collection in other moneys, where it also stated that defendant did not collect the sum in gold coin "or in any manner or sums or at all."

4. A finding that defendant held property purchased at a foreclosure sale for the use of himself and plaintiff subject to the same rights as he held the mortgage is proper, where defendant purchased with plaintiff's knowledge and consent, for their protection, and each agreed to share all expenses jointly, until it was disposed of.

5. The fact that defendant bought property mortgaged to himself and another, at foreclosure sale, in his own name, does not alone constitute an appropriation thereof to his own use.

6. Where an action for the collection of a note is commenced before its maturity, it is no bar to a subsequent action; hence a general judgment for defendant is proper.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county.

Action by James A. Hardin against W. J. Dickey. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Meux & Johnston, for appellant. H. H. Welsh and F. H. Short, for respondent.

**PRINGLE, C.** Appeal from order denying motion for new trial, and from judgment. Action brought to recover \$1,180 upon an instrument in writing. The defendant answered, making denials, and setting up affirmative matter in defense. Demurrer to the answer was interposed, chiefly on the ground of alleged insufficiency of the denials. Demurrer was overruled, and the parties went to trial, and judgment passed for defendant. The overruling of the demurrer is assigned as error. It is claimed also that the evidence does not sustain the findings, or the findings support the judgment. For the more convenient solution of these questions it will be well to reverse the order of considering them, and ascertain—First, whether the findings support the judgment; second, whether the findings

are sustained by the evidence; and, third, whether the answer is sufficient to support the findings.

1. Do the findings support the judgment? They are substantially as follows: On November 8, 1889, W. J. Dickey, the defendant in this action, and one M. J. Donahoo, were entitled to collect and receive from D. R. McKenzie and Frank Rule the sum of \$3,376.58; and, for the purpose of securing the indebtedness, McKenzie and Rule gave a note and mortgage for that amount. The defendant Dickey was entitled to about two-thirds of the amount, and Donahoo to about one-third thereof. And it was agreed between them that the note and mortgage should be taken in the name of the defendant, and be by him collected or foreclosed for the benefit of the defendant and said Donahoo in the proportion aforesaid. In evidence of this agreement, Dickey gave to Donahoo, on the same 8th day of November, the written instrument set forth in the complaint, which is the foundation of the action. The following is the instrument: "\$1,180. Fresno, Cal., Nov. 8, 1889. Twelve months after date, without grace, for value received, I promise to pay to M. J. Donahoo or order the sum of eleven hundred and eighty dollars, said amount now included in mtg. of Rule & McKenzie to W. J. Dickey, of even date, and to be paid pro rata out of any sum pd. on said mtg., & not to be paid until that time, with interest thereon at the rate of one per cent. per month from date until paid, both principal and interest payable in gold coin of the government of the United States, said interest payable —, and, if not so paid, the interest to draw interest the same as the principal; and, if this note is collected by suit, — agree and promise that the court having jurisdiction allow a reasonable attorney's fee, together with all legal expenses, to be made a part of the judgment. W. J. Dickey." Thereafter an action was brought to foreclose another mortgage on these mortgaged premises, and Dickey, defendant herein, was made a defendant. Dickey, with the knowledge and consent of Donahoo, and under his direction, filed a cross-complaint in the action, setting up his mortgage, which was on the trial adjudged to be prior and superior to the other; and the result was that the mortgaged premises were sold under foreclosure, and bought in by the said Dickey at the sum of \$6,118.20, the amount due on his mortgage, no other person bidding at the sale. Sheriff's certificate was executed to Dickey, who receipted to the sheriff for the purchase money; but no money was in fact received by Dickey, nor any property or thing of value, except what was so conveyed to him under the foreclosure. Dickey holds the mortgaged premises conveyed to him in the same manner and subject to the same rights and obligations as he had held the note and mortgage of McKenzie and Rule.

Upon these facts, the plaintiff, who sues as

<sup>1</sup> Rehearing denied March 20, 1899.



the assignee of Donahoo, is not entitled to recover upon the instrument set forth in the complaint. Nothing has been paid on the mortgage. Wallace v. Randol (Cal.) 54 Pac. 842. There can be no mistaking the intention of the instrument given by Dickey to Donahoo when read in the light of the surrounding circumstances. It was to sink or swim with the mortgage of Rule and McKenzie. "I promise to pay the sum of eleven hundred and eighty dollars, said amount now included in mortgage of Rule and McKenzie to W. J. Dickey of even date, and to be paid pro rata out of any sum paid on said mortgage, and not to be paid until that time," etc. The appellant contends that the buying in by Dickey of the mortgaged premises, and the receipt given by him to the sheriff, constitute a payment within the meaning of the instrument. But, between the two joint owners of the Rule and McKenzie mortgage, it cannot be that it was intended that one should take the chances of collection, and not the other. Even if the words were less explicit than they are, a court would resist the conclusion that, when the collection of the mortgage was to be made for account of both owners, the buying in by the nominal party at the foreclosure sale, in default of other bidders, and in the absence of any apparent intention to profit by the purchase, would make him liable to the co-owner. To foreclose a mortgage is merely to subject the property to the satisfaction of the lien. And in this case the foreclosure seems to have been forced upon Dickey by the aggression of the other mortgage on the same property, claiming priority. There are no legal objections to this conclusion. The appellant claims that it was error to permit the respondent to contradict his receipt to the sheriff. There is no force in this contention. A receipt may always be explained, and never so well as when it is given to the officer to make up his record in a foreclosure sale. This disposes of the main question on the judgment roll.

Criticism is made of the finding that the defendant did not collect the sum of \$6,118.20 in gold coin, on the ground that there is, by negative pregnant, an implication that it was collected in other moneys. But the criticism is not just. The entire finding is: "That the defendant did not \* \* \* on the 24th day of September, 1895, or at any other time, or at all, collect or receive from the said Rule and McKenzie note and mortgage, or from either of them, or at all, the sum of \$6,118.20 in gold coin of the United States, or *in any manner or sums or at all.*" The appellant, in his criticism, omitted the words in italics.

Objections are made to the verbal accuracy of the findings in reference to the assignment and to the title of plaintiff. But, in view of the affirmance of the judgment in favor of the defendant, they may be disregarded.

2. Does the evidence justify these findings? No objection is made to the finding that the note and mortgage were owned by Dickey and Donahoo in the proportions alleged; nor to the

findings that it was agreed between Donahoo and Dickey that the note and mortgage should be taken in the name of Dickey, and be by him collected or foreclosed for their joint benefit; nor to the finding that, with the knowledge and consent and under the direction of Donahoo, before his assignment to the plaintiff, Dickey filed his cross complaint to foreclose the mortgage. None of these material facts are attacked. Objection is made only to the general findings that the defendant did not collect the note of Rule and McKenzie, and that there is nothing due to the plaintiff; and upon them the chief argument of the appellant hinges. Objection is also made to the finding that the defendant holds the property for the use and benefit of himself and of Donahoo, or the plaintiff as his assignee, in the same manner and subject to the same rights and obligations as the note and mortgage were held by him. But this is a conclusion clearly justified by the circumstances under which the purchase was made by the defendant. The findings show the knowledge, consent, and direction of Donahoo to the foreclosure. And the plaintiff says that in the fore part of June, 1894, he notified Dickey that he had the note. "I called at his office, and had a pleasant interview with him, and told him I had this note, and how I came by it. He explained to me the situation of things, but did not tell me whether or not he would ever get anything out of the Rule and McKenzie mortgage and note. I spoke to him about the mortgage. At that time Mr. Meux was fighting the mortgage, which turned out to be a second mortgage, against this mortgage, and that had not been decided; and Mr. Dickey told me he was positive that our mortgage would take precedence, and he wanted the first mortgage. He was confident we would win the case, and no trouble about it, only took time." The defendant says: "Donahoo and myself were to jointly share all the expense; pay all the taxes and other moneys that were necessary to keep the property in repair until we could get rid of it. We were to jointly bear our proportion of the expenses. I did not receive any money; simply bid in the property to protect myself and Mr. Donahoo. No money was passed of any kind. I saw Colonel Hardin in my office a year or so ago; I disremember the date. He came in, and introduced himself, and told me what he came for. He told me he had a note from Mr. Donahoo, and he says: 'Well, I would like to sell it to you.' 'Well,' I says, 'I don't know yet whether we will ever get anything out of it or not. If we don't, it ain't worth anything.' \* \* \* Well, the colonel made me an offer in regard to what he would take on it, and I told him that there might be a possibility of nothing ever coming out of it. I says, 'It may be that we will never get anything out of it, and I don't wish to buy it,' and I told Mr. Donahoo,—he offered to sell it to me at the time it was taken originally,—and I told him I wouldn't have it, I had

enough in there, that I would protect what I had of course, and try to get it out. That is the import of the whole thing."

The strenuous contention of the appellant is that the buying in of the property by the respondent in his own name was an appropriation of it to his own use, and forced a maturity of the instrument sued on. Counsel says: "The only proposition, we think, that is presented to this court for consideration in this regard, is, did the plaintiff ever authorize the defendant to buy in the property in the manner it was purchased at the foreclosure sale?" It is shown that all the foreclosure proceedings, up to and including the decree, were had with the knowledge and consent of Donahoo, who was then the owner, and that, after the assignment to the plaintiff, he (the plaintiff) was in pleasant relations with the defendant, who says, "I explained to him about the foreclosure suit." Counsel complain that the defendant bought in his own name, and not in the joint names of himself and plaintiff, and that he has never tendered a declaration of trust, nor a conveyance to plaintiff of his interest in the property. But in the absence of any evidence tending to show any demand for such a declaration of trust or conveyance, or any refusal, the argument of the appellant comes with an ill grace in the same breath in which he takes exception to the very finding which declares a trust in his favor. He must submit to having a trust thrust upon him; for, there being no evidence whatever tending to show a denial of the rights of the plaintiff, the question is reduced to the single point whether the fact of buying, in the absence of any other bidders at the foreclosure sale, and of buying in his own name, is an appropriation to his own use, so as to constitute payment as between the plaintiff and himself; and on that point the question is of easy solution. The cases cited by counsel as to what is payment as between debtor and creditor have no bearing upon the question arising here between the two joint owners. The action of this defendant seems to have been for the best interest of both parties. It was not in any respect aggressive, but wholly defensive. It does not appear that he could have postponed the foreclosure sale with any prospect of a better result. By his purchase he put the property in a better position for a resale in the interest of himself and his associates, for he avoided the incubus of an equity of redemption. In view of the facts proved and of the law resulting from the situation, there can be no doubt that the rights of the parties were not affected by taking the property in satisfaction of and as a substitute for the lien of the mortgage upon it.

Another question which presents itself is whether the rights of the plaintiff in the property purchased, or to some subsequent proceeding, are prejudiced by the entry of a general judgment in this case in favor of the defendant. But it is well settled that this action, having been brought before the maturity

of the obligation, is no bar to any subsequent action or proceeding by the plaintiff. *Gray v. Dougherty*, 25 Cal. 266. And the plaintiff is at liberty to elect whether to await a conversion of the property into money by the defendant, and then collect his proportionate share at law, or to pursue such equitable remedy as he may prefer. As his action in this case was at law for the collection of the amount claimed to be due on the instrument, a general judgment for the defendant was proper.

3. Some of the denials in the answer are artificial and insufficient; but the matter set up affirmatively is a denial, and is sufficient to support the findings. I advise that the order denying the motion for new trial, and the judgment, be affirmed.

We concur: HAYNES, C.; BRITT, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying the motion for new trial, and the judgment, are affirmed.

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NASH v. KRELING. (S. F. 937.)

(Supreme Court of California. Feb. 13, 1899.)

CONTRACT OF EMPLOYMENT—INSTRUCTIONS—CONCLUSIVENESS OF VERDICT.

1. One about to enter the employ of another demanded \$100 per week for the term of two years. The employer offered him \$75 a week for the first year, and \$100 for the second. He declined, but agreed to contract for \$90 a week for the first year, and, if business should not then warrant the \$10 raise, he would wait until it did. This was accepted. *Held*, that this was a contract for one year only.

2. In an action for salary as stage manager of a theater, the court charged that if plaintiff agreed to devote his whole time to the theater, and to the duties of his employment, and to advise with defendant during business hours, and when requested, regarding the stage or business affairs, but failed and neglected any portion of his duties, he could not recover. *Held*, that the charge was not prejudicially erroneous, as allowing the original written contract to be varied by parol, or as implying, without evidence to support it, that his employment included other duties than that of stage manager; the evidence showing that his duties included the alleged additional promises, and the court having also charged that defendant employed plaintiff as stage manager, and could not require of him any formal contract differing from that shown by the original correspondence, nor to perform any duties not appertaining to his employment, and that the employer was entitled to the employee's services during reasonable hours of his employment, and that the jury must determine plaintiff's duties as stage manager, and whether he had neglected them.

3. A verdict on conflicting evidence is conclusive.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by John E. Nash against Ernestine Kreling. There was a judgment for defendant, and plaintiff appeals. *Affirmed*.



Naphtaly, Friedenrich & Ackerman, for appellant. H. H. Lowenthal, for respondent.

BRITT, C. The trial of this case resulted in a verdict and judgment for defendant. Plaintiff avers that defendant employed him for a term of two years, beginning August 6, 1894, to be stage manager of a theater conducted by her, known as the "Tivoli Opera House," in the city of San Francisco, at a salary of \$90 per week for the first year, and \$100 per week for the second. On June 2, 1895, she discharged him from said employment; and he sues in this action for alleged damages sustained by reason of such discharge during 12 weeks, beginning July 1, 1895, amounting, at the alleged rate of salary for that period, to \$1,150. The defense is that plaintiff was employed from week to week only, and also that he so neglected the duties of his employment as to justify his discharge, even if his contract was for the fixed period alleged by him.

To establish the terms of the contract, plaintiff produced in evidence a series of letters and telegrams which passed between himself, at various points in the Eastern states, and defendant, in San Francisco. From these it appeared that their negotiation related at first to an employment of plaintiff as stage manager of said theater for two years, plaintiff's first demand being \$100 a week for the entire term. At length defendant offered him \$75 a week for the first year, and \$100 a week for the second. Plaintiff replied declining the proposal, and added: "I will sign a contract for ninety dollars a week for the first year, and, if at the end of that time business should not warrant the ten-dollar raise, I would wait until it did,"—to which defendant rejoined: "Your terms, ninety dollars a week, accepted, \* \* \* which you can consider a contract until you get here, and then I will draw up proper one to suit." No other, however, was drawn up at any time. Plaintiff came to San Francisco, and entered upon said employment, and received, it seems, compensation at \$90 per week from August 6, 1894, until he was discharged, as stated. The court instructed the jury that said letters and telegrams constituted a contract upon the part of defendant to pay plaintiff for one year, but no longer.

On the issue whether plaintiff habitually neglected the requirements of his position of stage manager, and so warranted the defendant in discharging him (Civ. Code, § 2000), it became necessary to prove what his duties were, and on this point the evidence was discordant. The testimony for plaintiff tended to show that the duties of his employment "were entirely behind the curtain." There was other evidence, however, tending to show that, besides supervising the immediate production of plays and operas, it was the duty of the stage manager at said theater to keep informed of new attractions of that character, and of disengaged actors and actresses who might be available for the house, and nego-

tiate for both new pieces and new people, subject to the control of the general management, and otherwise to assist the management "both on and off the stage." There was also evidence that, when plaintiff arrived in San Francisco, he told defendant that he would "look out generally for the Tivoli, get new people and new plays, and devote all his time to the Tivoli," and consult with her about its affairs. Among the instructions given by the court to the jury was the following: "I charge you that if you find, from the evidence, the plaintiff agreed with Mrs. Kreling, upon his arrival in San Francisco, to devote his whole time and attention to the Tivoli, and to the duties of his employment, and he then promised and agreed with the defendant to advise and consult with her during business hours with regard to the stage affairs or business affairs of the Tivoli Opera House, and agreed to advise with her when requested to do so, in consideration of the receipt of ninety dollars per week, and if you are satisfied from the evidence that he habitually failed and neglected any part or portion of said duties, then plaintiff cannot recover in this action." The court also charged the jury, in substance, that defendant employed plaintiff to be stage manager of her theater; that she was not entitled to require of him the execution of any formal contract differing from that shown by the letters and telegrams, nor to perform any duties not appertaining to his employment; that an employer is entitled to the time and services of the employé during the reasonable hours of his employment; and, further, with considerable iteration, that they (the jury) must determine from the evidence in the case what were plaintiff's duties in the capacity of stage manager, and whether he habitually neglected any of them.

1. Plaintiff complains of the instruction that the contract of employment evidenced by said letters and telegrams was for a term of one year only. As the jury found that plaintiff was not entitled to recover at all, not even for loss of the contract during the closing weeks of the first year, it is not apparent that he could have been injured by this instruction. But the view of the court was correct. Plaintiff's final proposal was for one year's service, at \$90 per week, stating also a willingness to continue the employment at the same compensation until "business should warrant the ten dollars raise." This was a modification of his previous demand of \$100 a week for a second year. But we do not find that plaintiff has anywhere alleged or claimed that defendant agreed to such modification. She accepted his terms of \$90 a week for one year, but there was no agreement as to wages for another year, and hence no employment beyond the first year; for there is nothing in the correspondence between the parties to indicate that the defendant had in mind any period of service for which the rate of compensation was not fixed in advance.

2. The instruction which has been quoted above at length, relating to what plaintiff agreed to do, is strenuously attacked. Plaintiff contends that the instruction ignored the existence of a contract before his arrival in San Francisco; or, at least, that it allowed the terms of such prior contract, which was evidenced by writing, to be added to by parol, and that it implied, without evidence to support the assumption, that duties other than those of stage manager were included in his employment. The hypothetical statement in the instruction of duties which might be found to pertain to plaintiff's position did not, as modified by other parts of the charge, transcend the evidence which tended to attribute those duties to such position, irrespective of any agreement he might have made after reaching San Francisco; that is to say, there was evidence that, to perform properly the duties of stage manager at the Tivoli Theater, plaintiff should have done those things, whether he specifically so promised when he came to San Francisco or not. The contract evidenced by the writings was, as the court held, a continuing one, good after plaintiff reached San Francisco, as well as before; and the continuance of its provisions is probably what the court meant by reference in the instruction to plaintiff's agreements upon his arrival, treating those agreements as particulars of plaintiff's existing obligation; and, in view of other instructions given, we do not think the jury could have understood that the contract created by the letters and telegrams was to be at all disregarded, or that plaintiff was under obligation to serve defendant, except within the terms of that contract. They were told, in effect, that the written communications between the parties amounted to a contract, and that plaintiff was not required to sign any contract at all different therefrom, nor to perform any duties not included therein; also, that it was for them to determine from the evidence before them what constituted his duties as stage manager, and whether he neglected such duties. The reference in the instruction to the obligation of plaintiff to devote his whole time and attention to the Tivoli was qualified by the words following, "and to the duties of his employment," and by the charge elsewhere that "an employer is entitled to the time and services of an employé within all the reasonable hours of his employment." From the whole charge the jury can hardly have inferred, as supposed by plaintiff, that he was required to "be continually at the beck and call of the defendant."

In reviewing the charge to a jury, it must be held in mind that its different parts are to be considered in their mutual bearings, and as explanatory of each other, and that the jury is presumed to be capable of understanding the proper connection of the several parts, and their application to the facts. If, thus construed, the charge fairly and correct-

ly states the law necessary for the guidance of the jury, the judgment founded on their verdict should not be reversed, because some portion of the charge does not in its detached form contain all necessary qualifications which are made sufficiently prominent elsewhere. This is elementary doctrine. *People v. Bagnell*, 31 Cal. 409; *Ellis v. Tone*, 58 Cal. 290; *Cousins v. Partridge*, 79 Cal. 224, 21 Pac. 745; *Davis v. Button*, 78 Cal. 247, 18 Pac. 133, and 20 Pac. 545. While, therefore, the instruction under criticism was carelessly drawn, and went to the verge of error, we feel satisfied that, upon the whole charge, the jury were not misled to plaintiff's prejudice.

3. The argument that the evidence of plaintiff's neglect of his duties was not sufficient to sustain the verdict does not much impress us. The evidence on this issue was at least conflicting, and the verdict is conclusive. The judgment and order denying a new trial should be affirmed.

We concur: PRINGLE, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

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6 Cal. Unrep. 238

NASH v. KRELING. (S. F. 1013.)

(Supreme Court of California. Feb. 13, 1899.)

CONTRACT OF EMPLOYMENT—CONCLUSIVENESS OF VERDICT—EVIDENCE.

Defendant, in California, had been in communication with plaintiff, in Connecticut, looking to his engagement as stage manager. Plaintiff wrote, declining previous offers, but stated he would sign a contract for a certain sum for the first year, and, if at the end of that time business should not warrant a certain raise, he would not ask it. Defendant replied by telegram, "Your terms, \$90 a week, accepted," and, in a letter, wrote that she had sent a telegram, which plaintiff could consider a contract until he arrived, when a proper one would be drawn up. Plaintiff became stage manager, and defendant suggested that a contract should be drawn up, but he stated it was unnecessary. Held to create a contract between the parties.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county.

Action by John E. Nash against Ernestine Kreling. There was a judgment for plaintiff, and defendant appeals. Affirmed.

H. H. Lowenthal, for appellant. Naphtaly, Friedenrich & Ackerman, for respondent.

BRITT, C. This action is founded upon the same alleged breach of a contract of employment which is considered in the opinion rendered in the case of the same title (S. F. 937) 56 Pac. 260. In the present case, which was begun earlier than the other, plaintiff proceeded for the salary he would have earned under his contract, at \$90 per week, during the four weeks next following his discharge,



and ending June 30, 1895; and, contrary to the result in the other case, he obtained a verdict and judgment for the amount demanded. The defense was substantially the same in both actions.

On the trial of this case it appeared in evidence that sundry communications were sent between the parties—plaintiff at the East, defendant in San Francisco—looking to an engagement of plaintiff as stage manager of defendant's theater. Finally, in a letter dated at New Haven, Conn., May 11, 1894, plaintiff declined defendant's terms previously offered, and continued: "I will sign a contract for ninety dollars a week for the first year, and, if at the end of that time business should not warrant the ten dollars raise, I would wait until it did." On May 18th defendant replied by wire: "Your terms, ninety dollars a week, accepted. Letter follows." In the letter thus mentioned, she said: "Yours of the 11th received, and, in answer, sent telegram, which you can consider a contract until you get here, when I will draw up a proper one to suit." In reliance on these messages, plaintiff came to San Francisco, and became stage manager of defendant's theater, and received wages at the rate aforesaid, from August 6, 1894, to June 2, 1895. Defendant testified that she suggested to him about the time his salary began that a contract should be drawn and signed, but he said it was unnecessary; and so the matter rested. The court below ruled that the several letters and telegrams constituted a contract for the employment of plaintiff as stage manager at defendant's theater, for the period of one year, at a salary of \$90 per week. Defendant urges that they were ineffectual to create any contract at all.

We differ with defendant. After endeavors to reach an agreement, which had continued by letter and telegram, for a month prior to May 18th, it is hardly credible that the parties, or either of them, intended that plaintiff should come from the East to San Francisco to find that no agreement at all existed, or that what defendant declared to be a contract—by its terms wholly performable after plaintiff's arrival in San Francisco—should, upon his arrival, become a nullity. Rather, we hold, the circumstances considered, the remark in defendant's letter as to "drawing up one to suit" had reference merely to a more formal and detailed statement of the mutual obligations of the parties, and not to the rejection or suppression of what was already agreed in writing. Defendant relies on *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797. It may be true, as held in that case, that, when parties to a contract intend that it shall be reduced to writing and signed by them, it is not obligatory upon either until evidenced in the manner contemplated; but that is not saying that a contract already reduced to writing, and signed, is of no binding force merely because it contemplates a subsequent and more formal instrument, as the repository of the

terms of the agreement. In a recent case, involving a contract, which, as here, rested in letters and telegrams, it was held (we quote from the headnote) that "a stipulation to reduce a valid written contract to some other form does not affect its validity, and the stipulation may not be used by either of the parties for the purpose of \* \* \* evading the performance of any of the provisions of the contract." *Sanders v. Fruit Co.*, 144 N. Y. 209 (s. c. 39 N. E. 75). The doctrine is reasonable, and we have no doubt of its just application to the case before us. See, also, cases collected in 7 Am. & Eng. Enc. Law (2d Ed.) pp. 140, 141.

Defendant asserts that the evidence did not justify the verdict. The main question of fact was whether plaintiff neglected the duties of his employment. Upon this issue, as at the trial of the case determined in *S. F. 937* (56 Pac. 260), the evidence was conflicting; and, as the verdict there was conclusive of the question for defendant, so here it is conclusive against her. The order denying a new trial should be affirmed.

We concur: PRINGLE, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is affirmed.

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123 Cal. 508

**HARRON v. HARRON. (S. F. 1443.)**

(Supreme Court of California. Feb. 18, 1899.)

**APPEAL—SUITS IN EQUITY—AMOUNT IN CONTROVERSY—DIVORCE—ORDERS AFTER FINAL JUDGMENT.**

1. Const. art. 6, § 4, providing that the supreme court shall have appellate jurisdiction in all cases in equity, except such as arise in justices' courts, and also in all cases at law in which the demand amounts to \$300, places no limitation as to value on appeals from suits in equity.

2. An order made after a judgment granting a divorce, requiring defendant husband to pay the wife a certain sum for counsel fees and costs to contest the motion for a new trial, though a special order made after final judgment, is also an order made in a case in equity, so as to be appealable, under Const. art. 6, § 4, irrespective of the amount involved.

McFarland and Garoutte, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

Action by Annabelle Harron against Howard Harron. From an order requiring defendant to pay a certain sum to plaintiff, defendant appeals. Motion to dismiss the appeal. Denied.

G. W. McEnerney, for appellant. S. H. Regensburger and Dunne & McPike, for respondent.

**HARRISON, J.** Judgment was rendered in this action in favor of plaintiff for a divorce from the defendant; and, the defendant having appealed therefrom, the superior court made an order requiring him to pay to the plaintiff the sum of \$100 as and for counsel fees, and \$40 as and for costs, to enable the plaintiff to contest motion for a new trial in said court. From this order the defendant has appealed. The plaintiff moves to dismiss the appeal upon the ground that this court has no jurisdiction of the appeal, by reason of the fact that the value of the

property in controversy—that is, the amount of money required by the order to be paid—is less than \$300.

"The supreme court shall have appellate jurisdiction in all cases in equity except such as arise in justices' courts; also in all cases at law \* \* \* in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars." Const. art. 6, § 4. Under this provision of the constitution, this court has appellate jurisdiction in "all cases in equity," irrespective of the value of the property in controversy. It is only in a case at law that the value of the property forms an element in determining its jurisdiction; and it was held in *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456, 635, and 8 Pac. 709, that the jurisdiction of this court in an action of divorce comes from the fact that such action is a case in equity. As the appellate jurisdiction of this court extends to all cases in equity, it also includes all questions in a case in equity upon which a review of the action of the superior court is sought.

The order appealed from is a special order, made after final judgment; but it is none the less an order made in a case in equity, and is equally within the appellate jurisdiction of this court as is the judgment itself. Such an order is made appealable by an express provision of statute (Code Civ. Proc. § 939); and the jurisdiction to entertain the appeal is not dependent upon the amount of money named in the order, any more than it is determined by the amount involved in an action for the foreclosure of a mechanic's lien, or for a street assessment. In *Langan v. Langan*, 83 Cal. 613, 23 Pac. 1084, the court dismissed an appeal from an order allowing \$150 as counsel fees, assigning as the reason therefor that the amount in dispute was too small to give the court jurisdiction; but it does not appear that this provision of the constitution was presented to the court, or considered by it. We are satisfied, however, that the reason there given is not justified by a proper construction of the provision; and, as no rights have grown up by reason of the decision, we feel authorized to disregard it in favor of the proper construction to be given to the constitutional provision. The respondent also cites the case of *Fairbanks v. Lampkin*, 99 Cal. 429, 34 Pac. 101,—an action at law, in which an appeal from the judgment of this court, but in which an appeal from an order after judgment taxing the cost bill at less than \$300 was dismissed, upon the ground that such appeal was an independent proceeding, and that the amount in controversy was not sufficient to give this court jurisdiction,—and urges that, as the constitution makes no distinction in the jurisdiction of this court to entertain an appeal from an order after judgment directing the payment of money, whether such order be in a suit



In equity or in an action at law, the present appeal should be dismissed upon the authority of that case. *Fairbanks v. Lampkin* was, however, decided mainly upon the authority of *Langan v. Langan*, supra, and was based upon the proposition that the amount of money involved in the appeal was determinative of the jurisdiction of this court; but, as we hold that the appellate jurisdiction of this court includes all appealable orders that may be taken in a "case" which is within its jurisdiction, it must follow that the amount of money involved in an appealable order is not the test for determining its jurisdiction. The correctness of the decision in *Fairbanks v. Lampkin* was, moreover, never brought before the court in bank; and, as it established no rule of conduct or of property, we have less hesitation in holding that, to the extent that it is inconsistent with the views here presented, it is not to be regarded as authority. See, also, *Dashiell v. Slingerland*, 60 Cal. 653; *Lord v. Goldberg*, 81 Cal. 596, 22 Pac. 1126, in which principles are laid down at variance with *Fairbanks v. Lampkin*. The motion is denied.

We concur: BEATTY, C. J.; HENSHAW, J.; TEMPLE, J.

McFARLAND, J. I dissent. This appeal involves a distinct and independent order for the payment of money only. Such an order has been held to be a final judgment, from which an appeal lies, irrespective of the general course of the main action for divorce. In *Sharon v. Sharon*, 67 Cal. 195, 7 Pac. 462, this court, speaking of such an order, said: "Nothing remained to be done except to enforce it, and for that purpose an execution might issue and be proceeded on as if the judgment had been rendered in an ordinary action for the recovery of money. Although the pendency of an action for divorce constituted the basis of the order, it was no part of the relief demanded in the complaint;" and, further, quoting from another case: "While it may be true that a petition for alimony and attorney's fees could not be brought as a separate and independent suit, yet it is also true that such an application and order for an allowance pendente lite, especially such a one as is made in this case, is, so far as it affects the rights of this appellant in its consequences, wholly independent of the suit for divorce." Being an independent final judgment for money only, upon which a common execution will issue, I think it should be treated as any other ordinary money judgment, where the whole amount involved is less than \$300; and particularly should this be so since this court in bank so held many years ago, in *Langan v. Langan*, 83 Cal. 618, 23 Pac. 1084, which case has never before been questioned. Certainly, the position taken in this case is not so clearly right as to warrant and overthrow the rule hereto-

fore established; and appeals from money judgments involving less than the minimum prescribed by the constitution are not to be unnecessarily encouraged.

I concur: GAROUTTE, J.

123 Cal. 520

ANGLO-NEVADA ASSUR. CORP. v. ROSS.  
(S. F. 807.)

(Supreme Court of California. Feb. 21, 1899.)

NEW TRIAL—RES JUDICATA—APPEAL—REVIEW.

1. A denial of an ex parte motion for a new trial on the ground that the jury had disregarded the evidence so as to show prejudice is not res judicata, precluding a hearing on a motion, under Code Civ. Proc. § 657, after service of notice, on the ground of insufficiency of evidence, there being no statute authorizing the former motion, though the court may, on the grounds alleged therein, grant a new trial on its own motion, under section 662.

2. Defendant appealing from an order granting a motion for a new trial cannot complain that plaintiff was ordered to pay costs as a condition to the granting of the order.

3. A disposition of a motion for a new trial on the grounds of insufficiency of evidence will be sustained in the absence of a manifest abuse of discretion.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by the Anglo-Nevada Assurance Corporation against William Ross, J. F. Bigelow and others were substituted as plaintiffs. From an order granting plaintiffs' motion for a new trial, defendant appeals. Affirmed.

Geo. W. Towle, Jr., for appellant. R. H. Countryman, for respondents.

GRAY, C. This is an appeal from an order granting plaintiffs' motion for a new trial. The action is based on a promissory note. On the trial the jury returned a verdict in favor of defendant, and was discharged. Thereupon, without notice, counsel for plaintiffs moved the court to vacate and set aside said verdict, and to grant a new trial in said action, upon the ground that there had been such a plain disregard by the jury of the evidence in the case as to satisfy said court that said verdict was rendered under the influence of passion and prejudice, and upon the further ground that there had been such a plain disregard by the jury of the instructions of the court as to satisfy the court that the verdict was rendered under a misapprehension of such instructions. The court denied this motion, and thereafter the plaintiffs served notice of intention to move for a new trial on the grounds of insufficiency of evidence, that the verdict is against law, and for errors of law occurring at the trial. The court made an order granting this motion upon the payment by plaintiffs of the sum of \$76.50 costs.

I think the first motion of plaintiffs for a

new trial was made without any express authority therefor to be found in the statutes, and should be treated as nugatory, or at best as merely calling the attention of the court to the right existing under section 662 of the Code of Civil Procedure to order a new trial on the court's own motion. It will be observed that the grounds mentioned in the first motion of plaintiffs for a new trial are those contained in said section, that no preliminary notice of intention had been served, and that none of the grounds for a new trial contained in section 657 of the Code of Civil Procedure are mentioned in such motion. So that really the only motion for a new trial authorized by the Code of Civil Procedure that the plaintiffs made was their last motion, which was based on the grounds mentioned in section 657 of said Code, and conformed to the other provisions of the Code respecting motions for a new trial. Defendant's objection, therefore, that the court's action on the first motion was *res judicata*, and brings the case within the rules laid down in *Egan v. Egan*, 90 Cal. 15, 27 Pac. 22, and *Thorne v. Finn*, 69 Cal. 251, 10 Pac. 414, is deemed to be not well taken.

The condition that plaintiffs pay a certain amount as costs, attached to the order granting a new trial, is not a thing of which the defendant can be heard to complain, because it is not a condition imposed upon him; nor can it be said to show in any way that the act of the court in granting a new trial was erroneous. *Brooks v. Railway Co.*, 110 Cal. 173, 42 Pac. 570.

The disposition of a motion for a new trial on the ground of insufficiency of the evidence to sustain the verdict is a matter which rests in the sound discretion of the trial court, and this court has universally refused to interfere except where it manifestly appears that such discretion has been abused. One of the grounds of the motion for a new trial being the insufficiency of the evidence to justify the verdict, I cannot say, after an examination of the evidence, that the court did not act within the limits of its discretion in granting a new trial. I therefore advise that the order appealed from be affirmed.

We concur: HAYNES, C.; BRITT, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

123 Cal. 500

HALL v. GLASS et al. (S. F. 923.)

(Supreme Court of California. Feb. 18, 1899.)

CHattel Mortgage — Validity — Duration of Term — Consideration — Insolvency of Mortgagor — Declaration of Homestead — Foreclosure — Judgment.

1. A chattel mortgage on crops to be grown "during the continuance of a mortgage" is sufficiently definite as to the term, there being,

under the decisions of the court, a limit to the continuance of such a mortgage as against subsequent purchasers or incumbrancers.

2. A certain chattel mortgage on crops to be grown provided that the mortgagor should carefully tend and take care of the same, and harvest them for the benefit of the mortgagee. Thereafter, before the crops of a certain year were planted, the mortgagor went into insolvency, and the debt was, in proceedings under the insolvency act, discharged. *Held*, that the services to be rendered by the mortgagor were not the debt which the mortgage secured, so that there was no debt to sustain any lien which might arise when the crops began to have an existence, the mortgage providing that, on failure of the mortgagor to perform his part of the contract, the mortgagee could enter, and take necessary measures to protect the crops.

3. A chattel mortgage securing a debt on crops to be grown was not rendered invalid by declaration of homestead made by the mortgagor's wife after the mortgage, and before the crops were planted.

4. In an action to foreclose a chattel mortgage on growing crops, where the rights of the wife of the mortgagor were protected in the decree, and she was a party to the suit, and answered as the mortgagor's wife, failure to make a specific finding that she was such wife was not prejudicial error.

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county.

Action by Ernest E. Hall against Albert W. Glass and others. Judgment for plaintiff, and defendants Albert W. Glass and Jane Roe Glass appeal. Affirmed.

W. S. Tinning, for appellants. Snook & Church, for respondent.

PRINGLE, C. Appeal from judgment, with bill of exceptions. Action brought to foreclose a chattel mortgage upon crops growing and to be grown. Mortgage made to secure the payment of a note for \$1,550, bearing date January 24, 1895, payable one day after date, and also such other sums as the mortgagee might advance to the mortgagor during the continuance of the mortgage, provided that such advances shall be at the exclusive discretion and option of the mortgagee. The mortgage covers "all the crop and products of whatever nature which are now standing or growing, or which shall or may hereafter at any time be sown, planted, cut, or harvested by the said party of the first part during the continuance of this mortgage, on the following described lands and premises, and every part and portion thereof, to wit." Now follows description of two parcels of land, one owned by the mortgagor, A. W. Glass, and known as the "Glass Ranch," and the other held by him under lease. "This mortgage is intended to cover all the land farmed by the said A. W. Glass." The mortgagor covenants that "he will carefully tend, take care of, and protect the said crop while growing and until fit for harvesting, and then faithfully and without delay harvest, thresh, clean, and sack all the grain of every description raised upon said premises, and bale all the hay raised thereon in bales of approved and merchanta-



ble sizes, and put all the other products raised upon said premises in shape for market, and immediately deliver all said products into the possession of the party of the second part in the town of Pleasanton," etc. A. W. Glass, the mortgagor, filed his petition in insolvency on October 23, 1895, and was discharged from his debts on March 11, 1896. "Prior to the filing of the petition in insolvency, but subsequent to the making of note and mortgage," L. B. Glass made a declaration of homestead upon the Glass ranch, and the same was set apart as homestead by the insolvency court by order of December 7, 1895. A. W. Glass has always continued in possession of the Glass ranch. In the foreclosure proceedings a receiver was appointed to take possession and manage the crops of the year 1895; and another receiver was appointed to take possession and manage the crops of 1896. A decree was entered in favor of the plaintiff, directing the receivers to apply the proceeds of the crops of those two years in their hands towards the payment of the amount found due to plaintiff. No other relief is granted. Appeal from the judgment is taken by A. W. Glass and L. B. Glass, who answered, as the wife of A. W. Glass. The defendant Veale, sued as sheriff of Contra Costa county, and appointed assignee in insolvency of A. W. Glass, does not appeal. There is no contest over the proceeds of the crop of the year 1895. The contention of the appellants is that the mortgage is not a lien upon the crop of 1896.

The first point made by the appellants is that the crops to be grown after 1895 are not designated with sufficient certainty to create a lien thereon, against the homestead right of the appellants or the insolvency of A. W. Glass. There is no serious contention that a chattel mortgage cannot cover crops unplanted. That point was directly decided in *Arques v. Wasson*, 51 Cal. 620. The contention is that the subject of the mortgage must be clearly defined, and that this mortgage does not define same with sufficient certainty, there being no defined limit to the continuance of the mortgage during which the lien is to continue. In support of this position, counsel cite several cases from Iowa and one from Nebraska. The leading case in Iowa is *Pennington v. Jones*, 57 Iowa, 37, 10 N. W. 274. The mortgage covered sundry acres of grain of different kinds, "to be sown and raised on the land leased of Barber McDowell, and now occupied by said W. A. McDowell (the mortgagor), lying and being in section 17," etc. The court held the mortgage invalid, because it did not state "that all the crops to be grown for any specified number of years were mortgaged," saying that "before a mortgage on crops to be sown or planted can be regarded as valid, as against third persons, the year or term the crops are to be grown must be stated." In *Muir v. Blake*, 57 Iowa, 622, 11 N. W. 621, the mortgage said: "All the crops raised by me in any part of Jones coun-

ty for the term of three years." The court held that this was a "roving description, with nothing in the way of identification to suggest inquiry where the crops may be found except the body of the county." In *Eggert v. White*, 59 Iowa, 465, 13 N. W. 426: "All and the entire crop of flax and wheat and other grain or produce raised on the east half of \* \* \*." Held invalid, "because the year the same was to be grown is not stated." In *Cole v. Kerr*, 19 Neb. 554, 26 N. W. 598: "Seventy-five acres of corn to be planted, fifty acres of broom corn to be planted, tended, and delivered in June," etc. Held, that "to be planted" would apply to all corn "which might thereafter be found in Adams county." In all of these cases there are elements of uncertainty, either in the place or time of the planting. In the present case the description of the premises is specific. The alleged element of uncertainty is the term "during the continuance of the mortgage." The appellants contend that the provision in the mortgage that it is intended to secure any future advances which mortgagee may make to mortgagor introduces an element of uncertainty, in this: that by such advances the mortgage may be kept alive indefinitely beyond the statutory time of the note. There is, however, under our decisions, a limit to the continuance of a mortgage as against subsequent purchasers or incumbrancers. In a line of cases in this court, beginning with *Lord v. Morris*, 18 Cal. 482, it has been well settled that subsequent purchasers or incumbrancers may rely upon the apparent expiration of the mortgage, and will hold against a prior mortgage in spite of an extension or renewal of the debt beyond its statutory life. By the same reasoning, subsequent advances, although contracted for by the mortgagor, cannot extend the apparent maturity of the mortgage against subsequent purchasers. This rule, in reference to future advances, as laid down in the cases, is a limit to the life of a mortgage. It is said in *Tapia v. Demartini*, 77 Cal. 387, 19 Pac. 641, that, where a mortgage is given to secure future advances, the mortgagee cannot safely make such advances where he has actual notice of a sale or incumbrance made by the mortgagor. And in *Jones, Chat. Mortg.* (3d Ed.) § 97, it is said: "The general rule is that a prior mortgagee is affected only by actual notice of a subsequent incumbrance, and not by constructive notice; but there are numerous authorities which hold that if the mortgagee has the option to make the advances or not, as he chooses, the mortgage, as to each advance made upon it, is to be regarded as a fresh mortgage, and is subject to the lien of any incumbrance which has been duly recorded at the time the advance is made, whether the mortgagee has actual notice of it or not." In view of these authorities, the term "during the continuance of this mortgage" has a defined meaning. It cannot be said, as claimed by the appellants, that the mortgage could be continued ad in-

finium. In any event, the mortgage is good to the extent of the crops planted during the life of the note. The uncertainty of description insisted upon by appellants is in the doubtful period beyond the life of the note. There can be no question that the mortgage may be good to the extent of what is certain and definite, even if it be bad for the rest. In one of the cases cited by the appellants (*Luce v. Moorehead*, 73 Iowa, 499, 35 N. W. 598), it was said: "An instrument may be valid as to the property sufficiently described, and void for the uncertainty of the description of other property." This view of the present case is sufficient to sustain the ruling of the court below, which extends only to the crops of the first two years.

Another contention of the appellants is that, the proceedings in insolvency having been instituted in 1895, there was then no lien upon the crops of 1896 which were then unplanted, and, the debt being discharged by the insolvency, there was no debt to sustain any lien to arise thereafter when the crop began to have an existence. They cite the case of *Mayer v. Taylor*, 69 Ala. 403, to the effect that the lien actually attaches only when the property comes into existence. But the case recognizes the equitable lien attaching to the potential existence, by virtue of which the mortgage of an unplanted crop is valid. The case holds that this equitable mortgage was superior to a subsequent mortgage made after the crop was planted. And our case of *Arques v. Wasson*, supra, rests upon the same ground,—that there is in such cases a potential existence which sustains the lien of the mortgage. After this lien is created, insolvency proceedings cannot affect the debt to the impairment of the lien. In *Arques v. Wasson* this lien prevailed against an attachment and execution. In *Mayer v. Taylor* it prevailed against a mortgage made after the crop was planted. Certainly, proceedings in insolvency have no stronger legal or equitable force than purchasers for valuable consideration. But, say the appellants, this is a contract for continuing personal services; and they cite the case of *Mooney v. Detrick*, 85 Cal. 549, 26 Pac. 280, which holds that the debt due by one who engages the time and services of another is discharged by the insolvency. Conceding, without deciding, that the converse of this is sound,—that a covenantor is released from his contract for service by insolvency,—yet the personal services in this case are not the debt or of the essence of the debt. The covenant of this mortgage that the mortgagor should tend, protect, and take care of the crop, and deliver it to the mortgagee, is merely collateral to the real indebtedness, and for the better enforcement of the lien. By virtue of the debt and the lien, the mortgagee is entitled to hold all the crops grown and tended by the mortgagor; and the mortgagor covenants to tend and protect the crops, and deliver them to the mortgagee. That his services in that respect are not the debt which the mortgage secures,

nor of the essence of the debt, is made clear by the fact that provision is made in the mortgage that, in case of his breach of this covenant, the mortgagee might enter upon the premises, and take all measures necessary for the protection of the crops and products, and expressly appointing the mortgagee the attorney of the mortgagor for that purpose. The covenants in that respect are very significant: "And the party of the first part does hereby covenant and agree to and with the said party of the second part, its successors and assigns, that he and they will carefully tend, take care of \* \* \*; that, in default of any or either of the above acts to be done by the said party of the first part, the party of the second part, his successors or assigns, may enter into or upon the said premises, and take all measures necessary for the protection of said crops or products or his interest therein, etc. \* \* \* And the said party of the first part does, for the purpose aforesaid, make, constitute, and appoint the said party of the second part, or his successors or assigns, his true and lawful attorney irrevocable, with full power to enter upon said premises and take possession of said crops and take care of, protect, thresh, clean, and sack or bale the same in case of any default on the part of the covenants herein contained." It would be unreasonable to hold that a release of the mortgagor from these subsidiary services would destroy the lien which is so carefully guarded against any injury to arise from the absence of the subsidiary services. And the case is stronger, if possible, against an insolvent who himself institutes proceedings to disqualify himself.

Substantially the same argument is urged by appellants in reference to the declaration of homestead made after the mortgage, and before the crop of 1896 was planted. But the argument has no greater force in favor of a homestead right than in favor of a sale for value or proceeding in insolvency. Establish the fact that there is sufficient potential existence in the coming crops to sustain a legal or equitable lien upon them, and the lien must prevail against subsequent purchasers of every kind; otherwise, it is no lien at all. The objection made in all the cases to the descriptions is that they are not sufficient to impart notice. In one of the cases cited by appellants the certainty of description required is said to be "sufficient if it be such as to enable third parties, by inquiries, which the instrument itself indicates and directs, to identify the property covered by it." *Muir v. Blake*, 57 Iowa, 665, 11 N. W. 623. As the alleged element of uncertainty in this case was the continuance of the mortgage, the fact that it was in force in 1895 and 1896 was within the knowledge of one homestead claimant, and easily ascertained by the other.

Appellants insist that there is error in not making a specific finding that L. B. Glass is the wife of A. W. Glass. But her rights were protected. She was a party to the action.



She answered as the wife, declaring herself to be his wife. It is found that she made a declaration of homestead upon his property; and she set up in her answer the homestead which she had declared upon the land of her husband. Under these circumstances, the absence of a special finding has done her no harm.

Criticism is made of the form of the decree, the point of objection being that it contains the usual clause that the defendants and those claiming under them are barred and foreclosed of all equity of redemption in or claim to "the mortgaged property," but that no sale of property is ordered. The operative words of the decree are that the moneys which have come into the hands of the receivers from the sales of the crops of 1895 and 1896 be applied towards the payment of the ascertained debt. These sales appear to have been made by the receivers under orders of court presumably correct, as no objection to them appears in the records. The clause by which the defendants are barred and foreclosed of any right of redemption "in the mortgaged property" cannot be appropriately applied to any future crops not sold or ordered to be sold, but may properly be referred to what have been sold by the receivers, and the proceeds of which are ordered to be applied towards the payment of the debt. The respondent, in his points and authorities, declares that he "is satisfied with the decree"; and, as there is nothing in the decree reserving any right to further proceedings in the action, the jurisdiction is exhausted, and the clause in question, if error, is not prejudicial. I advise that the judgment be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

123 Cal. 474

VAN ALLEN et al. v. FRANCIS et al. (S. F. 740.)

(Supreme Court of California. Feb. 17, 1899.)

CONDITIONAL SALES—RIGHT OF RECAPTION—NOTES  
—SUBSEQUENT PURCHASER—NOTICE—ESTOPPEL.

1. An agreement to sell provided that on the payment of the price, or the execution of a mortgage, the seller was to execute a bill of sale, in the meantime title to remain in him, and on default in any payment he had the right of recaption. *Held*, that the sale was a conditional one, and this though the promise to pay was absolute, and notes for the price were given.

2. A transferee of property sold conditionally cannot object to recaption by the seller because he failed to restore the unpaid notes given for the price by the buyer, the transferee not being a party to them.

3. Where the buyer of goods, sold conditionally, incorporated, and transferred them to the corporation, which, not knowing of the seller's right of recaption, paid several of the purchase-price notes, the action of the seller in accepting payment while knowing of the in-

corporation did not estop him from retaking the goods, he having a right to suppose the payments were made with knowledge of the contract.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by G. W. Van Allen and others against D. B. Francis and others. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

Gordon & Young, for appellants. Selden S. & Geo. T. Wright and Geo. C. Sargent, for respondents.

HENSHAW, J. Plaintiffs sued defendants in conversion. The facts were stipulated, and judgment upon them was given for plaintiffs. Defendants appeal.

Plaintiffs had entered into a contract with one William M. Langton, the essential terms of which are as follows: "Van Allen and Boughton hereby agree to sell, at the sum of seventeen hundred and fifty dollars, to William M. Langton," a printing press. "\* \* \* William M. Langton hereby agrees to buy said press as above specified, and to pay therefor, on receipt of press, cash three hundred and fifty dollars, and the balance in payments evidenced by seven notes bearing legal interest, seven per cent., as follows: \* \* \*." These promissory notes were each for \$200, and were payable 3, 6, 9, 12, 15, 18, and 21 months, respectively, after the receipt of the press. "It is also agreed that the deferred payments above mentioned shall be secured by first mortgage on the property herein contracted to be sold. It is further agreed that the title to said property shall remain in the sellers until such mortgage be given, or until the purchase price and interest have been fully paid; and, in case of any default in any of the terms of this contract, the sellers shall have the right to take immediate possession of said property. Upon the execution and delivery of the aforesaid mortgage, or the payment of the purchase price in cash, Van Allen and Boughton agree to execute and deliver a good and sufficient bill of sale of the above-described property." Langton received the press and made the cash payment provided for, and also delivered the notes. On July 9, 1891, Langton was in default. The William M. Langton Printing Company was then organized for the purpose of carrying on the business formerly conducted by Langton. This was a corporation, and shares in it were subscribed and paid for by people who had not been previously connected with Langton in the conduct of the business. Langton transferred and assigned "all his right, title, and interest in and to the property" in question to the corporation. The property was delivered to the corporation, which "had no knowledge nor notice that said contract was in existence in regard to said press and said property, but only had knowledge that it appeared from the books of said William M. Langton

that an indebtedness of fourteen hundred dollars was due to Van Allen and Boughton." Van Allen and Boughton had full knowledge and notice of the organization and existence of the corporation to carry on the business formerly conducted by Langton. The corporation paid and discharged the moneys due upon the three promissory notes made by Langton maturing, respectively, three, six, and nine months after receipt of the press. No demand was made by plaintiffs for a mortgage upon the property, as contemplated by the contract. In January, 1892, the corporation assigned and conveyed to Hansbrow all of its property for the benefit of its creditors. Before the commencement of this action, Hansbrow assigned, sold, and conveyed the press to defendants. Neither the corporation nor Hansbrow nor the defendants had any knowledge of any claim of the plaintiffs to be the owners of the property.

The nature of the contract between plaintiffs and Langton first invites consideration. By appellants it is insisted that it shows an absolute sale of the property; by respondents, that the contract is one of conditional sale. We think the latter construction is the true one. Conditional sales are recognized in this state to the fullest extent (*Putnam v. Lamphier*, 36 Cal. 151; *Kohler v. Hayes*, 41 Cal. 455; *Hegler v. Eddy*, 53 Cal. 597; *Sere v. McGovern*, 65 Cal. 244, 3 Pac. 859; *Lowe v. Woods*, 100 Cal. 408, 34 Pac. 959); and it is well settled that even bona fide purchasers from the person to whom personal property is delivered under an executory contract of sale get no valid claim to the property (*Palmer v. Howard*, 72 Cal. 293, 13 Pac. 858). The rules governing, or at least aiding, the construction of contracts such as this have been succinctly formulated. In Lord Blackburn's treatise on the Contract of Sale two rules are laid down: First, that where, by the agreement, the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property; second, that where anything remains to be done to the goods for ascertaining the price, such as weighing or testing, this is a condition precedent to the transfer of the property. *Blackb. Sales*, 152. *Benjamin on Sales* adds a third rule which is generally recognized: Third, where the buyer is by contract bound to do anything as a condition either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer. *Benj. Sales*, par. 320. The question whether or not a given contract is or is not a contract of conditional sale is to be determined wholly by the intent of the parties, expressed in and deducible from the contract itself. In arriving at the solution of the question the whole contract is to be considered, and no detached term or condition is to be given prominence or effect over and above another. So that, if

the legal effect of the whole contract be to establish a mortgage or a lease or an option to purchase between the parties, the mere negation or denial in another part of the contract of that legal effect will not control. But if, upon the other hand, the intent be clear that title shall not pass until the performance by the vendee of a condition precedent or concurrent, such a contract becomes a conditional sale, and not repugnant to any principle of justice or equity, even though possession of the property be given to the proposing purchaser. *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51; *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448. Looking at the terms of this agreement either singly or collectively, it is quite clear that one and all contemplate that there shall be no transfer of title to Langton saving upon the performance by him—First, either of the condition precedent, the payment of the moneys; or, second, upon performance of the condition concurrent, the execution of a mortgage. It is not a contract under which Van Allen and Boughton have sold, as was the case of *Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, where the determination that the contract was a sale absolute was rested mainly upon the use of this language, but it is a contract by which Van Allen and Boughton agree to sell. Langton agrees to buy, and to pay upon receipt of the press \$350 in cash, and to make other payments at stipulated times. Promissory notes are given. But under this contract the question cannot be said to arise as it arose in *Heryford v. Davis*, 102 U. S. 235, as to whether or not the notes were received in payment of the property, for this contract expressly declares that the payments to be made shall be evidenced by the notes, thus negating the idea that the notes themselves constituted payment. Deferred payments were to be secured by mortgage, a right to the vendor which he could waive, and which he did waive; but in this regard title was to pass only upon the giving of the mortgage, and this Langton never gave. It cannot successfully be argued that the circumstance that Langton was to give a mortgage demonstrates the fact that title to the property must have passed to him, because it is clear from the context that the giving of the mortgage and the passing of the title were interdependent and concurrent. The contract further provides that the title shall remain in the seller until the mortgage be given, or until the purchase price, with interest, has been fully paid. Unless there be found in the contract some term, clause, or condition nullifying or modifying this clear provision, this language in itself is of controlling force, for it is of the very essence of a contract of conditional sale that the title shall so remain in the seller until compliance with the condition. Again, in case of default the right of recaption is reserved to the seller, but there is no condition for the sale of the property, and the payment of any surplus over to the purchaser, —a condition which, when found, is always



strongly persuasive that the contract is one of absolute sale, with a reserved lien or mortgage back. *Palmer v. Howard*, 72 Cal. 293, 13 Pac. 858. Finally, provision is made for the execution of a bill of sale to the property upon delivery of the mortgage or payment of the purchase price, itself a circumstance indicative of the conditional nature of the transaction. See *Kohler v. Hayes*, 41 Cal. 455, and *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448. The significance which appellants seek to attach to the use of the phrase "purchase price" does not, we think, belong to the language. The declaration is that the title to the property "shall remain in the sellers until such mortgage be given, or until the purchase price \* \* \* has been fully paid." A sale is a contract by which, for a pecuniary consideration called a "price," one transfers to another an interest in property. If there were not in this contract a purchase price, it could not be a sale, either absolute or conditional. "Sale" is a word of precise legal import. \* \* \* It means at all times a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay the seller for the thing bought and sold." *Williamson v. Berry*, 8 How. 495.

Nor can appellants' further contention be sustained, namely, that the fact that Langton's promise to pay is absolute is determinative and conclusive that the sale itself was absolute. In *Palmer v. Howard*, supra, a like circumstance is mentioned, but not discussed. In *Rodgers v. Bachman*, supra, the consideration is adverted to, but, while such a matter may be a circumstance in determining the nature of the contract, it is a circumstance, and no more. It never has been held to be a determinative characteristic, and it cannot be so held without undoing all the law upon the question. There can be no sale at all without an agreement, express or implied, to pay. Lacking such a promise, the contract is a mere option. *Hunt v. Wyman*, 100 Mass. 198. If the circumstance that the purchaser's promise to pay was absolute made the contract an absolute sale, the determination of the nature of such contracts would be so simple a matter as to have rendered entirely superfluous the vast amount of legal research and acumen that have been displayed by all the courts of this country and England in construing them. In truth, the purchaser's promise is usually an absolute promise. It was such a promise in *Putnam v. Lamphier*, 36 Cal. 151; *Parke & Lacy Co. v. White River Lumber Co.*, 101 Cal. 37, 35 Pac. 442; *Dunn v. Price*, 112 Cal. 46, 44 Pac. 354; *Hervey v. Locomotive Works*, 93 U. S. 664; *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51; *Preston v. Whitney*, 23 Mich. 260; *The Marina*, 19 Fed. 760; *Quinn v. Machinery Co. (Wash.)* 31 Pac. 866. Many other cases could be cited where the promise was absolute, and where the sale was held to be conditional, or, if found to be absolute, the finding was never placed upon the ground

that the absolute promise determined the question.

It is urged that plaintiffs may not maintain this action without restoration first made of the unpaid promissory notes still in their possession. If it were debatable whether or not the notes were taken in payment, either absolute or conditional, as was the case in *Segrist v. Crabtree*, 131 U. S. 287, 9 Sup. Ct. 687, it might well be argued that, as the plaintiffs were not entitled both to the property and to the purchase price of the property, they would be put to their election, and, if they insisted upon recaption of the property, they could only take it after surrender of the notes; or, upon the other hand, as was discussed in *Parke & Lacy Co. v. White River Lumber Co.*, 101 Cal. 37, 35 Pac. 442, if they brought an action to recover upon the notes, or to recover the purchase price of the property, it would be in ratification of the sale, and they would not be allowed to maintain a subsequent action for the recovery of the property itself. In this case the plaintiffs insist upon a recovery of the property. As these defendants are in no way held upon the notes given by Langton, it cannot matter to them that they are still unpaid, in the possession of plaintiffs. Had the plaintiffs sought to take the property while in the possession of Langton, he could have been heard to insist that they must first deliver to him his promissory notes; but with Langton's rights in this regard defendants have nothing to do, after a determination that the notes were neither given nor received in payment of the purchase price.

The further contention of appellants that plaintiffs are estopped, by their conduct, from asserting their rights under the contract, cannot be upheld. The facts upon which appellants rely in support of this estoppel in pais are disclosed by the stipulation. They amount to no more than this: that Langton was in default under his contract of conditional sale, that a corporation was organized for the conduct of Langton's business, and that to this corporation Langton conveyed his title and interest in the printing press conditionally sold to him. The corporation had no knowledge nor notice that the contract was in existence, but merely had knowledge that it appeared from the books of Langton that an indebtedness of \$1,400 was due to the plaintiffs. The plaintiffs had knowledge of the organization and existence of the corporation for the purpose of conducting the business which had formerly been Langton's. The corporation paid to the plaintiffs three of the Langton notes as they matured. Plaintiffs were guilty of no affirmative acts of misrepresentation, nor of any negative acts of concealment. They did nothing but to receive the moneys from the corporation as those moneys became due. It is not to be supposed that Langton misrepresented to or concealed from the corporation the true condition of his business; but, even if he did so,

it is still less to be supposed that the plaintiffs were parties to the deception. They had the unquestioned right to suppose that the corporation took from Langton with full knowledge of the contract, and the subsequent payment by the corporation to them could have served only to strengthen that belief. The case, then, lacks several of the essential elements necessary to the proof of an estoppel in pais. Plaintiffs made no admissions with intent to deceive, or with such carelessness as to amount to constructive fraud. The corporation, even if destitute of knowledge of the true state of its title, was certainly not destitute of the means of acquiring such knowledge, for it could have learned the facts by inquiry either from Langton or the plaintiffs. Still more, it is not shown that the corporation relied directly upon any declarations or admissions of these plaintiffs. The asserted estoppel is all of these particulars comes far short of the oft-affirmed requirements of *Boggs v. Mining Co.*, 14 Cal. 279. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.

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123 Cal. 587

AGAR et al. v. WINSLOW et al. (S. F. 916.)  
(Supreme Court of California. March 2, 1899.)

ELECTION OF REMEDIES—EFFECT OF ELECTING  
WRONG REMEDY—LANDLORD AND TENANT—  
EFFECT OF EJECTMENT AS EVICTION.

1. Where a lessor mistakes his remedy, and brings ejectment against his lessee, such action is not an election of remedies which will bar a subsequent action for unlawful detainer.

2. The bringing of ejectment by a lessor against a lessee does not amount to an eviction, relieving the latter from the obligation to pay rent, where the lessor had advised tenants of the property to continue to pay rent, pending the suit, to their landlord, who was a sublessee, and who, although he refused to pay rent to the lessee, on account of said suit, had given security for such rent.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Agnes M. Agar and another against James Winslow and others. From a judgment against defendant Winslow, and from an order denying a new trial, he appeals. Affirmed.

Wm. H. Chapman and E. P. Cole, for appellant. Freeman & Bates, for respondents.

GRAY, C. This is an unlawful detainer case. The defendant Winslow appeals from a judgment against him for the possession of the property, and for \$1,000 rents unpaid, so far as said judgment awards to plaintiffs said sum of \$1,000, and from an order denying said defendant's motion for a new trial.

Joseph Macdonough, being the owner of the premises in controversy, made a will in which he appointed the plaintiffs herein as his executors and trustees. Thereafter, in 1895, he died, and plaintiff John G. Agar was appointed by the court as sole executor of his said will; and on October 15, 1895, he alone, both as trustee and executor, leased said premises to Winslow for the term of five years from October 15, 1895, at the monthly rent of \$250, payable in advance. This rent was paid by Winslow to Agar for all the time up to and including July 15, 1896, since which time no rent has been paid to plaintiffs. The plaintiffs herein began this suit on October 20, 1896, and, after stating in their complaint the foregoing undisputed facts, say that the said premises were by the superior court distributed to the plaintiffs on May 12, 1896, to be by them held in trust according to the terms of the will; that since the date of such distribution they have been entitled to receive the rent due for such premises; that on October 9, 1896, plaintiffs served a notice on defendants, informing them of the decree of distribution, and that because of such decree Winslow thereafter had held said premises as ten-

ant holding over from month to month under said lease, that there was then due under said lease \$750, and that they pay that sum within three days, or quit and surrender possession of the property; and that, defendants having done neither of these things, plaintiffs demand restitution of the premises, and judgment for the \$750, together with \$250 for each month thereafter that defendants shall withhold possession of said premises. The defendant Winslow in his answer denies that he is a tenant holding over after the expiration of the lease, or that the lease terminated with the entry of the decree of distribution, but, on the contrary, says that the said lease is in full force and effect for the term of five years from July 25, 1895. The answer then alleges an eviction from the premises of defendant by plaintiffs on the 13th day of July, 1896; that Winslow had subleased to one George Sesnon, and that Sesnon had again subleased to the other defendants; that plaintiffs on the said 13th day of July, 1896, wrongfully brought an action against defendants in ejectment to recover rent and the possession of the said premises, on the ground that the said lease had expired; that by said action defendant's rights of possession had been slandered, and he had been unable to collect any rents since the said 13th day of July, 1896; and that he had been harassed and disturbed in his possession thereby. A trial was had, and the court found all the allegations of the complaint to be true, and that there had been no eviction by plaintiffs, but that plaintiffs did sue defendants in ejectment on July 13, 1896. The defendant, to support his answer, put in evidence the pleadings and papers on file in the case of Agar against Winslow et al., begun in the superior court July 13, 1896. The complaint in that case shows that it was an action to recover possession of the same premises involved in this suit, and for the value of the rents, issues, and profits, on the ground that the lease (which is the same lease mentioned in this case) was void, and that the defendants were trespassers. It appeared on the trial that this ejectment suit was still pending, and that Sesnon, to whom Winslow leased the premises, was a party defendant in the ejectment suit, but is not a party to this suit. It further appeared at the trial that on the advice of plaintiffs the tenants in possession paid to their lessor, Sesnon, all rents due from them, and that Sesnon had refused to pay Winslow, because, as he alleged, of the possibility of the lease from Agar to Winslow being declared void or forfeited, but Winslow had, however, taken no legal proceedings for the collection of the rent from Sesnon, and that Sesnon was away on the high seas at the time of the trial.

On this condition of the case the appellant contends: "(1) That the remedies of ejectment and unlawful detainer are inconsistent, and that, having chosen their option to bring ejectment, plaintiffs' election is final, and they cannot pursue the other remedy of unlawful



detainer." The rule contended for by appellant is stated by the court of appeals of New York in *Rodermund v. Clark*, 46 N. Y. 354, as follows: "Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts." Before one can exercise an option or preference between two things, both those things must have an actual existence. The defendant therefore cannot defend in this action of unlawful detainer on the theory that plaintiff, in beginning the suit in ejectment, exercised his right of election between two remedies, unless he makes it appear that both these remedies were open to plaintiff. If plaintiff was mistaken, and undertook to avail himself of a remedy that he was never entitled to, this does not prevent him from subsequently availing himself of a remedy that he is entitled to under the facts of the case. *Bunch v. Grave*, 111 Ind. 357, 12 N. E. 514. The defendant should have shown by the allegations of his answer and his evidence that the remedy of ejectment was available to plaintiffs. *Mackubin v. Whetcroft*, 4 Har. & McH. 135. On the contrary, the facts appearing in defendants' answer, as well as in the evidence at the trial, tend to negative the idea that plaintiff had any right to institute the ejectment suit. The action of ejectment is always based on the theory that the defendant is wrongfully in possession, and a trespasser on the premises sought to be recovered. It appears in this case that Winslow went into possession of the premises under a lease from plaintiff, and that his rent was paid in advance to a time subsequent to the date of the commencement of the ejectment suit. The defendant in his answer alleges that this lease is in full force and effect. If that be true, then the defendant was rightfully in possession, and certainly the action of ejectment would not lie; but even ignoring this affirmative statement of the answer, and treating the lease as having been terminated by the decree of distribution, the defendant has nevertheless remained in possession, paying rent to plaintiff, entitling him to hold the possession, as against plaintiff, to a date after the commencement of the ejectment suit, and creating a tenancy from month to month at the rent reserved in the lease. Civ. Code, § 1945. There was no notice given to terminate this lease until long after the beginning of the ejectment suit; nor is there any fact alleged or proved to show that the relation of landlord and tenant ever ceased to exist between plaintiffs and defendant up to the giving of the notice to pay rent or quit, just before the commencement of the present action. I have examined all the case cited in appellant's brief to show that, where a party elects between inconsistent remedies, he is limited to the one he first seeks to avail himself of, and find, in all those cases where they refer to that doctrine at all, it appeared that the first remedy sought was a real remedy available to the plaintiff. *Manufacturing Co. v. Ewing*,

109 Cal. 356, 42 Pac. 435, is a case of that kind, and is in consonance with all the other cases cited on the subject. No case has been called to my attention, nor do I believe that any can be found, which holds that a person is estopped from pursuing a remedy that he is entitled to, because he has endeavored to avail himself of another remedy that he never was entitled to. If this were the rule, then a mere mistake of judgment would result in depriving one of valuable rights. In the language of respondents' brief: "As we understand it, where an election is claimed the facts must be such that the rights of the parties may be mutual. In other words, the circumstances must be such that each may be bound by the election, and, if one of them is not bound, the other cannot be. Plaintiffs cannot be bound to treat defendant as a trespasser while defendant retains the right to compel them to treat him as a lessee." It would therefore seem that the ground for a reversal of the judgment, based on the principle that where a party is entitled to two inconsistent remedies his election between them is irrevocable, is not well taken in this case, because it does not appear that plaintiffs were entitled to the first remedy sought for by them.

The next and only remaining ground of reversal contended for by defendant is stated by him as follows: "(2) That the acts of plaintiffs were such as to evict defendant, and that the rent was suspended, and hence they could not maintain this action while the eviction continued." Appellant's principal contention as to this eviction is that the ejectment suit had the effect to prevent his subtenants from paying their rent. The finding of the court on this subject, which is fully sustained by the evidence, reads as follows: "That, notwithstanding the commencement and pendency of the action hereinbefore described, the defendants Siebe, Waltz, Christensen, and Jorgensen have continued in the full and entire possession and enjoyment of all the premises described in the plaintiffs' complaint, and have, with the consent and upon the advice of plaintiffs, paid to their lessor, George H. Sesnon, all rents accruing and due from them to him, according to the terms of their lease from him; and the plaintiff has not in any way interfered with the collection of the rents from any tenant or subtenant of the defendants, but, on the contrary, has at all times advised such payments to be made, and the rents have been paid, as above set forth, to the said George H. Sesnon, who has received monthly the rents accruing to him from his said tenants, Siebe, Waltz, Christensen, and Jorgensen; but he has not paid the same, or any part thereof, to said Winslow, nor has said Winslow taken any proceedings whatever for the collection of the same." It also appears from the evidence in the case that Winslow has a bond or contract from Sesnon in the sum of \$2,500, executed by three sureties, for the payment of the rent by Sesnon. I fully agree with the learned counsel for appellant that it is not neces-

sary that there should be an actual ouster, to constitute an eviction, but that any act of the lessor which results in depriving his lessee of the beneficial enjoyment of the premises constitutes an eviction. To this effect is the case of *Levitzky v. Canning*, 33 Cal. 299, and some other cases cited by appellants. But it appears that Winslow has not been deprived of the beneficial use of the premises, at least by any act of plaintiffs, as they have advised the payment of the rent, and the rent in full has actually been paid by the subtenants to Winslow's lessee; and though Winslow has not received it from Sesnon, his lessee, he has a right of action against both him and his sureties for it, and, whatever may be the result in the case at bar, he can collect his rent, if his lessee and sureties are able to respond to a judgment. It will be seen by an examination of the case of *Levitzky v. Canning*, supra, that the acts complained of as amounting to an eviction had the effect to make the tenants of the lessee quit the premises, leaving them vacant. Another case cited by appellant is *Leadbeater v. Roth*, 25 Ill. 478. In that case the subtenant was forbidden to pay any more rent to his lessor, and thereafter the first lessee had nothing more to do with the premises, and the subtenant paid the rent directly to the landlord. The case of *Skaggs v. Emerson*, 50 Cal. 3, decided simply that while a landlord, in violation of his lease, withheld part of the premises from the possession of his tenant, he could have no remedy in the courts against him. In the other cases cited by appellant the interference relied on as constituting an eviction was in every instance of such a character as to interfere with the lessee's enjoyment of the premises, by depriving him of his right to collect rent, or in some way rendering it inequitable for the landlord to collect rents from his lessee; and in none of them is the lessee freed from his obligation to his landlord, where he remains in possession and enjoyment of the premises, either personally or through his subtenants, with the power to collect rent from them. It will be unnecessary to consider respondents' point that the appeal should be dismissed. For the foregoing reasons, we advise that the judgment be affirmed.

We concur: HAYNES, C.; BRITT, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

123 Cal. 551

PEOPLE v. PHELAN. (Cr. 421.) 1

(Supreme Court of California. Feb. 27, 1899.)

HOMICIDE — SELF-DEFENSE — INDICTMENT — EVIDENCE — EXPERTS — THREATS — NEW TRIAL — MISCONDUCT OF JURY AND PROSECUTING ATTORNEY — NEWLY-DISCOVERED EVIDENCE — HARMLESS ERROR.

1. Defendant admitted a voluntary killing, but alleged self-defense. There were no eye-

1 Rehearing denied March 25, 1899.

witnesses, but one who heard the shooting corroborated defendant's account, to the effect that there were two light shots, followed by one heavy one; deceased using a pistol, and defendant a rifle. The state's theories were unsupported by the evidence; their only force being negative, as furnishing a possible explanation of circumstances and testimony, which, viewed otherwise, tended to establish innocence. In a letter written by defendant shortly before incarceration, containing a brief account of the affair, he made no mention of deceased's attempt to draw his pistol, as he testified to on the trial. At the autopsy he stated that he stood on deceased's right, while on the trial he stated that he stood on the left, side. The autopsy surgeon first concluded that the ball entered on the left side, but afterwards testified that it entered on the right. The evidence on this point was conflicting. *Held*, that the jury might disregard the claim of self-defense, and return a verdict of guilty.

2. Where the prosecution claims that defendant lay in wait for deceased, evidence, consisting of maps and photographs, showing the topography of the place of the homicide, is admissible.

3. Where an objection is made to evidence as irrelevant, it is proper for the court, in overruling the objection, to state the fact to which the evidence is relevant,—especially when the court states that it is for the jury to determine whether the fact is proved.

4. Where one, expecting to meet another at a certain place, goes there with the sole purpose of creating, and does in fact create, appearances justifying the latter in making a counter attack in self-defense, the killing of the latter is without justification, unless the former in good faith abandoned the contest, and so notified deceased; and, if there was no time after the counter attack for such notification, the former must take the consequences.

5. Where defendant was convicted only of murder in the second degree, error in charging, without evidence, that if defendant went to the place of the homicide with the sole purpose of creating appearances justifying deceased in making a counter attack, so that defendant might slay him, the homicide was unjustifiable, is immaterial.

6. A physician who has taken a course of lectures on medical jurisprudence, studied the standard authorities on gunshot wounds, read army surgeons' reports, and conducted the autopsy in the case at bar, is competent to testify as to the entrance and exit of the bullet, though in his 15 years' practice he has had but one case of gunshot wound, and that was only one of entrance.

7. A witness testifying to threats made by deceased against defendant should be allowed to state what was said by himself during the conversation, if necessary to show the significance of what was said by deceased.

8. Error in ruling otherwise was harmless, where the part excluded was not essential to understand deceased's remarks, and part was irrelevant, and witness managed, in spite of the ruling, to tell the whole story.

9. Where defendant, though he had not been held to answer, was in custody, charged with a crime, under a sworn complaint, and was brought into court before the grand jury were sworn, and offered the privilege of challenging, which he refused, it was proper to overrule his subsequent motion to set aside the indictment because he had not been held to answer, and to refuse to entertain challenges to the panel and to an individual juror.

10. On a motion for a new trial, an affidavit was made that, on the day before the trial closed, one of the jurors was seen in earnest conversation with deceased's brother; the conversation being out of hearing. Defendant's



counsel also made affidavit five days after the verdict that he had been informed that another juror had publicly stated during the trial that defendant ought to be hanged, but no one was named who heard the statement. *Held*, that the discretion of the court in refusing to examine the jurors or to order a new trial would not be interfered with.

11. On a trial for homicide, where it was claimed that after the shooting defendant had filled deceased's pistol with rifle cartridges of the same caliber, with the bullets trimmed down so as to let the cylinder rotate, deceased's cabin mate testified that there were no cartridges in the cabin which "would fit" deceased's pistol, except the ones with which it was loaded. On a motion for a new trial, he testified that there was in the cabin a box of rifle cartridges of the same caliber as deceased's pistol. *Held* that, as such testimony could have been brought out on cross-examination, a new trial was not justified.

12. Where testimony was given relating to sounds in the nighttime in the vicinity of the place of homicide, evidence, in contradiction thereof, of experiments in that vicinity conducted in the daytime, was admissible, though the atmospheric conditions were not shown to have been the same.

13. Where the prosecuting attorney believes a witness has testified falsely, he may discredit the testimony on cross-examination by questions implying a low estimate of the witness' character.

14. If the prosecuting attorney is guilty of misconduct in attempting to discredit a witness, and, from the circumstances, the jury must see it, the error is harmless.

15. The prosecuting attorney cannot be charged with misconduct in urging a theory as to defendant's acts or motives, though such theory has slight, if any, evidence to support it.

16. Misconduct of the prosecuting attorney while cross-examining a witness, if not objected to at the time, cannot be considered on appeal.

17. Where defendant claimed that on the day of the homicide he started to town, to put deceased under bond to keep the peace, a remark, in interrogatory form, made by the prosecuting attorney on cross-examination, that defendant knew what it was to be put under bonds himself, was improper.

18. It was not ground for reversal, however.

In bank. Appeal from superior court, Sierra county.

Richard Phelan was convicted of murder in the second degree, and he appeals. Affirmed.

Edw. J. Banning, Barclay Henley, and F. D. Soward, for appellant. Atty. Gen. Fitzgerald, for the People.

BEATTY, C. J. The defendant was convicted of murder in the second degree, but recommended by the jury to the mercy of the court. He was sentenced to be imprisoned for 25 years, and appeals from the judgment, and from an order denying him a new trial. Various errors are assigned upon the rulings of the superior court, misconduct of the district attorney is charged, and it is also contended that the evidence adduced at the trial was entirely insufficient to warrant or sustain the verdict.

The voluntary killing was admitted by the defendant, but the claim was made that it was done in necessary self-defense. This

plea rests mainly upon the testimony of the defendant himself, for there was no eye-witness to the encounter, in which the deceased was instantly killed, save the parties; and the defendant's account of what then took place is corroborated by the direct evidence of only one witness, who heard the shooting, and testifies to the number of shots fired, and the order in which the lighter and heavier reports occurred. Aside from this, the case for the defendant consisted in the proof of numerous and recent threats by the deceased against his life. Upon this point it is conceded by counsel for the people that the threats were clearly proven, and this concession goes none too far, in view of the evidence contained in the record. It seems that the defendant had formerly been superintendent for a mining company which had failed, leaving some wages due to the deceased. In an attempt to recover these wages by suit, the deceased complained that defendant had not properly seconded his efforts. The defendant would not attend as a witness at the trial, unless subpoenaed, and he appears to have found fault with the plan of operations adopted by deceased, all of which seems to have produced more or less ill feeling on the part of the latter. Another grievance was the discharge of the deceased from the employ of another mining company, of which defendant continued to be superintendent. In this way the deceased had been aroused to a state of violent hostility towards the defendant, and during the three or four months prior to his death had frequently threatened his life. Some of these threats had been communicated to the defendant, and he knew that deceased habitually went armed with a pistol, in the use of which he was supposed to be expert. The defendant was superintendent of the Hilda Mine, situated five or six miles above Sierra City, and occupied a cabin there, in company with two miners and a cook. The route from the mine to Sierra City was down a trail to the Leary wagon road, and along this and the Sierra Valley road to town. The deceased lived in a cabin at a place called "Milton," beyond the Hilda Mine, and in going from Sierra City to his home usually passed over the route to the mine as far as a point beyond the junction of the Hilda trail with the Leary wagon road. This being the general situation of affairs, the parties met early on the morning of the 19th day of October, 1897, in front of Thomas Devine's place, about a half mile above Sierra City. The defendant had been to town with a couple of pack mules for the purpose of transporting to the mine some iron water pipe which he had previously ordered cut into convenient lengths for packing. The pipe not being ready, he was returning to the mine without it. The deceased was on his way to town, and was engaged in conversation with Devine when defendant came up. According to the testimony of defendant, in which he is corroborated by Devine, the deceased com-

menced upon the sore subject of the suit for wages, with the result of the usual disagreement; but the defendant in other ways made several friendly and conciliatory overtures, which were angrily rejected by deceased. Devine also made an effort to bring about a reconciliation, but deceased refused to shake hands. Defendant then left, and, in leaving, stated in the hearing of deceased that he was coming back in the evening to get the water pipe which he had failed to get that morning. The deceased was thus advised that, on his road home in the afternoon, he might meet the defendant coming to town. According to the testimony of the defendant and four other persons who were there on that day, he returned to the mine about 10 o'clock a. m., and remained until after dinner,—about 1 p. m. During that time he announced his intention of going back to town for the purpose of having Dan O'Connor (the deceased) put under bonds to keep the peace. While waiting for dinner, defendant learned that one of his miners (White) had quit work. This led to some warm words between them, after which White started to town. Defendant says that, being apprehensive that White would get to drinking and return in an ugly mood, he directed all the firearms about the mine to be secreted, or put out of the way, to prevent mischief. There were at the mine a Winchester repeating rifle, 44 caliber, a muzzle-loading shotgun, a breech-loading shotgun, a large pistol, 44 caliber, and a Smith & Wesson revolver, 38 caliber, the last being a pistol habitually carried by defendant in his pocket. The muzzle-loading shotgun and large pistol were hidden away. The breech-loading shotgun was put in charge of the remaining miner (O'Conna), who was directed by defendant to take it with him down the trail where he was set to work mending the road. The defendant took the small pistol and the Winchester rifle, and followed O'Conna down the trail. He says that his purpose in taking the rifle as well as the pistol, which he usually carried, was partly to keep the rifle out of the way of White, and partly to defend himself in case he should meet Dan O'Connor on his way to town, and he should attempt to carry out his threats. In the meantime, deceased had proceeded to town, made some small purchases, and started home on foot. He took dinner with the Sharkeys, two of whom testify that they saw him exhibit a loaded pistol (imitation Smith & Wesson, 38 caliber), and heard him boast of his skill in using it. One of them says that deceased declared to him that he expected he might meet defendant on the road, and, if he did, he would bring him down. From Sharkey's he proceeded to Devine's, where he met defendant in the morning; and Devine testifies to seeing his pistol, and hearing similar threats against the life of defendant. He left Devine's about 2 o'clock, going in the direction of the junction of the Hilda trail with the Leary road. This point being only

3½ miles from Devine's, he should have arrived there as early as 3 o'clock p. m.

Returning to the defendant, he says that he passed on down the trail beyond the point where O'Conna was at work, took note of the places on the trail requiring repairs, did some work himself until about a quarter to 4, and then started to town. Arriving at the junction of the trail with the road, he stopped to make an estimate of the amount of grading required in order to construct a "turnout" for wagons hauling supplies for the mine to the foot of the trail. While so engaged, he happened to look up, and discovered Dan O'Connor standing about 30 feet distant on the road. At the moment he was carrying his rifle across his shoulder, with the muzzle in front, and was grasping it by the barrel. He says they eyed each other for an instant, and he was hesitating whether or not to speak to the deceased, when he saw him make a motion with his hand towards his pistol pocket, and, fearing for his life, he proceeded as quickly as possible to get his rifle into a position for use. Before he could do so, deceased had drawn his pistol and fired twice, during which time he (defendant) was dodging and ducking across the road to a position on the other side. The deceased was prevented from firing a third shot before defendant could use his rifle by some difficulty in revolving the cylinder of his pistol, and, while he was endeavoring to cock it, defendant dropped on his knee and fired, his bullet passing through the neck of the deceased, from side to side, severing the spinal cord, and killing him instantly. This is substantially the account of the killing given by the defendant in his testimony at the trial, and he is directly corroborated by O'Conna in one particular: O'Conna testifies that he heard the shots at the point where he was at work on the trail, and that they came in this order: Two light reports, followed by one louder and heavier. If this account is true, the defendant was, of course, innocent of any crime. He shot only to defend his life against a felonious assault, and under circumstances that would have induced any reasonable man to believe his life to be in danger.

But were the jury bound to accept the statement of defendant as the truth? It is contended on the part of the people that not only were the jury free to reject the testimony of the defendant in his own favor, but they were abundantly justified in so doing by numerous and serious discrepancies between the different accounts of the transaction given by the defendant at different times, by the discrepancies in the testimony of his witnesses, and by various circumstances inconsistent with the facts as testified to. Most of these discrepancies appear to be trivial and unimportant, and fairly referable to the incapacity of the most honest and well-meaning of witnesses to carefully observe and accurately recount the details of any transac-



tion. But some of them are more serious, and deserve consideration. The theory of the prosecution is that defendant, on account of the threats of the deceased, deliberately resolved to kill him, and, in order to give the killing the appearance of an act of self-defense, arranged and contrived the circumstances upon which he now relies to give an air of plausibility to his account of the fatal meeting. They contend that the secretion and removal of the arms at the mine for the alleged purpose of keeping them out of the reach of White was a mere pretense to screen the real motive of the defendant in taking the rifle down the trail where he expected to meet the deceased; that no work was needed on the trail, nor any turnout at the foot of it; that the supplies for the mine were all in for the winter, and the season during which the trail could be used at an end; that, while work on the trail was entirely needless at that time, work in the mine was an urgent necessity to prevent caving. They seem to claim that O'Conna was armed with the breech-loading shotgun, and stationed in convenient proximity to the spot where the defendant lay in wait for his victim, in order to have his assistance in some form. They ask why the defendant should have abandoned his purpose of returning to Sierra City with his mules for the load of water pipe, and why he should have made up his mind on that day, of all days, to put O'Connor under bonds to keep the peace. They say that O'Connor must have reached the junction of the trail and must have been killed about an hour before the time when defendant says they met, and, consequently, that it is not true that defendant spent the afternoon directing and assisting in the repair of the trail. Having, as they claim, demonstrated the falsity of his showing in this particular, they argue that, in order to make sure of his victim, he went directly from the mine to the foot of the trail, concealed himself behind a hollow stump near the junction, waited the arrival of O'Connor, and, as he turned from the road to ascend the trail, shot him in the side of the neck,—rather from the rear than from the front. Then, they say, he remained near the spot for an hour or two, arranging appearances to support his plea of self-defense. It was shown that the pistol of the deceased was handed by defendant to the magistrate into whose custody he surrendered himself after the killing; that defendant requested those present to examine it, and it was found to contain two whole cartridges and three exploded shells, upon one of which the hammer rested. These cartridges and shells, though of the right caliber for the pistol, viz. 38, were what is known as "long cartridges," or Winchester rifle cartridges, which, when placed in a Smith & Wesson pistol, are too long to admit the rotation of the cylinder, unless the ends are first trimmed off, as these had been. The prosecution claims to have proved that deceased

had no such cartridges, while defendant did have a supply of them, from which his own pistol was loaded; and it is a part of their theory of the case that, after killing O'Connor, defendant filled his pistol with cartridges taken from his own, and then discharged three of them, to make it appear that deceased had fired that often at him. Some of the witnesses testified that, at the time he gave himself into custody, defendant stated that deceased had fired three times. Afterwards he testified that he had heard but two shots before he returned the fire, and could only account for the three empty shells by supposing that the deceased succeeded in cocking his pistol and fired the third shot simultaneously with the discharge of his rifle, or that deceased had shot away one of his five cartridges previous to their meeting. In stating to the magistrate that deceased had fired three times, he was only stating his conclusion drawn from the three empty shells, and based upon his theory that the third shot being discharged simultaneously with his own was indistinguishable. The prosecution rejects this explanation, and contends that the defendant only changed his statement as to the number of shots fired by deceased after Jesse O'Conna had testified to two light reports followed by a louder one, in order to make their stories agree.

This is by no means an exhaustive review of the various contentions of counsel as to the effect of the evidence, but it presents the salient points of the controversy between them; and it will be seen that it involves questions of fact, rather than of law,—questions, in other words, to which the jurisdiction of this court does not extend. We have nevertheless carefully examined the evidence in the case, and, while we cannot help regarding several of the theories of the prosecution in respect to the motives and acts of the defendant as fanciful and unfounded, we are at the same time convinced that it cannot be held, as a proposition of law, that there is no evidence to support the verdict.

The theory of the prosecution that the defendant went directly from the Hilda Mine to the junction of the trail, and there lay in wait behind a hollow stump for an hour or two, finds no support in the evidence, and seems to be utterly opposed to the testimony of some of the most intelligent and trusted witnesses for the people, to the effect that a careful examination of the ground on the day following the killing disclosed no track or other disturbance of the soil behind or about the stump. Considering the nature of the soil in our mountain forests, it seems incredible that a man could crouch for an hour or more in one spot, and leave no trace of his presence on the ground.

The theory of the prosecution as to the hour of the shooting is equally unsupported by direct evidence. The claim is that the deceased must have arrived at the junction of the Hilda trail about 3 o'clock p. m., and

that he was shot from ambush as he turned into the trail. This claim is rested mainly upon an elaborate calculation as to the time that must necessarily have elapsed between the discovery of the dead body by Sam Devine and his return to the spot from Sierra City, at 6 o'clock p. m. In this calculation it is assumed that Devine did not discover the body until some time after the shooting; that it took him more than an hour to reach Sierra City, at least half an hour to get a team and look up the magistrate and two others who accompanied him on his return, and nearly an hour to drive three miles and a half. These are all assumptions, without any positive evidence to support them. For aught that appears, Devine may have arrived at the scene of the shooting within 10 minutes after it occurred; and, as to the time it took him to get to Sierra City, his evidence is that at the request of the district attorney he went over the same route again at about the same speed that he traveled on the day of the homicide, and it took him "about an hour." Considering that it was a prime factor in the theory of the prosecution that it must have taken him considerably more than an hour, the fact that the district attorney contented himself with this vague and indefinite answer from a witness who had made the experiment at his request justifies the inference that the time actually consumed was less rather than more than an hour; and this conclusion is corroborated by the admitted fact that on the day of the homicide Devine was excited and scared, and may have traveled faster than he was aware of. The other circumstances relied on to prove a greater lapse of time between the killing and the hour of 6 o'clock than would consist with defendant's story may possess a significance that is not apparent from any evidence in the case, for there is nothing to show that the blood would not have flowed as far as it did flow, or that the body would not have become as cold as it was, within the two hours between 4 and 6 o'clock.

The theory that defendant loaded the pistol of deceased with cartridges taken from his own pistol, in order that he might fire them off, and thus make it appear that deceased had participated in the shooting, assumes, in the first place, against the positive evidence of several unimpeached witnesses, and against all antecedent probability, that deceased was traveling with an unloaded pistol along a road where he had every reason to expect an encounter with an armed man, whom he had constantly been threatening to kill; and this, too, when it clearly appeared that the deceased habitually went armed, and that he had, a short time before, borrowed cartridges to load his pistol. But the prosecution proved that there remained in the pistol of deceased, when surrendered by the defendant, one or two 38-caliber Winchester rifle cartridges, with the ends trimmed off to make them short enough for the cylinder, and two empty shells of the same class of cartridges. It was also

proved that, a week after the homicide, part of a box of such cartridges was found in the cabin of the defendant at the Hilda Mine; and Davis, the roommate of the deceased, testified that they had no cartridges that would fit the pistol of deceased at their cabin, aside from those with which it was loaded. As against this evidence, the defendant points to the fact that there was no gun or pistol at his mine that a 38-caliber Winchester cartridge would fit, and claims that the box found in his cabin a week after his incarceration was put there to be found. And Davis, in support of the motion for a new trial, made an affidavit that there was at the cabin occupied by him and deceased a box of 38-caliber Winchester cartridges,—a statement not inconsistent with his testimony that they had no cartridges that "would fit" the pistol of deceased, since they required to be reduced in length in order to make them fit. But the strongest circumstance against the theory of the prosecution is the failure to produce any evidence as to the condition of defendant's pistol at the time he surrendered himself into custody. Was it loaded, or unloaded, or partly loaded? If loaded, what was the kind of cartridges? There is no answer to any of these questions, although the pistol was in the hands of the state's officers, and the evidence necessarily within their power. The defendant's claim is that his pistol was loaded at the time of the homicide with cartridges expressly adapted to it, viz. 38-caliber pistol cartridges; and, if so, it must have been in that condition when handed to the sheriff. If it was not in that condition, the fact could easily have been shown, and the theory of the prosecution established, or at least corroborated, by evidence to a contrary effect. It was of the greatest importance to the theory of the prosecution to prove that defendant's pistol, when surrendered to the sheriff, was unloaded, or loaded with Winchester cartridges that had been reduced in length, or partly so loaded. In the absence of such proof, the theory of the prosecution seems wholly untenable.

Other theories—such, for instance, as that respecting the supposed attempt of the defendant to mutilate the dead body by running a loaded wagon over it, for the purpose of obliterating the wound, and thus making it impossible to determine the points of entrance and exit of the fatal bullet—depend upon evidence and inferences equally inconclusive. The most that can be said of them is that they may be true,—just as it may be true, as argued, that the deceased had no intention of carrying out his threats against the life of the defendant, and that the absence of any threats by defendant against the deceased and his efforts at reconciliation are only evidence of a deeply-meditated scheme of murder, with a defense prepared in advance. We think it evident that the theories and arguments above outlined have but little, if any, positive force or value as tending to establish the guilt of the defendant; but some of them may have a



negative value, as offering a possible explanation of some circumstances, and much positive testimony, which, viewed in another light, would tend to establish his innocence.

The case, then, so far as the sufficiency of the evidence is concerned, reduces itself to this: The voluntary killing of deceased is established by sufficient proofs, and is admitted by the defendant. This being so, a *prima facie* case of murder in the second degree was made out, and it devolved upon the defendant to show facts which would justify, excuse, or mitigate the killing. If his account of the transaction given at the trial was true, it was clearly a case of justifiable self-defense; but the jury were not obliged to accept his account, and evidently they refused to do so. Their action in this respect was due, no doubt, to a belief that the testimony of the defendant was inconsistent with former statements by him, or with facts which they found to be satisfactorily established by the evidence. Among such former statements was a brief account of the affair contained in a letter from the defendant written shortly after his incarceration. In this letter he makes no mention of the fact testified to at the trial, that the deceased made an attempt to draw his pistol before he made any attempt to bring his rifle into position for firing. Another statement made to the surgeon who performed the autopsy was that he stood on the right side of deceased when he fired the fatal shot. This statement he subsequently corrected, and at the trial testified, in effect, that the left side of deceased was turned towards him during the affray. The first opinion of the autopsy surgeon was that the ball had entered from the left side; but he afterwards concluded, and at the trial testified, that it entered from the right side,—the right side of the neck instead of the left lower jaw. This was a very important point, and the evidence upon it conflicting; but if the jury believed, as they probably did believe, that the point of entrance was on the right side, they may for this reason alone have rejected the defendant's version of the affair. There were some other circumstances, of very slight importance in themselves, but of similar tendency; and, such being the case, this court cannot set aside the verdict upon the ground that there is no evidence to support it.

In regard to the errors assigned upon the rulings and actions of the superior court, we note, in the first place, a charge, more than once repeated in appellant's brief, that the trial judge first suggested and announced the theory of lying in wait behind the stump, which it is said was thereafter adopted by the prosecution. This complaint appears to us wholly unfounded. The evidence in the record shows that the district attorney had made elaborate preparation before the trial to prove the facts upon which the ambush theory was founded, and we entertain no doubt that it was fully developed in his opening statement of the case. Moreover, it was clearly in-

dicated in the examination of the witness Thomas, which occurred before the court made any reference to the matter. This is a reflection upon the trial court which counsel should not have permitted themselves to make.

It is contended that the superior court erred in overruling objections of defendant to the admission in evidence of maps and photographs of the scene of the homicide, and especially of the evidence given in that connection as to the position of the hollow stump, as to the relative elevations of the stump and junction of the trail, as to the fact that there was an unobstructed view from the one point to the other, etc. The court did not err in admitting this evidence, the manifest purpose of which was to sustain the theory of lying in wait. The facts surrounding the killing were certainly material, and the topography of the spot where the killing occurred was clearly relevant. It was not for the court, but for the jury, to determine what theories could be justly founded on such facts. Neither did the court err in the remarks made in overruling these objections. When objection is made to offered evidence, that it is irrelevant, the court cannot overrule the objection without saying, in effect, that the evidence has some tendency to prove some material fact; and we cannot see that the defendant is injured by a mention of the fact to which the evidence is relevant,—especially when, as in this instance, the court clearly states that it is the sole province of the jury to determine whether such fact is proven.

With respect to all these matters it may also be said that the verdict of murder in the second degree conclusively shows that the jury must have discarded the theories of the prosecution as to lying in wait, etc., for upon those theories the defendant was guilty of murder in the first degree. It is more likely that the verdict was based upon some such hypothesis as that stated in the following passage from the charge of the court: "If, on the contrary, you believe from the evidence, beyond a reasonable doubt, that the defendant went to the scene of the homicide, expecting and intending there to meet the deceased, with the sole purpose then and there of creating appearances justifying the deceased in making a deadly counter attack in self-defense, and that he did in fact then and there create such appearances, and that the deceased did in fact then and there make a deadly counter attack in self-defense, and the defendant then and there slew him, such killing was without justification under the law, unless the defendant, before so killing deceased, had first, and in good faith, declined further combat, and fairly notified deceased he had abandoned the contest. And if the circumstances were such, arising from the suddenness of the counter attack, that he could not so notify him, it was defendant's fault, and he must take the consequences." It is contended on the part of appellant that it was error to give this instruction, not only because there was no evidence upon

which to base it, but because the principle is not correctly stated. We do not think the instruction misstates the law of the case supposed, but it is not so easy to say that there is evidence to sustain the hypothesis. Defendant, it is true, admits that he armed himself with a rifle because he apprehended that he might meet the deceased on the road, and might be called upon to defend his life; and in the letter above referred to he seems to admit that his own movement to bring his rifle into a position for ready use is what caused the deceased to commence firing. But there is no direct evidence that he went to the scene of the homicide with the sole purpose, or with any preconceived purpose, of creating appearances which would bring on a conflict. That particular part of the instruction, however, which supposes a deliberate purpose on the part of defendant to create appearances, becomes immaterial, in view of the verdict acquitting him of murder in the first degree; and it is only important to consider whether the court was justified in submitting an instruction based upon the hypothesis that the defendant, without any preconceived design, did in fact create appearances justifying a deadly counter assault by deceased. Upon this point it cannot be said that there was a total lack of evidence to sustain the court in submitting the question to the jury.

It is claimed that the superior court erred in allowing Dr. Igliek to give his opinion as an expert upon the question of exit and entrance of the bullet. The doctor had been a practicing physician and surgeon for 15 years, but had never had but one case of gunshot wound, and in that case there was only a wound of entrance; but he had taken a regular course of lectures on medical jurisprudence, had studied the standard authorities on the subject of gunshot wounds, had read the reports of our army surgeons on the subject, and had himself conducted the autopsy in this case, so that he was not only able to express a general opinion in answer to a hypothetical question, but was able to state the particular grounds upon which his opinion in this case was founded. There was, we think, a sufficient foundation laid to warrant the court in admitting his testimony. Its value was a question for the jury.

There was perhaps a technical error in the rulings of the court with respect to the witness Ring. He was called for the purpose of proving threats by deceased made in the course of a conversation with the witness. The court sustained objections to the proof of what the witness had said in the course of the conversation, upon the ground that only what the deceased had said was material. This is not strictly true, for it was not only material to show what the deceased actually said, but much more material to show the true meaning and significance of what he said, and this would not always appear with one-half of the conversation suppressed. But in this case the particular portions of the

conversation which the court succeeded in excluding do not seem to have been essential to an understanding of all that deceased had said, and parts of it were clearly irrelevant. The witness contrived, in spite of the rulings of the court, to tell the whole story, so that, whatever the error in the ruling, there was no prejudice to the defendant.

The defendant at the proper time moved to set aside the indictment upon the ground that he had not been held to answer at the time the grand jury was impaneled, and in that connection challenged the panel, as well as an individual grand juror, upon statutory grounds. But the court denied his motion, and refused to entertain the challenge, upon proof of the fact that, although the defendant had not been held to answer at the time of the formation of the grand jury, he was at that time in actual custody, charged with the murder by sworn complaint, and had been brought into court before the grand jurors were sworn, and offered the privilege of challenging, which he had declined to exercise. The ruling of the court in refusing to entertain the challenge or dismiss the indictment is fully sustained by the construction given to the statute in *People v. Geiger*, 49 Cal. 650, from which we do not feel at liberty to depart.

Defendant's motion for a new trial was based partly upon the ground of misconduct of some of the trial jurors, and of newly-discovered evidence. It seems that the jurors were allowed to separate during the trial, and it was shown by affidavit that one of the jurors was seen in "earnest conversation" with a brother of the deceased on the day before the trial closed. The evidence is conflicting as to whether the conversation was in a public place, but it appears that it was out of hearing of any third party. One of defendant's counsel also made an affidavit five days after the verdict that he had been informed that another of the jurors had publicly stated during the progress of the trial that the defendant ought to be hanged. Upon these affidavits he moved for a postponement of the hearing of the motion for a new trial, and for the issuance of subpoenas for the jurors referred to, in order that they might be examined as to their alleged misconduct. This application was denied, and the motion for a new trial overruled. We cannot say that this ruling was error calling for a reversal of the judgment, although we do think it would have been a wise exercise of the discretion of the court to investigate fully these charges of misconduct. It was not legal misconduct in a juror to engage in conversation with a brother of the deceased upon a subject disconnected with the case on trial; but it was a grave impropriety, exposing the juror to suspicion, and reflecting upon the administration of the law. It is not going too far to say that his conduct called for explanation. But this was a matter resting in the discretion of the trial court, and, since



it does not appear that the conversation related to the case on trial, we cannot hold that there was abuse of discretion. As to the other juror, the evidence was hearsay, and, considering the time that had elapsed subsequent to the alleged public declaration of his opinion, and the fact that no person was named who had heard it, the court was justified in disregarding the charge.

The newly-discovered evidence was that of Davis, with reference to the box of Winchester cartridges above referred to. This was a matter so closely related to the evidence given by Davis at the trial that the court may reasonably have concluded that it should, as it clearly might, have been called out upon cross-examination at that time.

Exception was taken to certain rulings of the court admitting evidence of experiments made by direction of the prosecution for the purpose of contradicting the testimony of some of defendant's witnesses. The testimony related to sounds heard in the nighttime in the vicinity of defendant's cabin. The experiments were conducted at the same place, but in the daytime; and it was not shown that the atmospheric conditions—such as humidity, temperature, etc.—were the same. The court did not err in admitting this testimony. The principal conditions were the same, and the jury could weigh and make allowance for the differences referred to. They affected the weight, but not the competency, of the evidence.

The last point to be considered is the alleged misconduct of the district attorney. It is charged that the district attorney was unfair to several of defendant's witnesses, that he was uncandid in his presentation of evidence, that he persisted in charging and insinuating acts and motives upon the part of defendant which were wholly unsustained by the evidence, and that he endeavored to prejudice the jury by asking defendant himself, on cross-examination, questions which he must have known he had no right to ask, and the only design of which was to insinuate charges against the defendant which could not have been proven on a trial of this indictment, even if true. It is true that the district attorney asked some of the witnesses for defendant questions which implied a low estimate of their character, but they were in the line of a cross-examination, the evident purpose of which was to discredit their testimony. It was the privilege, and even the duty, of the district attorney to discredit these witnesses, if he believed they had testified falsely. If he abused his privilege, the jury must have seen it, and the prejudice was to his own case, not to that of the defendant. The same thing may be said with reference to the offer to prove the finding of a cartridge box in a valise belonging to deceased. It is quite possible that the district attorney was himself deceived in that matter. If it was clear that he was not deceived, the jury must have seen it, and he must have suffered all the prejudice. The acts

and motives charged against defendant were a part of the theory or theories of the prosecution. We have indicated in our opinion that several of those theories found but slight, if any, support in the evidence, but the prosecution had a right to urge them. It was for the jury to pass upon all such matters. The district attorney had no right to read the telegram from the sheriff of Placer county while cross-examining the witness Zuver, but the defendant had an opportunity of objecting to it, which he failed to do. It seems to have been read with his tacit consent, and there was no protest or exception at the time.

The most serious fault committed by the district attorney was in his cross-examination of the defendant with reference to his testimony to the effect that he started to Sierra City on the day of the homicide for the purpose of having the deceased put under bonds to keep the peace. The following extract from the record will show what then occurred: "Q. But you would want to get to Sierra City before it was dark, and back home again, if you were afoot? A. That depends—yes, sir, if I was going home; if not, I might stay in Sierra City. I made up my mind to put him under bonds that day, on account of the recent occurrences and of his actions, and I had an opinion back in July to do so, and I determined to do so. Q. Then, why didn't you? A. Well, I had reasons that I didn't care to do it. Q. You knew what it was to be put under bonds? A. I did. Q. You knew what it was to be put under bonds yourself? Judge Soward: We object. I also charge misconduct on the part of the district attorney. Mr. Wehe: You are awful tender of this defendant. Judge Soward: I charge that as misconduct, also. You want to try this case, and no other. The Court: I don't think it is proper to inquire whether the defendant had been under bonds." The questions here asked appear to us, as they evidently appeared to the trial judge, to contain an insinuation that the defendant was himself a man of violent character, who required at times to be put under bonds. If so, the questions were highly improper, and ought to have been known to the district attorney to be improper. But the offense was not so flagrant as in itself to constitute ground for reversal. The judgment and order of the superior court are affirmed.

We concur: GAROUTTE, J.; TEMPLE, J.; HARRISON, J.; HENSHAW, J.

McFARLAND, J. I concur in the judgment, and in the opinion of the Chief Justice. I desire to say, however, that if the testimony were to be considered simply as it stands in the cold, printed record, without any reference to the appearance, manner of testifying, etc., of the witnesses, I would not feel sure in holding that it warranted a conviction. But the credibility of the witnesses rests with the jury, and, as it depends upon many things which cannot be reproduced here, I do not

feel that this court would be justified in setting aside the verdict on the ground of want of evidence. I agree with the Chief Justice that there were no errors of law calling for a reversal.

(123 Cal. 544)

EDWARDS v. BERLIN. (S. F. 1,080.)<sup>1</sup>

(Supreme Court of California. Feb. 28, 1899.)

STREET IMPROVEMENT—ASSESSMENT—VALIDITY—SUPERVISORS' MINUTES—PRESUMPTION—RESOLUTION OF INTENTION—JURISDICTION—BURDEN OF PROOF—EVIDENCE—OPENING AND DECLARING BIDS.

1. A street improvement sufficiently describes the work to be done, though the resolution of intention calls for curbing where not already done.

2. The minutes of a board of supervisors relating to a resolution of intent to improve a street, the order directing it to be done, and orders giving extensions of time, refer to them as relating to "certain street work," and as having, on motion, been adopted and numbered by certain numbers. In books produced from the clerk's office, they were found under corresponding numbers, describing the work to be done with the clerk's name printed at the end, but not otherwise authenticated. Held that, the board not being required to keep its minutes in any one book, failure to perform acts essential to the validity of the assessment was not thereby sufficiently shown to overcome the burden of proving its invalidity, arising on the prima facie case of validity made by proof of the assessment.

3. The description in an order extending the time for completing a street improvement need only indicate, as between the board of supervisors and the contractor, what contract was intended, so far as it is essential to jurisdiction to make assessments.

4. When minutes of the board of supervisors do not show that a bid for the work of a street improvement was opened and declared publicly, as the statute requires, it is prima facie proof that it was not done.

5. A failure to comply with section 5 of the Vrooman act (St. 1889, p. 161), requiring that bids for the work of street improvements shall be opened and declared publicly, invalidates assessments therefor.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by William Edwards, administrator, etc., against F. A. Berlin. From a judgment in favor of plaintiff, defendant appeals. Reversed.

F. A. Berlin, for appellant. J. C. Bates, for respondent.

TEMPLE, J. In this case, which is an action to foreclose an assessment lien, defendant contends that the assessment is void for 18 specified reasons.

The first two points depend upon the alleged lack of power because the resolution of intention calls for curbing where not already done. The objection was overruled in *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877. It is held that, under such a contract or resolution, nothing is left to be determined, as to the amount of work to be done, by the street superintendent. The board exercises its own judgment in the matter, and delegates nothing to

others. *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71; *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877.

The third, fourth, and fifth points are all founded upon the mode of entering orders in the minutes by the clerk of the board of supervisors. For the purpose of overcoming the prima facie case made by the assessment, the defendant called the clerk, and introduced the records kept by him. All that the minutes disclose in regard to the resolution of intention is as follows: "Supervisor Day also offered a resolution declaring the intention of the board to order the performance of certain street work, which was on motion adopted, and numbered 9,950. Supervisor Denman voting, 'No.'" The resolution is not entered on the minutes, and it was not even shown that it had been filed. The direction to the clerk to cause the resolution to be posted and published is not entered on the minutes at all, but it is customary to include that in the resolution of intention. In rebuttal, plaintiff produced a book which was found in the office of the clerk of the board, entitled "9,306 to 10,114-43, Resolutions, No. 43." This book contained blank printed forms of resolutions of intention, with spaces left for whatever was peculiar to each contract, and with the name of the clerk printed at the end of each. Some of the blanks had been filled out, and among them one which included a description of the work for which this suit was brought. None of them are certified or authenticated in any mode whatever; for, of course, the printed name of the clerk under such circumstances performs no one purpose or function of an authentication. But, while it must excite our special wonder that important records of the city and county are kept in this loose way, we do not feel like holding that the proceedings are therefore void. A legislative body is not required to keep its minutes in any one book. Unless the law requires it, their enactments need not be there entered at all, but the minutes certainly should show what action was had upon them; that is, that they were enacted, and the enactments themselves should be authenticated in some mode. No special mode of authentication seems to have been provided, and although a mere reference by number to what is assumed to be a book of resolutions kept by the board is an unsatisfactory mode of identification, we cannot say that the resolution is thereby made invalid. The assessment, being put in evidence, makes a prima facie case. To rebut it, the defendant must prove affirmatively the failure on the part of the board to perform some act essential to its validity. The minutes show the requisite action on the part of the board. Some resolution corresponding in number was passed. It is a question simply of identification, and I think the prima facie case has not been rebutted.

Similar objections are made to the order directing the work to be done, and to three several orders granting extensions of time,

<sup>1</sup> Rehearing denied March 25, 1899.



and the objections may all be similarly answered. To the resolutions extending time, the additional objection is made that the resolution does not sufficiently describe the work. These resolutions were, however, not jurisdictional in the absolute sense, but were acts in the exercise of jurisdiction which it is assumed had been vested in the board. The description is sufficient as between the board and the contractor to indicate what contracts it was intended to extend, and nothing more was required.

The next objection made cannot, I think, be so readily disposed of. It is provided in section 5 of the so-called "Vrooman Act" that bids shall be invited for doing the work, and that each proposal or bid shall be accompanied by a check, and that "said proposals or bids shall be delivered to the clerk of the said city council, and said council shall in open session examine and publicly declare the same," etc. St. 1889, p. 161. The allegation in the complaint is that the bids were opened and publicly declared on the 2d day of October, 1894. The minutes of the board were put in evidence, and they showed that no such proceedings were had on that day or at any other time. *Prima facie*, at least, this is proof that the statute was not in this respect complied with. What the minutes do not show to have been done we must conclude was not done. No argument is needed to show that this requirement is imperative. It was intended thereby to secure to the property owners, the public, and the rival bidders, fair play and an honest deal. At the same time, it affords some degree of security to the board against unjust charges. It is enough, however, that it is required by the statute, and compliance may be of advantage to the property owners. For this reason, I think the assessment cannot be upheld. Other points need not be noticed. Judgment and order reversed.

We concur: McFARLAND, J.; HENSHAW, J.

123 Cal. 576

PEOPLE v. VALLIERE. (Cr. 449.)

(Supreme Court of California. March 1, 1899.)

ASSAULT WITH INTENT TO KILL—DEADLY WEAPON  
—INTENT—EVIDENCE—QUESTION FOR JURY.

1. In a prosecution for assault with intent to kill, committed by a prisoner upon the jailer, evidence that defendant was in jail awaiting sentence for a burglary of which he had been found guilty is admissible to show motive.

2. Since, in a prosecution for assault with intent to kill, the prosecutor must show that the weapon used was a deadly weapon, a question asked a witness, "Could a man be killed with that weapon?" while inclusive, is not irrelevant.

3. Where, in a prosecution for assault with intent to kill, a witness testified that the weapon used, which was a stocking filled with salt and plaster, was capable of producing death, a question on cross-examination, whether a "billy" was a deadly weapon was properly excluded.

4. Evidence that defendant assaulted a jail-

er with a deadly weapon for the purpose of obtaining his keys, and escaping from the jail, is sufficient to sustain a verdict that the assault was with intent to kill.

5. Where the testimony is that whether a weapon with which an assault was made is capable of producing death depends upon the manner of its use and the portion of the body on which it is used, the question whether it is a deadly weapon is a mixed one of law and fact, to be submitted to the jury under proper instruction.

6. Testimony of a physician that a stocking filled with salt and plaster, with which defendant had assaulted his jailer in an attempt to escape, was capable of producing death if used on certain portions of the body, is sufficient, when submitted with proper instruction, to sustain a finding that it is a deadly weapon.

Commissioners' decision. Department 2. Appeal from superior court, Butte county.

John J. Valliere was convicted of an assault with intent to kill, and from the judgment, and an order denying a new trial, he appeals. Affirmed.

Geo. E. Gardner, for appellant. Atty. Gen. Fitzgerald, for the People.

HAYNES, C. Appellant was tried upon an information charging him with an assault with a deadly weapon with intent to murder one John Boyle, was found guilty, and sentenced to imprisonment for the term of 14 years; and he appeals from the judgment, and an order denying his motion for a new trial. Appellant specifies several rulings of the court upon questions of evidence, and that the evidence does not justify the verdict, as the grounds upon which he seeks the reversal of the judgment and the granting of a new trial. At the time of the commission of the alleged offense, appellant was confined in the county jail, and committed the assault charged in the information upon the deputy sheriff in the evening, when the deputy was about to lock him up in his cell for the night. The instrument with which the assault was committed was a stocking, loaded with salt and plaster, which had been hardened by wetting.

The prosecution offered evidence to show that appellant, at the time of the assault, had been tried on a charge of burglary, had been found guilty, and was in jail, awaiting sentence therefor; and this evidence was received over appellant's objection, the court ruling that it was admissible as tending to show motive for the assault, his purpose being to make an escape. For the purpose of showing motive and intent, this evidence was properly received. *People v. Lane*, 101 Cal. 513, 36 Pac. 16, and cases there cited.

Dr. Gates was called by the prosecution, and, after being shown the instrument with which the assault was committed, was asked by the district attorney: "Could a man kill another with that bag?" Defendant's objection to the question was sustained. The witness was then asked by the prosecution: "Is that a deadly weapon?" Answer: "I presume that would depend altogether on the

portion of the body that it came in contact with, and the force used." Question: "Could a man be killed with that weapon?" Defendant's objection was overruled, and exception taken. The witness answered: "There are portions of the body which, if struck, would produce death, or produce a condition from which death would ensue." Question: "Is the temple one portion of the body where if a man were struck with that it might produce death?" Answer: "Yes; if you could strike him with sufficient force." The question objected to, "Could a man be killed with that weapon?" was, to say the least, inconclusive, since there are many things with which a man may be killed which could not be classed as a "deadly weapon." A "deadly weapon" is defined to be one "likely to produce death or great bodily injury." *People v. Fuqua*, 58 Cal. 245; *People v. Franklin*, 70 Cal. 641, 11 Pac. 797; *People v. Leyba*, 74 Cal. 407, 16 Pac. 200. The question, however inclusive it might be, was not irrelevant, since, if it was an instrument with which life could not be taken, it could not be classed or considered as a deadly weapon, and the prosecutor might first show that life could be taken with it, and then proceed to show how it could be done, and thus proceed to establish the fact that it was an instrument likely to produce death when used in the manner the evidence shows it was; and the evidence touching the manner in which it was used, in connection with the testimony of this witness, was sufficient to justify the jury in finding that it was a deadly weapon. The fact that defendant's objection to the same question, when first put to the witness, was sustained, does not make the second ruling erroneous; and, as the first ruling was in defendant's favor, he cannot complain that it was erroneous.

The respondent's objections to the several questions put to this witness by the defendant upon cross-examination as to a "billy," what it is used for, and whether the witness would call it a deadly weapon, were properly sustained.

It is further contended by appellant that his motion for a new trial should have been granted, because the evidence does not justify the verdict—First, because the evidence shows that the sole intent with which the assault was committed was that of escaping from jail; and, second, that the evidence does not justify the finding of the jury that the instrument used was a deadly weapon.

As to the first of these grounds, there can be no question that the purpose intended to be accomplished by means of the assault was to escape from jail; but, to accomplish this, it was necessary to secure the keys of the doors through which the sheriff entered, and to prevent alarm, interference, and pursuit. If defendant had snatched the keys from the deputy, he might still have been prevented from reaching the door, or, if he succeeded, the deputy could give alarm and pursuit; but,

if he killed the deputy, alarm and pursuit might be prevented; and therefore the ultimate purpose or object to be accomplished is not the question to be decided, but whether he intended to kill the deputy in order that he might escape. For the purpose of determining whether the assault was made with intent to murder, the character of the instrument, the manner in which it was used, and the purpose to be accomplished, are all to be considered.

It is urged, however, that the instrument with which the assault was made is not a deadly weapon. The testimony of Dr. Gates would seem to show that whether the instrument used was such as would likely produce death depends upon the manner of its use and the portion of the body upon which it was used, and therefore it becomes a mixed question of law and fact, which the jury must determine under proper instructions. *People v. Fuqua*, 58 Cal. 245; *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481; *People v. Leyba*, 74 Cal. 407, 16 Pac. 200. The blow given by the defendant was upon the side of the face and temple, and knocked the deputy down, but did not disable him. The jury saw the defendant, and the instrument with which the assault was committed, heard all the evidence touching the circumstances and manner of the assault, and, under proper instructions from the court, found that the instrument used was a deadly weapon. We cannot say, as a matter of law, that their conclusion was wrong, or that the verdict for any reason was not justified by the evidence. I advise that the judgment be affirmed.

We concur: GRAY, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(March 10, 1899.)

PER CURIAM. The order made in this case in the opinion filed March 1, 1899, having inadvertently omitted to dispose of the appeal from the order denying the motion for a new trial, the said order is hereby amended so as to read as follows: "For the reasons given in the foregoing opinion, the judgment and order are affirmed."

(123 Cal. 580)

FOX v. MACKAY et al. (S. F. 1,016.)

(Supreme Court of California. March 2, 1899.)

CONSPIRACY — FRAUD — EVIDENCE — FINDINGS OF FACT.

Where directors of a corporation paid a large sum to its superintendent for special services rendered, which payment plaintiff, a stockholder, alleged to have been fraudulent, a judgment in favor of a defendant claimed to have conspired with the directors in inducing such payment is supported by findings of fact stating that defendant was not a member of the board of directors; that he in no way profited by, and was a stranger to, the whole transaction.



Department 1. Appeal from superior court, city and county of San Francisco.

Action by Theodore Fox against John W. Mackay and the Consolidated California & Virginia Mining Company to recover a fund paid by the company to its superintendent in fraud of stockholders. From a judgment in favor of defendant Mackay, plaintiff appeals. Affirmed.

H. G. Sieberst, for appellant. W. E. F. Deal and Edmund Tauszky, for respondents.

GAROUTTE, J. This action is brought by Theodore Fox, a stockholder of the Consolidated California & Virginia Mining Company, against John W. Mackay and the aforesaid corporation. The action is prosecuted by Fox, as he alleges, in the interest and for the benefit of the corporation. The gist of the cause of action alleged against Mackay is that he conspired to defraud, and did defraud, the mining company, with the aid and connivance of its board of directors, out of the sum of \$50,000. It is now sought by this appeal to compel him to replace that amount of money in the treasury of the company. The basis of plaintiff's claim is found in the payment to one W. H. Patton, an employé of the company and superintendent of the mine, of the sum of \$50,000, in four monthly installments of \$12,500 each. This money was paid to Patton under a resolution of the board of directors reciting that it was done in consideration of the extraordinary and valuable services rendered to the company in the extinguishing of a fire of long standing in the lower levels of the mine. The denials of Mackay's answer to these various charges of fraud were full and complete, and, upon the submission of the case under the evidence and argument, findings of fact were made by the trial judge supporting all along the line the position of defendant Mackay. This appeal is now prosecuted by plaintiff from that judgment.

Upon this appeal there appears to be but a single point urged for the reversal of the judgment, and that point is somewhat vaguely made, and pressed with but little enthusiasm. We assume the point to be that the findings of fact do not support the judgment. But, upon an examination of those findings, we see nothing to justify this contention; and appellant's counsel has failed to particularize in that regard. The findings of fact are full and substantially contain a detailed history of the transaction of which complaint is made. If the claim of appellant be that the superintendent was already an employé of the company at the time these services were performed in extinguishing the fire, and that for such reason the services were done under his original and ordinary employment, then a complete answer to such claim is found in the finding of fact that "said services of said Patton in extinguishing said fire were valuable, efficient, unusual, and extraordinary services, and were outside of his ordinary

duties as such superintendent." But, aside from this fact, we find other findings which cut away below any question of the power of the board of directors looking towards an appropriation of this large sum of money for the payment of services, and that, too, whether those services were real or fancied. Those findings of fact are to the effect that Mackay committed no fraud; that he was not a conspirator; that he was not a member of the board of directors of the mining company; that he in no way profited by the transaction, and was an entire stranger to the whole matter from start to finish. Upon this state of facts, a judgment of nonliability upon his part has ample support, and should be affirmed. It is so ordered.

We concur: HARRISON, J.; VAN DYKE, J.

123 Cal. 582

FOX v. MACKAY et al. (S. F. 1,040.)

(Supreme Court of California. March 2, 1899.)

#### CONSPIRACY—EVIDENCE.

Where a defendant, claimed to have successfully conspired to induce the directors of a corporation to vote a large sum to its superintendent in fraud of stockholders, was absent from the city for a long time, both prior and subsequent to the action of the directors, and knew nothing of the matter until long after it was entirely completed, a judgment dismissing the action as to him was supported by the evidence.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Theodore Fox against John W. Mackay and the Consolidated California & Virginia Mining Company to recover a fund paid by the company to its superintendent in fraud of stockholders. From a judgment in favor of defendant Mackay, plaintiff appeals. Affirmed.

H. G. Sieberst, for appellant. W. E. F. Deal and Edmund Tauszky, for respondents.

GAROUTTE, J. This cause is S. F. No. 1,040, but it is the same cause as S. F. No. 1,016, decided this day (56 Pac. 434), and was argued jointly and upon the same briefs. No. 1,016 is an appeal from the judgment. No. 1,040 is an appeal from the order denying plaintiff's motion for a new trial, and is now before us upon a separate record. Upon this appeal it is contended that the evidence is insufficient to support the findings of fact. A brief summary of various facts which gave rise to the present litigation is set forth in the opinion of the court upon the appeal from the judgment. Mackay was a director in the Nevada Bank, and the Nevada Bank was treasurer of the mining company defendant. Patton, superintendent of the mine, was indebted to the Nevada Bank by note in the sum of about \$50,000. It may be said that the theory of plaintiff's case is that Flood and Mackay formed a conspiracy to get the pay-

ment of Patton's note by inducing the directors of the mining company, whom they controlled, to vote Patton a gratuity of \$50,000, it being understood that the money when paid should be applied to the payment of Patton's indebtedness to the bank.

Upon the case, measured by the record before the court, we do not find it necessary to discuss the legal proposition involved in the question as to the right of the board of directors of the mining company to pay Patton from the treasury of that company the sum of \$50,000. If there was fraud in that transaction, if legal wrong to the company was done there, it could only be material here if the defendant Mackay was a party to it. However much that payment may have been unauthorized in law, and however much it may have been a fraud upon the stockholders of the mining company, still if the defendant Mackay was not a participant therein, either directly or indirectly, no liability can be put upon him. As to his connection with the transaction, the findings of fact are all one way. By these findings it is declared that he had nothing to do with it, and the evidence is in full accord with the findings of fact. It is not even contradictory. Mackay was not in the state when the board of directors of the mining company resolved to pay this money, and had not been in the state for a long time prior thereto. He knew nothing whatever of the matter until long after it had become a thing of the past. He in no way attempted to influence the board of directors in voting the money. The \$50,000 indebtedness of Patton to the bank was amply secured by collateral; hence, as a stockholder of the bank, the payment of the loan from the treasury of the mining company was no benefit to him; but, upon the contrary, as a stockholder of the mining company, it was a substantial injury. He in no degree received any pecuniary benefit from the transaction, and in no sense was a conspirator to defraud the company out of the money. The findings of fact exonerate him from all liability, and the evidence does the same. For the foregoing reasons, the order is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

123 Cal. 634

WHYTE v. ROSENCRANTZ. (S. F. 847.)  
(Supreme Court of California. March 3, 1899.)

STATUTE OF FRAUDS—VENDOR AND PURCHASER—  
INFANTS—DISAFFIRMANCE OF CONTRACT—NOTES  
—DELIVERY—PLEADING—EVIDENCE—CONTRACTS  
—RESCISSION—MONEY RECEIVED.

1. One to whom a loan is made in consideration of a promise to secure it by a conveyance of real property is, on his refusal to make the conveyance, liable for the amount of the loan as for money had and received, though the promise was void under the statute of frauds.

2. A complaint for money had and received alleged that defendant executed a note for the sum due, and attempted to deliver it to the

payee, but she refused to accept it, whereupon he left it at her residence, and that the note never was in fact delivered; and it offered to return it. *Held* that, by offering to return the note, the complaint did not show an acceptance of it.

3. Under Civ. Code, § 35, authorizing the disaffirmance of a contract because of minority only on restoration of the consideration or payment of its equivalent, where at the time of its execution the minor was over 18 years of age, a minor to whom a loan was made on his oral promise to secure it by a conveyance of real property on coming of age is, on his refusal, after attaining his majority, to make such conveyance, liable as for money had and received, unless he offers to return the amount received, though he no longer has the identical money loaned him.

4. A loan was made in consideration of a promise to secure it by a conveyance of realty as soon as the debtor became of age, and two demand notes were given for it. Shortly before the time when the conveyance was to be made, the debtor obtained the notes from the payee, stating that he intended to use them in settling with his guardian, and to make the promised conveyance. Some time thereafter he came back with a new note for the amount of the debt, and threw it on the table, saying that, unless the payee took this, she would never get a cent. She refused to accept the note, and tried to get him to take it back, but he went away, leaving it; and she took it to her attorney, indorsed it, and left it with him. Thereafter the maker paid interest on it to her, but prior to its execution he had been paying the interest on a debt due from her to a third person, under the original agreement by which the loan to him was made, and she understood it to be interest to apply on such debt. *Held*, that a finding that there was no delivery of the new note was warranted.

5. There never having been an acceptance of the new note, no rescission by the payee was necessary to permit her to sue, as for money had and received, on the debtor's refusal to make the conveyance.

6. In a suit against the debtor as for money had and received, an offer was made to return the note, and it was brought into court to be canceled. *Held* a sufficient rescission, under Civ. Code, § 1691, subd. 2, requiring a person rescinding a contract to restore to the other party everything of value received thereunder.

7. To make the rescission effective, it was unnecessary to return interest paid by the debtor, since it was voluntarily paid by him under the agreement under which he obtained the loan.

8. Since the interest paid was but a reasonable compensation for the use of the money, the debtor was not entitled to a return thereof.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by A. C. Whyte against H. Rosencrantz. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

L. Rosencrantz, for appellant. J. F. Fleming and C. S. Peery, for respondent.

CHIPMAN, C. Action for money had and received. Plaintiff is assignee of Adele Hesser, from whom it is alleged that defendant received the sum of \$5,000, under a verbal agreement, "upon the express condition that said defendant would immediately, upon meeting his majority, make, execute, and deliver to said Adele Hesser, as security for the pay-



ment of said sum, an assignment of all the right, title, and interest in and to" certain property situated in the city of San Francisco, of which defendant was the owner of an undivided one-eighth interest. It is alleged that at this time defendant was over the age of 18 years; that prior to the commencement of the action defendant came of age, and said Adele Hesser demanded that defendant execute said assignment, but he failed and refused to do so, and wholly failed to secure said sum. On or about January 20, 1895, defendant signed a promissory note for said sum, with interest at 7 per cent., payable 11 months after date, "and attempted to deliver the same to said Adele Hesser, and left the same with said Adele Hesser at her residence; but said Adele Hesser then and there refused to accept the said note, \* \* \* unless said defendant would secure payment of the same by said assignment of said interest on said real property as aforesaid, and said note was not in fact delivered." Said Mrs. Hesser, prior to the commencement of the action, offered to return said note to defendant; but he refused to accept the same, and refused to return said sum of \$5,000 or any part thereof; and no part of said sum has been paid, but the whole thereof is due. Plaintiff is now willing and ready to return said note to defendant, and "brings the same into court for said defendant." The complaint is verified. Defendant denies the alleged or any agreement or conditions as attaching to the receipt of the money; admits making the \$5,000 note; denies that it was not accepted by Mrs. Hesser, and alleges that it was received by her in payment of said sum; denies the offer to return the note, and denies the alleged assignment to plaintiff; alleges that about September 20, 1894, he borrowed of Mrs. Hesser \$2,000, and gave his note therefor to her, payable one day after date, at 7 per cent. interest; that on December 26, 1894, he borrowed from her \$3,000, and gave his note to her for that amount, payable one day after date, at 7 per cent. interest; that at these times defendant was over 18 years old, and under 21 years, and on January 6, 1895, defendant came of age, and about January 20, 1895, executed and delivered to Mrs. Hesser his note for \$5,000, payable 11 months after date, at 7 per cent. interest, which she accepted to secure the payment of said sum; alleges that Mrs. Hesser surrendered to defendant said two notes first given (when they were surrendered is not alleged); and, when the \$5,000 note was given, Mrs. Hesser and defendant agreed that it should be received in payment of the first two notes, and that it was so received by her, and that said last note was not due when this suit was commenced.

The cause was tried without a jury, and the court found: That defendant received the \$5,000 under the verbal agreement as alleged in the complaint. It was paid as follows: \$2,000 about September 26, 1894, and \$3,000

about December 2, 1894. And that defendant gave his two notes for these amounts, bearing date as alleged in the answer, but that they were not accepted "as absolute or conditional payment, but were intended by and between the parties, and it was so agreed and understood, that said notes should be taken merely as evidence of the said indebtedness until said defendant should arrive at his majority, and would make, execute, and deliver the said conveyance of said real estate as security for said indebtedness as hereinbefore set forth, and were the only written evidence said Adele Hesser had of said indebtedness." About January 1, 1895, defendant obtained possession of said two last-mentioned notes from Mrs. Hesser, upon the promise of defendant "to thereafter immediately deliver to her said conveyance of said real estate as aforesaid, and the said notes were, while in the possession of said defendant, marked 'Paid' by him, and retained by him, but the said Adele Hesser did not deliver the said notes up to be canceled, nor were the same then paid or the indebtedness evidenced then thereby released or discharged." That about January 20, 1895, defendant signed a promissory note for \$5,000 (the note as above referred to), and offered to deliver the same to Mrs. Hesser, "and showed the same to her, and left the said note upon a table, in the presence of said Adele Hesser, at her residence; but said Adele Hesser then and there refused to accept said note in settlement or payment of the said indebtedness, and refused to accept the same in any manner without the security for the payment of the same which she claimed the defendant had promised her; and the said defendant then said, 'You can have the said note or nothing.' Thereupon the said Adele Hesser demanded the said conveyance and the said real property as security for the said sum of \$5,000, and at the same time offered to return the said note to defendant, and insisted that he should take the same, and make the said conveyance; but defendant refused to take the said note away, and refused to make the said conveyance, and refused to return to the said Adele Hesser the said sum of \$5,000 or any part thereof. That said Adele Hesser was inexperienced in business, and, although she retained the said note in her possession thereafter, she had no intention at any time of accepting the said note as a conditional or absolute payment of said indebtedness." That Mrs. Hesser did not sell this note, but assigned it for the purpose of producing the note at the trial to be canceled, and the same was delivered to the clerk of the court for that purpose. That Mrs. Hesser mortgaged her property to obtain the money loaned to defendant, and he agreed to pay the interest thereon, and that the interest money alleged by defendant to have been paid by him was in fact paid to the mortgagee, and not to Mrs. Hesser on said notes first executed by defendant. The court also found that defendant owned the interest in

certain property as alleged in the complaint; that defendant came of age January 5, 1895; and that Mrs. Hesser frequently thereafter demanded that he execute said conveyance, but on said January 20, 1895, he refused, and ever since has refused, to make said conveyance or secure said loan, and thereby disaffirmed said contract and agreement entered into by him when he received said money. Judgment passed for plaintiff, from which, and from the order denying his motion for a new trial, defendant appeals.

1. Appellant claims that the complaint does not state facts sufficient to constitute a cause of action, but "does state facts which effectually dispel the legal theory upon which it is framed." The basis of the action is that defendant has received money which, under the circumstances, it would be inequitable for him to retain. The complaint alleged that defendant obtained from Mrs. Hesser \$5,000, upon a promise to give a certain security therefor at a certain time. The condition was not complied with, and, being void, it could not be enforced. This void feature of the transaction does not preclude recovery. An action on quantum meruit or quantum valebat will lie where money is paid or services performed under a contract void by the statute of frauds; and we see no difference in principle where the action is for money had and received and the contract is void for other reasons. In *Buck v. City of Eureka*, 109 Cal. 504, 42 Pac. 243, where the action was on a void contract, this court held that an action would lie for services rendered on quantum meruit. Upon the proposition, see, also, *Day v. Railway Co.*, 51 N. Y. 583; 89 N. Y. 616; *Cook v. Doggett*, 2 Allen, 439; *Jarboe v. Severin*, 85 Ind. 496; *Reynolds v. Harris*, 9 Cal. 340. But it is further said that, although the complaint averred nondelivery of the note, and refusal to accept it by Mrs. Hesser, it is alleged that an offer was made to return it, which shows delivery, else how could there be an offer to return? We think the explanation made of the circumstances attending the attempted delivery, and the reasons for retaining the note and offering to return it, relieve the pleading from the charge of inconsistency or of being *felo de se*.

2. Appellant's next five points may be summarized and treated together: Defendant's agreement to secure the money was void. If he made it, he had the right to, and did, disaffirm. And under the provisions of section 35, Civ. Code, he was not bound to restore the money unless he had the identical money he had received, the burden of proving which was on plaintiff. That the \$5,000 note was a substitution for the first two notes, and changed the time of payment, and was acquiesced in by Mrs. Hesser; and hence it became a new contract on conditional payment, and operated at least to postpone payment, and as full performance of defendant's agreement. That Mrs. Hesser could not hold the note, and at the same time demand payment of the

money, and she did not rescind or attempt to rescind. The evidence tended to show that defendant obtained the money as alleged and as found by the court, and upon the agreement as found by the court. A few days before defendant came of age, he got from Mrs. Hesser the two notes first given for the purpose, as he said, to use them in settling with his guardian, "and to give her a transfer of his property." He came of age January 5th, and the next day he came to Mrs. Hesser, as she testified, and said to her: "I will be up in the evening, and I can bring you the deed to my property, and you can sell it, and make me paid." He said: "'You are my mother' and that he would treat me as a mother." These notes were never paid, and were not returned to Mrs. Hesser, but were marked "Paid" by defendant. She did not see him again until about the 20th of January, "when," as she testified, "he rang the bell, and came in in a passion. I said, 'Hilly, what is the matter with you?' He said, 'Here,' and he flung that \$5,000 note on the table, and he said, 'If you don't take this, madam, you will never get a cent.' I said, 'What is the matter, Hilly?' He said, 'I will make myself execution proof, like my brother, Isidor Rosencrantz, and you will get nothing.'" There was evidence corroborative of this meeting. She testified that she did not accept the note, and the evidence tends to show that she tried to get him to take back the note, and insisted on having the deed to his property, but that he threw the note on a table, and left the house, and she saw him no more. In February, Mrs. Hesser handed the note to plaintiff, with the right to sue; and she put the matter in the hands of her attorney, Mr. Fleming, and he took the note, and she indorsed it in his presence, and he has had it ever since. It appears that defendant paid some interest directly to Mrs. Hesser, and some to the bank on her mortgage given to secure the money she borrowed to loan to defendant; but Mrs. Hesser testified that she understood it to be interest money to apply on her mortgage, as defendant had promised to furnish the money for that purpose. It appears, however, that she did receive some interest money on the \$5,000 note, as to which her attorney, in March, informed defendant it was without the attorney's knowledge; and an offer was made to return it, and a new demand made for the deed. The evidence is conflicting, but I think there is some evidence tending to support the findings.

It is conceded that the verbal agreement to convey the property was void; and, being void by the statute of frauds, and not because of defendant's minority, it may not have been necessary for him to disaffirm, and possibly his disaffirmance or nondisaffirmance would not affect the case. He did, however, disaffirm the agreement to convey. The action is not upon this void agreement. It arises out of the relations of the parties, and rests upon the rule that, while the law will not give the action on the agreement, it regards it as morally



binding, and for that reason will not give relief against a party not in default, nor in favor of a party who is in default in his performance of the agreement; and where a party, who has received money under such an agreement, has refused to perform it, the law, to do justice to the other party, will imply an assumpsit. This being the rule between parties ordinarily, does it apply to a minor over the age of 18 years, under our Civil Code? There are certain obligations, not here involved, which the minor may not disaffirm. Civ. Code, §§ 36, 37. In all other cases the contract of the minor, "if made whilst he is under the age of eighteen, may be disaffirmed," etc.; but, "if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received or paying its equivalent." Id. § 35. Appellant relies upon *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, and 18 Am. St. Rep. 571, for the proposition that this section applies only when, upon his majority, the minor has the money.

It may be true, as appellant claims, that the law elsewhere is that no restitution is required "unless the appellant had the identical money he had received." But whatever may be the law under other statutes, we think our Code is too plain to admit of any such interpretation, and was so made to obviate perplexities existing where the statutes had not made the law clear. See Code commissioners' note to section 35. The consideration here was the \$5,000 received by defendant. Conceding, but by no means admitting, that the duty of the minor only goes to the extent of returning the identical money received, if he have it, as seems to be held under some statutes, our Code adds the words "or paying its equivalent," which clearly implies that, if he cannot restore the identical consideration received, he must pay its equivalent. In this case defendant received money, and that or other money is its only equivalent. See note to *Craig v. Van Bebber*, 18 Am. St. Rep., at page 694 (s. c. 100 Mo. 584, 13 S. W. 906); *Combs v. Hawes* (Cal.) 8 Pac. 597.

The claim that the \$5,000 note was a substitution and a new contract in place of the first two notes is not borne out by the evidence, and the finding is to the contrary. It seems that defendant obtained possession of these latter notes under pretense that he wanted them for a particular purpose, and not to be canceled, which he assumed to do after getting possession of them. They were one-day notes, and were not received as payment, but mere evidences of the debt until Mrs. Hesser could get the deed promised her. The \$5,000 note was thrust upon Mrs. Hesser under circumstances justifying the finding of the court that she did not retain it with any intention of accepting it as conditional or absolute payment of the indebtedness evidenced thereby. That she received some interest was some evidence of acceptance, but it was not

conclusive. Nor can appellant claim that payment was postponed because this note was made payable 11 months after date, for Mrs. Hesser did not accept the note. I do not think that her retention of the note, under the circumstances, and turning it over to her attorney, is at all conclusive of her acceptance of it as a new contract substituted for the earlier notes. It was evidence of the fact merely, but open to explanation. As defendant got possession of the earlier notes apparently under a false pretense, and still retained them, the burden was on him to make clear the proof of delivery and acceptance of the new note. The evidence on the point was conflicting, of which there was sufficient to justify the finding against defendant's contention. Upon the point that Mrs. Hesser failed to rescind or offer to rescind, the obvious answer is that there was nothing for her to rescind, as she did not receive and accept the note as conditional or absolute payment of the indebtedness. Besides, the offer to surrender the note and bringing it into court at the time to be canceled was sufficient. Defendant was thus fully protected against any other action on that note. *Coghill v. Boring*, 15 Cal. 213; Civ. Code, § 1691, subd. 2.

There was no offer to return the interest money paid by defendant, but this was voluntarily paid by him to apply to Mrs. Hesser's mortgage according to agreement, and, furthermore, was but the reasonable compensation for the use of the money, to the return of which defendant was not entitled. *Wilson v. Moriarty*, 77 Cal. 596, 20 Pac. 134.

3. Appellant makes an omnibus objection that "each and every ruling of the court below, which was made the object of objection and exception, was erroneous"; citing many folios of the transcript, but not pointing out why error is claimed as to any one of these numerous assignments. This method of presenting errors would, under the practice of this court, justify ignoring them altogether. We have, however, looked through the transcript, in obedience to the learned counsel's request, but can discover no error prejudicial to defendant.

We are of the opinion that the judgment and order should be affirmed, and so advise.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing, the judgment and order are affirmed.

123 Cal. 666

CITY OF EUREKA v. MCKAY & CO.

(S. F. 915.)

(Supreme Court of California. March 6, 1899.)

DEDICATION OF STREETS—WHAT CONSTITUTES—ESTOPPEL.

1. St. 1856, p. 103, incorporates the town of Eureka, describing its boundaries as commencing at a certain point north of A street, and running south to its corner, and thence south-erly along A street to a certain point. A street

had previously been designated as such on a map of Eureka, and the land occupied by it was owned by the state. *Held*, that the land occupied by A street was not dedicated as a street by the act incorporating the town.

2. St. 1857, p. 76, grants to the town of Eureka the lands within its limits owned by the state, including what is known as the "water front," extending from high-water mark into the bay to a point where the water is not over six feet at low tide, the trustees of the town being required to plat the water front into lots, and to sell such of them at a certain price to persons who were bona fide occupants thereof at the time the act was passed. Thereafter the trustees passed an ordinance employing a surveyor "to run off and set stakes at the corners of all the blocks lying between A and N streets and the bay." Pursuant thereto, a map was made of a part of the town, including A street, which was placed in the recorder's office. This map contained no names of streets. Thereafter an occupant of part of the water front applied for a deed, and the town conveyed to his successor, the deed including a part of A street; and in another street, which was also conveyed, a right of way to the bay was reserved for the original occupant. *Held*, that the municipal authorities had not dedicated as a street the part of A street conveyed by them.

3. A conveyance by a municipality included a portion of a street which was not being used as such; and the grantee and his successors took possession, and paid taxes thereon, and inclosed it with a substantial fence. *Held*, that the city was not equitably estopped from claiming the land as a street.

Department 2. Appeal from superior court, Humboldt county.

Ejection by the city of Eureka against McKay & Co., a corporation. There was a judgment for plaintiff, and defendant appeals. Reversed.

E. B. & Geo. H. Mastick, for appellant. A. G. Monroe, for respondent.

HENSHAW, J. This is an action in ejectment, brought by the city of Eureka, to recover from defendant a piece of land alleged to be a public street of that city, described and known as "A Street." The answer denied the allegations of the complaint, and affirmatively pleaded the statute of limitations and an estoppel against plaintiff. The case was tried upon an agreed statement of facts. Judgment passed for plaintiff, and defendant appeals.

In 1850 a settlement was made on the site of what afterwards came to be the town of Eureka, now the city of Eureka. In that year one Ryan made a map entitled "Map of Eureka." Before the 18th day of April, 1856, this map was deposited in the office of the recorder of Humboldt county, and has since remained in the office of the recorder. It bears upon it no marks of filing. The map represented blocks, lots, and streets,—those streets running generally north and south being named from the letters of the alphabet; those running at right angles to them by numbers. "A street," as delineated, forms the western boundary of the town, and extends from the waters of Humboldt Bay southerly beyond Third street. On April 18, 1856, the legislature passed an act incorporating the

town of Eureka. St. 1856, p. 103. The boundaries of the town were thus delimited: "Commencing at a point one hundred yards north of A and First streets, in Humboldt Bay, and running south to the corner of A and First streets; thence southerly, along A street, to 16th street; thence easterly, along 16th street, to S street," etc. In the following year the state ceded to the town of Eureka all of the land which by virtue of its sovereignty it owned within the corporate limits of the town. St. 1857, p. 76. Of the land so owned by the state, and so granted to the municipality, a part was the "water front" of the town, defined in the act to be the land within the corporate limits of the town "extending from high-water mark to a point in the bay where the water shall not be over six feet deep at low tide." The other land which passed to the town by this grant was the marsh land lying between this water front and the upland proper. The land here in controversy is a part of this marsh land. The act contained the following provision: "Sec. 2. The board of trustees of said town are hereby authorized and required to lay off the said water front in lots of such size and in such manner as will accommodate and subserve the interest of the present 'mill owners' and other occupants, and shall proceed to sell such lots as are now in the bona fide possession of such 'mill owners' and other occupants, at a price not to exceed one dollar per front foot, and extending from high-water mark to a point in the bay where the water shall not be over six feet deep at low tide." Upon the 17th of August, 1857, the board of trustees, following this act, adopted an ordinance known as "Ordinance No. 9," as follows: "The board of trustees of the town of Eureka do ordain as follows: That Mr. Murray be employed to run off and set a stake at the corners of all the blocks lying between A and N streets and the bay and Third street, on the most reasonable terms." In the following month, by resolution, the trustees declared that "the board employed Mr. Murray to survey the town as provided in Ordinance No. 9, for the sum of seventy-five dollars, the board to furnish assistance." In December, 1857, the minutes of the board of trustees show the following: "James Dawson applied for the water front in the rear of lots Nos. 20 and 21, on the map of Eureka, to be deeded to him as the occupant thereof," etc. John Vance claimed to be the sole occupant of the water front in part of the lot No. 16 on the map of Eureka. Upon the 4th day of January, the minutes of the trustees show the following: "On motion of Mr. Simpson it was voted that a deed be executed to W. P. Duff as a bona fide occupant for a water front lot on the east side of B street, and extending from Third street to a point in the bay where the water is not more than six feet deep at low tide, and sixty feet wide, at the price of one dollar per front foot, the streets and alleys running



across the said lot to be reserved by the town as they are laid out on the map of Eureka, and surveyed by Mr. Murray in September last." On the 15th day of January, 1858, Ryan, on behalf of Ryan & Duff, made application to the trustees for a deed to a lot of land. On the 16th day of January, 1858, the board determined that Ryan & Duff were bona fide occupants of the "water front" claimed by them, and ordered "that a deed be executed to James T. Ryan and James R. Duff for the water-front lot commencing at the northwest corner of A and Third streets; from thence running northerly to a point in the bay where the water is not more than six feet deep at low tide; thence easterly to the east side of B street; thence southerly to Third street; thence westerly, along the north side of Third street, to the place of beginning,—reserving a right of way to the bay, in B street, to W. R. Duff." A deed to this land from the city was duly made to William I. Reed, who had succeeded by purchase to the rights of Ryan & Duff; and the defendant derails title by mesne conveyances from Reed, each successive grantee having paid full value for the property. Between the date of the passage of Ordinance No. 9 and the date of the application of Ryan & Duff for a deed, Murray set stakes, as contemplated by Ordinance No. 9, at the corners of the blocks, and, in particular, staked the corners of the blocks on A street, between First street and Third street. He also made a survey of A street between First and Third streets, and there was placed in the recorder's office a map called "Map of a resurvey of a portion of the town of Eureka, scale one hundred and fifty feet to the inch, by Joseph Seely, county surveyor. J. S. Murray, Deputy." This diagram represents blocks, lots, and streets; but it contains no names of streets, nor names or designations or numbers of lots or blocks, and bears no indication of the points of the compass. A comparison of it with the Ryan map discloses that it is but an enlarged and incomplete copy of that drawing. The land affected by this controversy is a part of the land conveyed by the city to Reed. It is marsh land, and (assuming A street to be a street) comprises that portion of A street between Third street and Second street. This land was not, and never has been, open to travel, nor used as a street. Taxes have been paid upon it by defendant and its grantors regularly and continuously; and for many years it has been inclosed by a substantial fence.

The legal questions presented under these facts are the following: (1) Was the land in controversy dedicated as a public street by the act of the legislature incorporating the town of Eureka? (2) Was it dedicated as a public street by the municipal authorities of the town of Eureka? (3) If a dedication was made, is an estoppel in pais raised against the city by reason of its deed, its subsequent conduct, and circumstances of an exceptional nature which would render it inequitable to per-

mit the city to claim a street against this defendant?

1. We think it quite clear that the act of the legislature incorporating the town of Eureka did not operate as a dedication of A street. Dedication is always a question of intent, and the acts of the owner of property are sufficient to prove a dedication only when they are evincive of such intent, or, what amounts substantially to the same thing, when they are such as to estop him from denying that such was his intent. The act of 1856 was an act "to incorporate the town of Eureka," and as essential to that incorporation to fix the boundaries of the town, and thus limit the territory over which the municipality could exercise corporate jurisdiction. In defining these boundaries, it made reference to streets. The streets named in the act were those which formed the boundary streets upon the Ryan map. It would be unreasonable to say that by the act of incorporation the legislature meant to dedicate as public streets these boundary streets, and yet that it entirely ignored all of the other cross streets and connecting streets, as shown on the map. In truth, the legislative mind was not directed to the dedication of public highways at all. That might well be left, and in fact was left, to the municipal authorities. The case upon this proposition is like those of *People v. Kruger*, 19 Cal. 411, and *People v. Dana*, 22 Cal. 11, where the same contention was made as to the dedication by the legislature of a street in San Francisco, and this court said: "This phrase was not designed to lay off a street or to protract the line of a street already existing. The legislature might well trust the city with such police and municipal regulation. The only object was to fix the boundary in order to show what was conveyed. This could as well be done by giving the course or the imaginary or real line of the given street as by opening and establishing the street to the desired point, and making it the boundary."

2. Do the acts of the municipal authorities amount to a dedication of A street? The Ryan map, being the unauthorized act of a person having no interest in the land, could not amount even to an offer of dedication. *City of Eureka v. Croghan*, 81 Cal. 524, 22 Pac. 693. The act of the legislature incorporating the town contained, as already stated, no dedication, much less an adoption of the Ryan map, to which no reference whatever is made. This portion of A street has never been used by the public as a street. If, then, a dedication of it as a highway was ever made, that dedication is to be found in the acts of the municipal authorities directed to that end. Here respondent places much reliance upon Ordinance No. 9 and the acts of Mr. Murray in placing his survey stakes, as contemplated by that ordinance. But Ordinance No. 9 is not a dedication of proposed streets. The utmost that can be allowed for it is that it was a recognition by the mu-

nality of pre-existing streets. Murray had no authority from the board to lay out new streets, nor any authority to prepare or file a map showing new or any streets. The crude and imperfect drawing which was placed in the recorder's office, and which was made by Murray, contains no reference for its authority to Ordinance No. 9. It does not disclose that it was made by the authority of any one. It contains no names or designations of streets or lots. So incomplete is it that it is not such a diagram or plat as could be made the foundation of an offer to dedicate by map, even if the desire so to dedicate were in the mind of the owner of the land. Nor is the mention of A street in Ordinance No. 9 any evidence of an intent upon the part of the municipal authorities to dedicate it as a street. Murray was to survey and stake off the blocks "between A and N streets." If A street was not, previous to the date of that ordinance, a dedicated street, this language would not make it such. The case would be very like that before this court in *Cerf v. Pfeiging*, 94 Cal. 131, 29 Pac. 417. There a plat had been made by one other than the owner, and without the owner's authority. The owner conveyed by reference to the lines of streets designated upon the plat, and the land conveyed was described "as being a part of Pacific street." This court said: "A mere statement of the owner of land that it constitutes a part of a street is certainly not an offer to dedicate, although it may be a probative fact of some value in determining whether he had not previously dedicated it." The grants by the city to other persons of the so-called "water-front lands," made prior to the grant of the land here in question, do not affect the question. There is in them no reference whatsoever to A street. Thus, all the acts of the city up to the time of the grant to Reed are insufficient to show a legal dedication of the land in controversy. When we come, however, to the proceedings of the trustees by which the deed to Ryan & Duff was authorized to be made, there is strong internal evidence to combat the theory of a dedication, and to prove that the intent to dedicate this portion of A street was never in the mind of the municipal authorities. The authorization, it will be noted, was for a deed to Ryan & Duff of certain specifically described and bounded lands. Within the boundaries thus defined were included the portion of A street in controversy, and a portion of the next adjoining street to the east, B street. The trustees were careful to reserve "a right of way to the bay in B street to W. R. Duff." B street stood, so far as dedication by Ordinance No. 9 was concerned, in precisely the same condition as did A street. Manifestly, the trustees did not consider that B street was a public way, or they would not have been guilty of the folly of reserving a private right of way to an individual in a public street. From the full fee in B street which they granted to Ryan and James R. Duff, they reserved a private right

of way to W. R. Duff. No such reservation was made as to the land embraced in A street. It seems a natural—indeed, a most inevitable—conclusion that the municipal authorities at that time did not believe A street or B street to be public streets, and least of all did they believe that they themselves had dedicated them to public use.

3. The conclusion thus reached that there was no dedication of "A street" renders unnecessary any extended consideration of the question of estoppel in pais invoked against the city. Suffice it to say that this court has recognized such an estoppel in cases of peculiar hardship where, saving for its aid, grave injustice would result. *Fresno v. Irrigation Co.*, 98 Cal. 179, 32 Pac. 943; *Los Angeles v. Cohn*, 101 Cal. 373, 35 Pac. 1002. But the facts in this case present not nearly so strong a motive for the invocation of the doctrine as was presented by the facts in the case of *City of Sacramento v. Clunie*, 120 Cal. 29, 52 Pac. 44. Yet in this latter case it was held that the proof fell far short of establishing this exceptional estoppel.

The agreed statement of facts was made subject to such objections, in point of law, as either party might make on the trial. Upon the trial the court overruled defendant's objection to the admission and consideration of certain facts set out in sundry paragraphs of the stipulation. We have preferred, however, to consider the questions of dedication and estoppel in the light of all of the admitted facts. The conclusions which we have reached render unnecessary any detailed consideration of the objections made to the introduction of the evidence.

As the facts in this case are stipulated, and the appeal is from the judgment, it is unnecessary to order a new trial. Upon the determination by this court that no dedication of "A Street" is proved, defendant is entitled to judgment upon the stipulated facts. The judgment of the trial court is therefore reversed, and the cause remanded, with directions that, upon the facts stipulated, judgment be entered for defendant.

We concur: TEMPLE, J.; McFARLAND, J.

6 Cal. Unrep. 241

PEOPLE v. OUBRIDGE. (Cr. 499.)<sup>1</sup>  
(Supreme Court of California. Feb. 28, 1899.)

FORGERY—EVIDENCE—VARIANCE.

Where experts testified that a check defendant was charged with forging was signed by the name charged in the indictment, and the jury so found, a conviction will not be reversed on appeal on the ground of variance, though the name appearing thereon might be deciphered slightly differently.

Department 1. Appeal from superior court, Alameda county.

Henry Oubridge was convicted of forgery, and he appeals. Affirmed.

W. H. O'Brien, for appellant. Atty. Gen. Ford, for the People.

<sup>1</sup>Rehearing denied March 29, 1899.



**PER CURIAM.** Defendant has been convicted of the crime of forgery, and now prosecutes an appeal to this court.

It is contended that a fatal variance exists between the allegations of the information and the proof, in this: that it is alleged the forged signature to the check is "Ned Forester," while the check, upon its face, shows the signature to be "Ned Forestns." There is no merit in the contention. It is not at all apparent from an inspection of the check that the signature is "Ned Forestns." It might readily answer to the call of other signatures equally with that of "Forestns." There was expert testimony tending to show that the signature was "Forester," and, in addition to that testimony, the jury had the check before them for personal inspection. Under this evidence of the expert, and from personal inspection, the jury, by their verdict, declared the signature was "Forester," and this court will not disturb that finding of fact. No other point is made by defendant upon his appeal, and for the foregoing reasons the judgment and orders appealed from are affirmed.

(123 Cal. 571)

**PEOPLE v. HILL. (Cr. 457.)**

(Supreme Court of California. Feb. 28, 1899.)

**HOMICIDE — EVIDENCE — HEARSAY — PREJUDICIAL ERROR — EXPERIMENTS — ERRONEOUS ADMISION — HARMLESS ERROR.**

1. Deceased's wife testified that she saw defendant and deceased in conversation, and soon after was attracted by the loud voice of her husband, and saw him lying on the ground, and defendant standing over him with an uplifted club, but was unable to designate the point where she saw her husband lying, nor to point it out on a diagram. Some days after the homicide, she pointed out the place to a witness, who was permitted, over defendant's objection, to testify to that fact, and to point out the place on the diagram. *Held*, that the evidence was hearsay, and its admission prejudicial error, since it permitted the jury to determine the place of the conflict from evidence based on the unsworn information of another.

2. Where deceased was killed in a corral by being struck on the head with a smooth stick, and there was no evidence identifying a stick found in the corral as the one with which deceased was struck, or in any manner connecting it with defendant, and the wound could have been produced by any large smooth implement, it was error to permit the stick found to be introduced in evidence, and exhibited to the jury.

3. Where it was admitted that defendant got over a wire fence before striking deceased, and it appeared that one of the wires at the post where he got over was bent, the admission of evidence that a witness put his weight on the wire next to another post, to observe its effect, and that the wire was bent in the same manner, without showing the conditions to have been the same in both cases, while erroneous, was not prejudicial, since it was immaterial how defendant got over.

In bank. Appeal from superior court, Ventura county.

Robert L. Hill was convicted of murder, and he appeals. Reversed.

Blackstock and Ewing, for appellant. Atty. Gen. Fitzgerald, for the People.

**HARRISON, J.** The appellant was convicted of murder in the second degree in killing Theodore R. Parvin, and has appealed from the judgment thereon. The circumstances attending the homicide are as follows: The appellant had leased to Parvin certain premises, known as the "Hill Place," and had also sold him certain personal property for use in the cultivation of the land, upon which he had taken a chattel mortgage as security for the payment therefor. Becoming dissatisfied with the manner in which Parvin was cultivating the land, he was anxious to buy him off, and for that purpose went to the place in company with his father on the 8th of February, 1898. Very soon after his arrival, he approached the deceased, who was working within a corral upon a fence at the westerly side thereof; and while upon the outer side of the corral, and talking with the deceased respecting the purchase, hot words ensued between them, followed by a mutual assault, which resulted in the defendant striking Parvin across the head with a stick, from the effects of which he died the same night.

The only person who witnessed the altercation was the father of the defendant, and at the trial he testified that he was at work about 20 or 30 feet away from where they were standing, while on opposite sides of the fence, and, having his attention drawn to them by hearing Parvin speak in a loud tone of voice, saw him approach the defendant with uplifted hands, having a saw in one and a hammer in the other, and strike at him. Thereupon the defendant stooped down, and picked up a stick from the ground, and got over the fence into the corral. Parvin still had the saw and hammer uplifted in his hands, and, while striking at the defendant with the hammer, the defendant struck him across the head with the stick which he had picked up, which caused Parvin to fall to the ground, from which he almost immediately got up, and walked over to the barn, against which he rested for a few minutes, and then went to another part of the corral, and sat down. He also testified that the point in the corral at which Parvin was standing when the defendant struck him was about 3 feet east of the west fence of the corral, and about 25 feet from the barn; that he fell towards the west with his head about a foot from the fence. Mrs. Parvin, the wife of the deceased, was in the dwelling house, and saw the defendant and her husband while they were in conversation upon opposite sides of the fence, but did not see the defendant strike her husband. She testified that, very soon after she had seen them thus talking, she was attracted by the loud voice of her husband, and went out upon the porch, and saw her husband lying on the ground, and the defendant standing over him with a club raised as if to strike him, when his father came up and grabbed

his arm. She said that, in seeing this, she looked through the cracks of a pig pen which stood between her and the corral, and which was shown to be 92 feet from where she stood; but she was unable to designate the point in the corral at which she saw her husband lying on the ground, or to point the same out upon the map or diagram which was before the jury; but she stated that on the 16th of February she had pointed out the place to Mr. Graham as near as she could locate it. Thereupon the prosecution called Mr. Graham as a witness, and asked him whether on the 16th of February Mrs. Parvin had indicated to him the point in the corral at which she had seen her husband lying on the ground on the 8th of February, and, if so, to point out same on the diagram. Defendant objected to these questions, on the ground that the testimony sought thereby was hearsay and incompetent, but the objection was overruled, and the witness testified that Mrs. Parvin did point out a place where she said she saw her husband lying on the ground, and the place so pointed out the witness located at a point 165 feet from the porch, and about 20 feet from the place at which the other witness had testified that Parvin fell. The father had also testified that the defendant did not stand with a club raised over the deceased, or attempt to strike Parvin after he fell, nor did he grab defendant's arm or attempt to prevent him from striking Parvin.

The testimony thus given by Graham was clearly hearsay, and the court erred in admitting it. It permitted the jury to determine the point at which the conflict took place by the statement of a witness based upon information derived from another not under oath, and the correctness of whose statement was not subject to a cross-examination by the defendant. The evidence was material, both for the purpose of illustrating the theory of the prosecution in conducting the trial, and for establishing the charge against the defendant by its corroboration of other evidence introduced against him; and that it was deemed material by the prosecution is shown by its efforts to secure its admission, notwithstanding the objections of the defendant. Another witness for the prosecution (McClure) testified that in the afternoon of the 8th of February, about an hour after the occurrence, and after all the parties had left the corral, he went into the corral, and searched for weapons, or what he could find therein, and found a two by four scantling about three feet long, lying on the ground; and, in answer to a question whether he observed any indications on the ground of a struggle, he said that near where he found the stick he saw toe prints that looked as if his toes had pushed the dirt and straw back. This place, he testified, was about north of the middle of the barn, and about 15 feet from it. The barn was shown to be 48 feet in length. The place in the corral at which the altercation took place became, therefore, important for the purpose of determining

whether the defendant struck the deceased while defending himself from the assault against him, or whether he pursued the deceased after he got over the fence, and struck him while retreating.

The court also erred in permitting the club which McClure found in the corral to be received in evidence, and exhibited to the jury. There was no evidence identifying the stick as the one with which the defendant struck the deceased, or in any way connecting the defendant with it. Both of the witnesses who testified to having seen the defendant and the deceased together in the corral stated that they were unable to recognize it as the stick which the defendant had used; and the only other testimony relating thereto was that of the physician, who stated that the blow upon the head of the deceased must have been made by some rather large and smooth instrument, and that it could have been produced by such a stick. But, as it is evident from the description of the physician that the blow could have been produced by any other large and smooth implement, it was necessary that there should be some evidence identifying this stick as the one with which the blow was given before it could be offered in evidence; otherwise, the jury could only conjecture that it had been used by defendant. See *Tayl. Ev.* § 557.

The witness Graham testified to some measurements made by him of the fence on the 16th of February, and that he noticed that the top wire on the north side of the third post, at which it was claimed the defendant got over the fence into the corral, was bent downward about an inch and a half. He then testified, over the objections of the defendant, that he put his weight on the wire next to another post, for the purpose of observing its effect, and that it made the downward appearance just about as it did at the third post. Under the principle stated in *People v. Woon Tuck Wo*, 120 Cal. 204, 52 Pac. 833, this evidence should have been excluded. See, also, *Gillett, Ind. & Col. Ev.* § 66. If it were intended thereby to show that the kink in the wire at the third post had been made by the defendant, it was not shown that the conditions of the experiment by Graham were the same. The relative weight of the two persons, the tension of the wire at the different posts, and the force with which each stepped upon the fence, were elements to be considered before the experiment could illustrate the supposed act of the defendant. It cannot be said, however, that the defendant was prejudiced by this testimony. It was conceded that he did get over the fence before striking the deceased, and whether he leaped over without touching the wire, or stepped upon the wire in order to get over, was immaterial for the purpose of determining the character of the affray between them.

Objections are made to certain instructions to the jury; but as these objections relate to the form rather than to the substance of the



instructions, and may be obviated upon another trial, it is unnecessary to discuss their correctness. The motion to set aside the information was properly refused. *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: GAROUTTE, J.; McFARLAND, J.; TEMPLE, J.; HENSHAW, J.

123 Cal. 598

**PEOPLE ex rel. CUFF v. CITY OF OAKLAND. (S. F. 1,589.)**

(Supreme Court of California. March 2, 1899.)  
MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—INCORPORATED SANITARY DISTRICT—AMENDMENT OF CHARTER.

1. St. 1891, p. 223, authorizes the creation of sanitary districts, and provides for their dissolution by proceedings for that purpose, except that there shall be no dissolution for the purpose of paying outstanding bonded indebtedness, and that the property of the district shall vest in any incorporated city or town occupying a portion of the territory of the district. St. 1889, p. 358, authorizes the annexation of new territory to towns or cities not forming part of any incorporated town or city, and provides proceedings for that purpose. *Held*, that an incorporated sanitary district, or a part thereof, may be annexed to an incorporated town or city by proceedings under St. 1889, p. 358.

2. St. 1883, p. 97, classifying municipalities according to population, and providing a charter for each class, and authorizing the consolidation of contiguous municipal corporations, does not authorize the annexation of an incorporated sanitary district, or a part thereof, to an incorporated city or town.

3. Under Const. art. 11, § 6, providing that cities shall be subject to and controlled by general laws, except in municipal affairs, *Oakland City Charter*, § 25 (St. 1889, p. 524), requiring the city council to divide the city into seven wards in the year 1890, and every tenth year thereafter, making the same as nearly equal in population as possible, does not supersede St. 1889, p. 358, authorizing the annexation of territory to incorporated towns and cities, and providing (section 2) that a city annexing such territory shall by ordinance alter the boundaries of wards so as to include the annexed territory, or make a new ward thereof; and the annexation of territory to the city of Oakland under the provisions of St. 1889, p. 358, is not void as depriving the qualified electors residing in the annexed territory of their elective franchise.

4. The annexation of new territory to an incorporated city is not an amendment of its charter, within Const. art. 11, § 8, permitting the amendment of a city charter only at intervals of not less than two years, and with the consent of three-fifths of the qualified electors of the city.

5. Under St. 1889, p. 358, § 1, requiring the city council, on receiving a petition for the annexation of territory to the city, to submit the question whether such annexation shall be made, without delay, to a vote of the electors of the city and of the territory to be annexed, the city council has jurisdiction of a petition for the annexation of territory, even though it has not yet taken final action on a prior petition for the annexation of the same territory, where the second petition included all the territory covered by the first, and every one entitled to vote on the first was also entitled to vote on the second.

In bank. Appeal from superior court, Alameda county.

Action by the people, by W. F. Fitzgerald, attorney general, on the relation of Thomas Cuff, against the city of Oakland. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

For opinion on motion to dismiss, see 55 Pac. 772.

Fitzgerald & Abbott and W. F. Fitzgerald, for appellant. W. A. Dow, for respondent.

HAYNES, C. The purpose for which this action is prosecuted is to determine the validity of certain proceedings under which the defendant claims that certain territory lying between the northerly charter line of said city and the southerly line of the town of Berkeley has been annexed to it, and that said territory is now a part of said city. Findings were filed and judgment entered in favor of the defendant, and the plaintiff appeals from the judgment, and from an order denying a new trial.

There is no controversy as to the facts. Nearly all were stipulated, and are incorporated in the findings; nor is it questioned that the requirements of the statute under which the proceedings were taken were complied with; but, upon the grounds hereinafter stated, appellant contends that said proceedings were unauthorized and void, and that the judgment affirming that the annexation of said territory was accomplished thereby should be reversed.

1. The annexed territory includes the whole of Adeline sanitary district, and part of Golden Gate sanitary district; and appellant contends that sanitary districts cannot be annexed to an incorporated town or city under the act of 1889 (St. 1889, p. 358), under which the proceedings in question were had. This contention is based upon the proposition that two public corporations cannot exist in the same territory when the powers conferred upon each conflict one with the other, and that the powers conferred upon each do conflict; that a sanitary district cannot be dissolved by annexation proceedings under the act of 1889, but only in the special way provided by the sanitary act under which they were organized (St. 1891, p. 223), and, if they can be annexed to the city, it must be under the statute providing for the consolidation of municipal corporations. It may be conceded at the outset that sanitary districts are public corporations, though not designated as corporations by the statute, and that all their powers, duties, and privileges are such as are incident to municipal corporations formed under the municipal government act, or existing under freeholders' charters, though not possessing many of the important powers, duties, and privileges of the latter, and that the same powers could not, after annexation, be exercised by each in the same territory. But, if the statute permits territory embraced in or

covered by a sanitary district to be annexed to a city,—a municipal corporation of a higher class, and capable of exercising the same functions, as well as others essential to municipal government,—such statute contemplates, ex necessitate rei, a cession of the powers of the inferior corporation to the greater, and a consequent dissolution of the former as a result of the annexation. If the territory embraced in these sanitary districts had chosen to incorporate under the statute as a town or city, instead of becoming annexed to the city of Oakland, it certainly could not have been necessary, as a preliminary to such incorporation, to disincorporate as such sanitary districts, since by the incorporation they would have preserved every right and privilege they had before, and would at the same time acquire other rights and additional powers, which would enable them the better to preserve and secure all the rights they had as sanitary districts; and, if they might incorporate as a town or city without first dissolving the prior corporation, no reason is perceived why they could not accomplish the same thing by becoming annexed to an existing municipal corporation under the act of 1889, which provides: "The boundaries of any incorporated town or city, whether heretofore or hereafter formed, incorporated, organized or reorganized, may be altered, and new territory annexed thereto and incorporated and included therein, and made part thereof, upon proceedings being had and taken as in this act provided. \* \* \* No territory, which at the time such petition for such proposed annexation is presented to such legislative body forms any part of any incorporated town or city, shall be annexed under the provisions of this act." This statute unquestionably authorized the annexation of the territory here in question, unless appellant's further contention can be sustained, viz. that these districts were municipal corporations, and the proceedings to accomplish the union of this territory with the city of Oakland should have been taken under section 8 of the act of 1883 (St. 1883, p. 97). That act is commonly known as the "Municipal Government Act," which classifies the different municipal corporations according to population, and provides a charter for each class, as required by the constitution, and section 8 provides for the "consolidation" of contiguous municipal corporations. But it must be apparent that the municipal corporations there intended were those, or such as those, which might be organized under that act, or existed under special charters granted by the legislature under the former constitution, or under charters permitted to be framed under the new constitution, and which were designated as towns and cities. As sanitary districts could not be formed under the municipal government act, it would seem to be clear that they could not be consolidated with a city or town, under its provisions; and as any "territory" may be annexed to a town or city to which it is con-

tiguous, unless it is part of an "incorporated town or city," territory embraced in a sanitary district may be annexed.

It is also suggested that difficulties may arise out of the division of Golden Gate sanitary district, a part of which is not annexed. That district, as such, is not a party to this proceeding, nor is any fact stated in the record showing that a controversy will arise; and no question of that character can be pertinent here, unless it tends to show that a division of the district by the annexation of part of it is contrary to law, and that, therefore, the annexation of such part is not accomplished. It is sufficient to say that section 21 of the act under which these districts were organized, which provides for their dissolution, would seem to be comprehensive enough to point the way to the adjustment of all controversies that may be reasonably anticipated, and that the anticipation of controversies that may be thus adjusted cannot make the annexation unlawful. Said section, however, provides that, if there be any outstanding bonded indebtedness, the vote to dissolve such district shall dissolve the same for all purposes, excepting only the levy and collection of taxes for the payment of such indebtedness. It also contains the following provision: "Upon such dissolution the property of the district shall vest in any incorporated city or town that may at said time be in occupation of a considerable portion of the territory of the district, and, if there be no such incorporated city or town, then the property shall be vested in the board of supervisors of the county until the formation of such a city or town." These provisions would seem to make it clear that there are no legal obstacles to the annexation, either of such districts, or parts thereof, to an incorporated city, and no other question is here considered or decided.

2. Appellant's second point is: "There is no law under which to add the annexed territory to any wards, so as to enable the duly-qualified electors residing in the annexed territory to use the elective franchise to which they are entitled under the constitution." Section 25 of the charter of the city of Oakland provides: "The council shall in the year 1890, and every tenth year thereafter, re-district the city into seven wards, making the same as nearly equal in population and as geographically compact as possible; but the city shall not be re-districted within ninety days previous to any municipal election." St. 1889, p. 524. Section 2 of the act of 1889, under which the territory here in question was annexed, provides: "The legislative body of any incorporated town or city which is or shall be divided into wards, and to which territory has been or shall be hereafter annexed, must by ordinance either so alter the boundaries of the wards of such municipal corporation as to include such annexed territory in one or more wards adjoining such annexed territory, or make of such annexed territory one or more additional wards; provided, that the



number of wards shall not be so increased as to exceed the number which such municipal corporation may according to law have. In altering the boundaries of wards, or creating new wards, regard must be had to the number of inhabitants, so that each ward shall contain, as near as may be, an equal number of inhabitants, exclusive of persons incapable of citizenship in this state." The agreed statement of facts on this point is, in substance, that the said new territory adjoined the Second ward of said city, and no other; that on September 20, 1897, the council adopted an ordinance altering the boundaries of the Second ward so as to include the annexed territory; that it was approved on September 28th, and has ever since been in full force and effect. Appellant's argument is that section 2 of the act of 1889, above quoted, conflicts with said section 25 of the charter, and that under section 6 of article 11 of the constitution, as amended in 1893, the charter provision must control. Said constitutional provision, so far as material, is as follows: "Cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, *except in municipal affairs*, shall be subject to and controlled by general laws." The words in italics constitute the amendment to said section; and appellant's contention seems to be that the city had no power to change the boundaries of any of its wards, except at the times and in the manner specified in said section of its charter, and that, as said section 2 of the act of 1889 relates to municipal affairs, the city cannot avail itself of its provisions to change the boundaries of a ward, or be in any manner controlled by it. I do not perceive any ground upon which it can be said that the act providing for the annexation of territory to an incorporated town or city is obnoxious to said section of the constitution as amended. It permits territory not within the city limits or under its control to become annexed to and incorporated with the city, by the mutual action of the city and the inhabitants of such territory,—a thing that could not be accomplished through any provision of the charter of the city of Oakland, or otherwise than under the statutory authority given by said act; and therefore such relation as said act has to "municipal affairs" is not within the constitutional exception. It does not compel action contrary to the provisions of the city charter, but authorizes action, at the pleasure of the city, which could not otherwise be taken. As the legislature alone has the power to authorize such annexation, it must have the power to prescribe the terms, conditions, and mode of annexation, and especially to provide that the inhabitants of the annexed territory shall not be deprived of any constitutional right; and it is therefore enacted that the boundary of the adjacent ward or wards shall be changed so as to include the added territory, or that it shall be made into one or more wards, if thereby the number of wards to which the

city is restricted shall not be exceeded. As the city of Oakland is limited to seven wards by its charter, the annexed territory was properly added to the Second ward. This I think could be done without a violation of its charter. Section 25 of the charter, while requiring that the city shall be redistricted into seven wards every tenth year, does not prohibit a change of boundaries at other times (unless within 90 days previous to a municipal election), and therefore the electors residing within the added territory were not deprived of the right to exercise the elective franchise, and the annexation cannot be declared void upon that ground. Whether the city should at that time have been redistricted into seven wards of as nearly equal population as possible is not a question affecting the validity of the annexation, and need not be considered. Appellant's contention that the voters of the annexed territory could not participate in the election of city officers is not sustained. What has been said also disposes of appellant's third point.

4. Appellant's fourth point is, "The annexation is void because section 1 of the act of 1889 is unconstitutional, when considered in connection with section 8 of article 11 of the constitution." Appellant's argument is that the charter of the city of Oakland (commonly known as a "freeholders' charter"), framed and adopted under the provisions of said section of the constitution, can only be amended at intervals of two years, and in the manner in said section provided, which includes the approval of such amendment by the legislature, and that the effect of annexing new territory is an amendment of the charter in a mode which does not conform to the constitution, since a description of the territory covered by the charter is an essential part of it; and cites *People v. City of Oakland*, 92 Cal. 611, 28 Pac. 807. This contention is conclusively answered by the case of *People v. City of Coronado*, 100 Cal. 571, 35 Pac. 162. There the city of San Diego had a freeholders' charter also, and the charter included the city of Coronado within its boundaries. Proceedings were taken under the act of March 19, 1889 (St. 1889, p. 356), to exclude the city of Coronado. It was there contended, as here, that the exclusion, if effectual, constituted an amendment to the city charter. It was held that said act of 1889 authorizing the change of boundaries was constitutional and applied to cities having a freeholders' charter. The case of *People v. City of Oakland*, 92 Cal. 611, 28 Pac. 807, was there noticed, and shown not to be in point.

5. Lastly, it is contended that the city council had no jurisdiction to act on the petition under which the annexation proceedings were had. The petition under which the proceedings to annex the new territory were had was presented to the city council on April 19th. On March 9th the council received a petition to annex certain territory therein described, but which was different from that described

In the second petition. Said first petition was on March 22d referred by the council to the ordinance and judiciary committee, which consisted of five members. That the relator herein, and other residents and property owners within the territory sought to be annexed, filed with the council a protest against said petition first presented, and alleged, as the ground of such protest "that the description of the new territory asked to be annexed is incorrect, and cannot be located, and that said petition does not conform to the law, and is void." On April 19th the said committee reported in writing to the council, recommending that no action be taken on said petition first presented, which report was received by said council and filed; and on the same day the second petition, under which said territory was annexed to the city, was presented. Touching said first petition, the court below found that the description of the territory sought to be annexed thereunder was sufficient to identify it, and was sufficient for the purpose of annexation proceedings. It is contended by appellant that "section 1 of the act of 1889 (St. 1889, p. 358) makes it mandatory upon the council, upon receiving a written petition containing the requirements of the statute, to submit, 'without delay,' to the electors of the municipal corporation, and to the electors of the district proposed to be annexed, the question whether the new territory should be annexed." But it is clear that the sufficiency of a petition presented for such purpose must first be passed upon by the council, before an election is ordered. The protest against said petition, above mentioned, will illustrate this proposition, viz. that the description of the territory proposed to be annexed "is incorrect and cannot be located." If that were true, the council could neither determine who, outside of the city, should be entitled to vote upon the question of annexation, nor whether a majority of those actually voting upon the question of annexation were entitled to vote; and, if the council should come to the conclusion that the boundaries were uncertain or could not be ascertained, it would certainly be their duty not to submit the uncertain proposition to an uncertain and indefinite body of voters. Having jurisdiction to pass upon that question, it is immaterial whether the council erred upon the question of its sufficiency. But, however, that may be, the second petition embraced all the territory described in the first, and additional territory not described in the first. It was presented before final action was taken by the council upon the first, and, as no one who was included in the first petition as a resident of the territory proposed to be annexed was excluded by the second, it could not be necessary to submit both to a vote of the electors. No one could be injured by the failure to submit the first to a vote, since every one affected by the first, and entitled to vote thereon, was entitled to vote upon the second.

No other questions are discussed, or require consideration. I advise that the judgment and order appealed from be affirmed.

We concur: GRAY, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

BEATTY, C. J. I concur in the judgment and in the opinion of the court, with this exception: I do not think the constitutional amendment of 1896 affects the construction or validity of the annexation act of 1889, or in any wise limits its operation upon the Oakland charter. In other words, I do not think it has any retroactive operation. Under numerous decisions of this court, the annexation act of 1889, as a general law, controlled all charters at the time it was passed, and the subsequent adoption of the amendment of 1896 did not have the effect of undoing what was then fully accomplished.

(123 Cal. 522)

#### In re DISBARMENT OF COFFEY.

(S. F. 451.)<sup>1</sup>

(Supreme Court of California. Feb. 27, 1899.)

DISBARMENT—DEFENSE—CRUEL OR UNUSUAL PUNISHMENT—MISDEMEANOR INVOLVING MORAL TURPITUDE.

1. That a certified copy of the record of the conviction of an attorney for an offense warranting his disbarment was not transmitted to the supreme court within 30 days after conviction, as required by Code Civ. Proc. § 288, is no defense to the disbarment proceeding.

2. A judgment of disbarment for a misdemeanor in addition to a fine is not cruel or unusual punishment, within the constitutional prohibition.

3. Under Code Civ. Proc. § 287, declaring that an attorney may be disbarred on conviction of a misdemeanor involving moral turpitude, a disbarment is warranted for a conviction of unsuccessfully attempting by any verbal threat, such as are specified by Pen. Code, § 519, to extort money or other property from another, and expressly made a misdemeanor, under section 524.

In bank. In the matter of the disbarment of John J. Coffey. Removal from office, and revocation of license ordered.

For rule to show cause, see 53 Pac. 1128.

Jos. F. Coffey, for the prosecution. John J. Coffey, in pro. per.

GAROUTTE, J. Section 518 of the Penal Code reads: "Extortion is the obtaining of property from another with his consent induced by a wrongful use of force or fear, or under color of official right." Section 524 provides: "Every person who unsuccessfully attempts, by means of any verbal threat, such as is specified in section five hundred and nineteen, to extort money or other property from another, is guilty of a misdemeanor." Section 287 of the Code of Civil Procedure declares: "An attorney and counselor may

<sup>1</sup> Rehearing denied March 20, 1899.



be removed or suspended by the supreme court or any department thereof, or by any superior court of the state, for either of the following causes arising after his admission to practice: (1) His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence."

John J. Coffey, an attorney of this court, has been convicted of the offense of attempted extortion, as outlined by the aforesaid section 524. A certified copy of the record of his conviction was placed before this court, and, upon an order to show cause why he (Coffey) should not be removed as an attorney and counselor at law, he made answer as follows: (1) A certified copy of the record of conviction was not transmitted to this court within 30 days after the conviction was had, as required by section 288 of the Code of Civil Procedure. (2) A judgment of disbarment in addition to the fine imposed upon respondent would be violative of the constitutional provision that cruel or unusual punishment shall not be inflicted. (3) It does not appear, and it is not true, that the misdemeanor of which this respondent was convicted involved moral turpitude, within the provision of section 287 of the Code of Civil Procedure, upon which this proceeding is based. (4) The police court in which this respondent was convicted had no jurisdiction to try the respondent for the alleged offense, and its proceedings therein were coram non judice.

We see no merit whatever in the first, second, and fourth defenses made by respondent in his answer, and they require no extended consideration. By the third defense it is insisted that the misdemeanor of which the respondent has been convicted does not involve "moral turpitude." This contention presents the only important question in the case. It must be true that, if the actual commission of an offense involves moral turpitude, then an attempt to commit that offense likewise involves turpitude. It therefore follows that, if the crime of extortion by any of the threats enumerated in section 519 of the Penal Code involves moral turpitude upon the part of the extorter, then the attempt of this respondent to extort also involves moral turpitude. Bouvier defines turpitude as "everything done contrary to justice, honesty, modesty, or good morals." This definition is so broad that we are not compelled to approach its exterior limits in holding that turpitude is an ingredient of the crime of extortion. No one would contend that moral turpitude was not involved in the crime of robbery; yet extortion is but one degree removed from that crime. Under the statutes of England, extortion by a private individual was termed "robbery," and punished as such; and an attempt to "extort," under the Penal Code of this state, by the statutes of some other states, is made an "attempt to rob." In *People v. Barondess*, 61 Hun, 576, 16 N. Y. Supp. 438, it is said: "Robbery is the un-

lawful taking against the will by means of force or violence or fear of injury, immediate or future, to one's personal property, while extortion is the obtaining with consent by similar means." In a note by the commissioners found under section 484 of the Penal Code, annotated, in speaking as to robbery, embezzlement, larceny, and extortion, it is said: "All four include the criminal acquisition of the property of another. In robbery this is accomplished by means of force or fear, and by overcoming or disregarding the will of the rightful possessor. \* \* \* In extortion there is again a taking. Now, this is with the consent of the party injured, but it is consent induced by threats or under color of some official right. \* \* \* Thus, extortion partakes in an inferior degree of the nature of robbery, and embezzlement shares that of larceny." In *People v. Griffin*, 2 Barb. 430, the court said: "Before the statute, the act of obtaining money or property without a color or claim of right through means of threatening letters was not a subject of criminal recognizance; and yet it is apparent that such acts were as dangerous and accompanied with as much moral turpitude as the crime of robbery. In declaring the act a crime, and providing for its punishment, the legislature have with great propriety placed the offense in the same class with that of robbery; and, in giving the statute an interpretation, I think we should apply the same rule in respect to the intent with which the act is committed as we would in a case of the common-law offense of an intention to rob, in which the *lucri causa* must always characterize the act." It is thus apparent that extortion is not an act innocent in itself, and only wrong because prohibited by the statute law. But, upon the contrary, it is an act inherently bad and vicious. It is a crime against property, and by the Penal Code of the state is so classified. By the provisions of the Code, we find it in the company of arson, burglary, counterfeiting, larceny, and embezzlement. They are bad and wicked companions, and, by the company it keeps, it must be judged.

For the foregoing reasons, it is ordered that respondent, John J. Coffey, be removed from his office as attorney and counselor at law, and that his license to practice law in the courts of this state be revoked and set aside.

We concur: BEATTY, C. J.; HARRISON, J.; HENSHAW, J.; McFARLAND, J.

123 Cal. 532

MACOMBER v. BIGELOW. (S. F. 835.)

(Supreme Court of California. Feb. 28, 1899.)

BUILDING CONTRACTORS—SUITS BY SUBCONTRACTORS—PRIOR DETERMINATION—CONTRACTOR'S ACTION—CONTINUANCE—QUANTUM MERUIT—RECOVERY—INTEREST.

1. Under Code Civ. Proc. § 1193, requiring a building contractor to defend, at his expense, actions brought against the property which was the subject of the contract for work

done or materials furnished by subcontractors, the owner is entitled to set off the expense incurred in defending lien foreclosure suits by subcontractors against the contractor's claim based on a quantum meruit, where the contract was invalid because of the contractor's failure to record it as required by Code Civ. Proc. § 1183, and hence it was error for the court to refuse to continue the contractor's action until the subcontractors' suits had been determined.

2. In an action on a quantum meruit for the reasonable value of services and materials furnished by a builder, it was error for the court to allow plaintiff interest on the amount recovered from the date the services were performed and the materials furnished, since the claim was not liquidated, and its amount could only be established by evidence in court, or by an accord between the parties.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by C. A. Macomber against L. M. Bigelow. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Henley & Costello, for appellant. Knight & Heggerty and W. M. Madden, for respondent.

GRAY, C. This action was brought by the assignee of Belyea & Rogers for services performed and materials furnished by plaintiff's assignors for defendant under a building contract, which was void for failure to comply with the requirements of section 1183 of the Code of Civil Procedure as to recording before work commenced, etc. The defendant answered, the case was tried before the court without a jury, and the plaintiff had judgment for the reasonable value of the services performed and the materials furnished, together with interest thereon from the date that the same were so performed and furnished. The defendant moved for a new trial on the grounds, among others, that the court erred in not continuing, staying, and abating this action, and the trial thereof, until certain other actions, which had been begun against defendant by subcontractors to enforce their liens against the property which was the subject of the void contract, could be tried and determined. Another ground of the motion for a new trial was that, the claim sued upon being an unliquidated demand, no interest could be recovered with it. I think the new trial was properly granted on these grounds. There was no privity of contract between these subcontractors and the defendant herein, they having furnished the materials and performed the labor on the building under a contract with plaintiff's assignors only. The defendant, therefore, was not personally liable to them, but they were entitled merely to enforce their liens against his property. It became necessary, as a measure to his own self-protection, to defend these foreclosure suits of the subcontractors, that the sums due under them might be ascertained and fixed by the judgment of the court. This was the best way he had of ascertaining whether the claims of the lienholders were valid or not.

And it was also the duty of the contractor, under section 1193 of the Code of Civil Procedure, to bear the burden and expense of defending these actions of foreclosure. Appellant says that this section 1193, and the requirement thereof that the contractor defend at his own expense any action brought against the property which is the subject of the contract for work done or material furnished to him, the contractor, applies only in cases where the contractor has a valid contract, which has been recorded in compliance with the mechanic's lien law, and he himself has a lien on the property. This contention can have no controlling force in this case. That identical argument was made before this court in bank in a case where the building contract was void in the same way that it is in the case at bar, and the court held that the defendant was entitled to set off the costs and attorneys' fees incurred in defending the foreclosure suit of the subcontractor against the claim of the contractor on a quantum meruit. *Covell v. Washburn*, 91 Cal. 560, 27 Pac. 859.

In the case at bar it was pleaded in the answer and admitted at the trial that there was then pending in another department of the superior court of San Francisco a suit brought by plaintiff herein against defendant herein to foreclose a claim of lien for \$5,907.19, originally in favor of one Madigan, but assigned to this plaintiff before he brought such suit, and that such claim of lien was for work and materials furnished at request of Belyea & Rogers upon the same property that was the subject of the void builder's contract mentioned above. It was also pleaded and admitted that two other similar foreclosure suits against such property and against this defendant were pending. To properly protect the right which defendant had, under section 1193 of the Code of Civil Procedure, to require the contractor to bear the expense of these foreclosure suits, and to secure to defendant the right to "deduct from the amount due from him to the contractor" the amount of any costs that might accrue in such foreclosure cases, it was necessary that this action should have been continued until the amount of those costs was ascertained. These could have been ascertained at the conclusion of the trials of those cases, and not before, and to that time should the trial of this case have been continued. If it be urged that this would result in great delay in the collection of plaintiff's claim, the reply is, that is the contractor's fault. He might have avoided all delay by paying his debts to these lienholders. These were and are his debts, and not the debts of this defendant. It follows, then, that, for the reason of the refusal of the court to continue the cause until the amount of the costs and attorney fees in the foreclosure suits could be determined and set off against plaintiff's claim herein, it was proper for the court to grant the new trial.

The appellant himself does not contend that the court could properly allow interest to be



recovered in the case, and the suit being on a quantum meruit "for the reasonable value of services and materials, the amount, character, and value of which could only be established by evidence in court, or by an accord between the parties, and which are not susceptible of ascertainment either by computation or by reference to market rates," it would seem that the court erred in holding that interest might be recovered prior to the decision of the case (*Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100; *Swinnerton v. Development Co.*, 112 Cal. 375, 44 Pac. 719), and for this reason alone the court properly granted a new trial. The order granting a new trial should be affirmed.

We concur: BRITT, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order granting a new trial is affirmed.

123 Cal. 548

DAUPHINY et al. v. RED POLL CREAMERY CO. (S. F. 900.)

(Supreme Court of California. Feb. 28, 1899.)

SALES—PAROL CONTRACT—STATUTE OF FRAUDS—ACCEPTANCE AND RECEIPT BY BUYER—PROOF—EVIDENCE—REVIEW—HARMLESS ERROR.

1. No recovery can be had on a contract for the sale of goods, within the statute of frauds (Civ. Code, § 1739), which is not in writing, in absence of clear and unequivocal proof of acceptance and receipt by the buyer.

2. Plaintiff orally contracted to sell to M. & Co., defendant's assignors, wood, the value of which exceeded \$200, to be measured and paid for after defendant consumed wood then on hand, purchased of another. The wood was delivered, but the evidence as to whether it was measured was conflicting, and the wood previously purchased was not consumed. About five cords of the wood was used by M. & Co., but afterwards, on the wood being attached as their property, plaintiff claimed title thereto. Held not sufficient evidence of acceptance and receipt of the wood by the buyers to exempt the contract from the operation of the statute of frauds (Civ. Code, § 1739).

3. Where plaintiff's evidence was insufficient to establish acceptance and receipt of goods by the buyer under an oral contract, void under the statute of frauds, in the absence of such proof the admission of immaterial evidence that certain of the goods were used by the buyer by mistake was not prejudicial.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county.

Action by A. C. Dauphiny & Co. against the Red Poll Creamery Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Henry L. Ford, for appellants. Buck & Cutler, for respondent.

PRINGLE, C. Appeal from judgment, with bill of exceptions. Appeal taken within 60 days after rendition of judgment. Action brought to recover the price of 180 cords of wood, at \$1.75 per cord. Defense, that there was no contract in writing, and no receipt and

acceptance of the wood. It is not claimed that there was any contract in writing. The court below found that the wood was delivered upon the lands of the respondent, and near its creamery, but that no part of it was accepted and received, within the meaning of section 1739 of the Civil Code. In such case the acceptance is matter for the jury to determine, and the finding must stand, unless the uncontroverted facts are sufficient in law to constitute an acceptance. The cases, under the clause of the statute of frauds which our Code section has reproduced, hold that, in order to supply the place of a writing, acceptance and receipt are necessary to show the complete consent of the vendee to the existence of the contract. Acceptance and receipt are both necessary. "The acceptance must be clear and unequivocal." *Benj. Sales*, § 144, where cases are collected. In this case the facts which are without controversy are not sufficient to constitute acceptance and receipt. The well-established facts are that in the fall of 1895 Isaac and Alex. Mosely, the assignors of plaintiffs, agreed with A. M. George, as manager of the respondent, to sell the wood, and deliver it on the lands of respondent, to be measured and paid for after the respondent had consumed 100 cords of wood previously purchased from one Niles, and then on hand. The manager of the respondent was to receive and measure the wood. The wood was cut and delivered on the lands of the respondent some time before the respondent was ready to receive it, the Niles wood being still unconsumed. All that tends to show acceptance by the respondent is the fact that the respondent used about 5½ cords of the wood. There was an effort on the part of the respondent to show that this was done by mistake, the manager supposing the wood consumed to be part of a lot which had been purchased from one Olmstead. But the record of the testimony is evidently very imperfect, and there is nothing to show clearly that fact. Upon the facts shown, there is nothing to explain in one way or the other the use by the respondent of the 5 cords of the wood, and that must remain as a fact in favor of the appellants, tending to show acceptance. It cannot, however, have much significance in that direction, because there is no proof that the wood was measured by the manager with a view to acceptance and payment. Alex. Mosely says that Sage, the manager of the respondent, told him that Cutler, the respondent's secretary, had measured it. But Cutler says: "I never measured the wood. I do not know of any one measuring the wood for the company. I do not know of any one receiving the wood for the company." And, the finding being against the acceptance, we must hold that it was not measured for the respondent. This would take from the use of the 5 cords all its significance as an act of acceptance. Effort is made by the respondent to prove the alleged mistake by which these 5 cords were used as wood supposed to

have been bought from Olmstead. But nothing is actually proved, except the fact of a purchase of wood from Olmstead. The alleged mistake in the use is not established. Cutler, the secretary, says: "I did know of the wood having been used by the defendant until this suit was commenced." If we are permitted to insert the word "not," evidently omitted by accident, that would still only tend to show the mistake alleged. There is not, however, affirmative proof enough on the part of the appellants to make out an acceptance, against the finding of the trial court. A fact that weighs strongly against the appellants is that on August 19, 1896, the wood which had been delivered on the lands of the respondent was attached in a suit against the Mosely brothers; and thereupon the appellants served upon the respondent a formal notice, in writing, that the wood was the property of the appellants; the notice ending as follows: "And you are hereby forbidden to use the same, or any part thereof, without your first having obtained consent of A. C. Dauphny & Co." Cutler, the secretary of the respondent, says in reference to this notice: "When Mr. Dauphny served the notice on me that has been introduced in evidence, it was the first time I knew Dauphny & Co. claimed the wood." There is not affirmative proof on the part of the appellants sufficient to overcome the adverse finding of the court.

The appellants claim error at the trial in admitting the testimony of Olmstead and Cutler in reference to the purchase by Olmstead of 29 cords of wood from the Mosely brothers, and his sale of that wood to the defendant. The evidence was offered with a view to establish the alleged mistake of the defendant in using the 5 cords. It will be seen, however, from the above general statement of the case, that, if the evidence was immaterial, it was not prejudicial to the appellants, for the respondent's case is made out without proof of the fact. The evidence of those witnesses is all that was offered on that subject. It did not, as we have seen, prove the mistake contended for. But as the respondent gets its judgment from the weakness of appellants' case, and without proof of the alleged mistake, the error, if any, was not prejudicial. I advise that the judgment be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

123 Cal. 504

ALLSTEAD v. NICOL. (S. F. 855.)

(Supreme Court of California. March 2, 1899.)

SPECIFIC PERFORMANCE—GUARANTY OF TITLE—REASONABLE TIME FOR PERFORMANCE—MODIFICATION OF CONTRACT—EVIDENCE—APPEAL.

1. A party to a contract for the exchange of land, who guaranties his title to be good, has

a reasonable time in which to perfect it if it is found defective.

2. In an action to enforce the specific performance of a written contract for the exchange of land, evidence that, when plaintiff tendered performance, defendant said he would have to go and see plaintiff's land first, and that plaintiff made no objection, is insufficient to show a subsequent parol agreement that defendant was not to exchange, unless satisfied with plaintiff's land after the inspection.

3. An objection to a finding by the court not made in the specification of errors cannot be raised on appeal.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Bill by Gustave Allstead against William Nicol for specific performance. From a decree for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

T. Z. Blakeman, for appellant. Stafford & Stafford, for respondent.

CHIPMAN, C. Specific performance. Plaintiff and defendant entered into the following written agreement, at San Francisco, on September 14, 1892: "Gustave Allstead and William Nicol agree to exchange property as follows: William Nicol deeds to G. Allstead five lots in gift map No. 3, viz. 1540, 1547, 1548, 1549, and 1550, in exchange for forty-five acres of land in Anderson, three-quarters of a mile from Anderson R. R. station, Shasta county. G. Allstead guaranties his title to be perfect, or no sale. William Nicol has an abstract ordered, for which G. Allstead pays twenty dollars if title proves good. If title of William Nicol is defective, G. Allstead does not have to pay said twenty dollars. William Nicol reserves the right to make title good if it is defective, or annul the exchange. Wm. Nicol, in addition to the lots above, gives Allstead, if the trade goes through, Allstead's promissory note for twenty-five dollars." The court finds the particular description of the property agreed to be exchanged by the parties, and that on October 17, 1892, plaintiff made a written tender personally to defendant of a sufficient deed to the property of plaintiff, and a tender of the \$20 referred to in the agreement for the abstract, and also his acceptance and approval of defendant's title to the lots in San Francisco, and in the same paper demanded performance by defendant; that, at the time of said tender, defendant made no objection to the form of the deed or the title of the land of plaintiff, but defendant refused to carry out the agreement of September 14th, and refused to accept plaintiff's deed; that said agreement was fairly entered into by the parties, and was just, fair, and reasonable; and that plaintiff's property was of the value of \$1,000, and defendant's property of the value of \$900. In his answer, defendant alleged that, after the execution of the written contract, it was agreed that defendant should visit plaintiff's land for purposes of inspection, and, if not satisfied with it, said written agreement



should not be carried out. The court found this alleged modification not to be true. The court gave judgment for plaintiff, from which, and from an order denying defendant's motion for a new trial, this appeal is here.

1. Defendant claims that, as plaintiff guaranteed his title to be perfect or no sale, defendant, by the terms of the contract, "had the right to declare the trade off" when he found the title defective. It appears that the abstract of plaintiff's title disclosed an unredeemed tax sale for 1891 for the sum of \$23.55. On October 6, 1892, plaintiff redeemed from the state; and when, on October 17th, he tendered his deed to defendant, the title was perfect. Defendant testified that he got the abstract on September 20th, and that he told plaintiff he would have to submit it to examination, and would also have to go and look at the land. He went to Anderson, and returned September 24th; and, when plaintiff called to see him, he told plaintiff he would not take the land, because the title was not good, and because the land was not what it was represented to be. The latter of these reasons will be noticed hereafter. As to defendant's right, by the terms of the contract, "to declare the trade off" when he found a defect in the title, we find no clause in the agreement warranting such claim. Plaintiff gave a guaranty of good title, without which there was to be no sale; but plaintiff had a reasonable time within which to remove any defect which the abstract might reveal. He did this within 12 days after the abstract came into defendant's hands. The law upon this point is that even when a time is specified in the contract for its completion, and there is nothing special in its objects or in the subject-matter, and the delay is sufficiently explained and excused, and the delay had not been in itself prejudicial to the other party beyond the means of reparation, specific performance will be decreed. The rule has gone so far in some cases as to hold that if the vendor is able to procure and give a good title at the time of the decree, even though he could not do so at the commencement of the suit, the doctrine of the equity court will be satisfied. Pom. Spec. Perf. Cont. §§ 371, 375, 376, 421, and cases there cited. The case before us is an ordinary one, presenting no special features; and the evidence tends to show that defendant's real and persistent objection did not relate to the defect in the title, and nothing in the case shows the slightest injury or prejudice to defendant by the short lapse of time between the making of the contract and the tender of a perfect title.

2. Defendant attacks the finding that there was no agreement subsequent to the written contract, such as defendant alleged in the answer. Defendant's testimony does not support the alleged defense, conceding that he could change the written agreement by parol. He testified: "He [the plaintiff] told

me his title was good and perfect. I was to be satisfied with the title. I got the abstract on September 20, 1892, and on that day I told Allstead that I would have to go and look at the land first, as well as have the abstract examined. He asked me when I would go, and I told him I would go at the end of the week." Plaintiff testified, when asked on cross-examination what he said to defendant at this time: "I did not object to his going and seeing the land." This evidence is far from establishing a supplemental contract, such as is alleged in the answer, or proving any contract at all. The evidence shows no agreement that the trade was to depend upon the result of this trip to Anderson. Nor was there any evidence tending to show that the agreement was not fair and reasonable. The evidence tended to show that plaintiff's land was worth \$25 or \$30 per acre, and that defendant's lots were worth \$1,200 or \$1,300. There is no allegation in the answer of fraud or misrepresentation by plaintiff; and the evidence tends to show that the properties were of about the same value. The evidence is not such as to invite a discussion of the rule as to when inadequacy of price will render specific performance impossible.

3. The only remaining point relied upon by defendant is that the contract is too indefinite to be enforced by a court of equity. The amended complaint described specifically the land to be conveyed by plaintiff. This allegation is not only not denied, but the answer avers that title to that particular land "was not clear or good." The case was tried by that description, and it was found by the court as alleged in the complaint, and this finding is not attacked in the specification of errors. It is too late now for the first time to raise the point. We see no error in the record, and advise that the judgment and order be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

123 Cal. 535

WM. WOLFF & CO. v. CANADIAN PAC. RY. CO. (S. F. 859.)

(Supreme Court of California. Feb. 28, 1899.)

JUDGMENT—DEFAULT—MOTION TO SET ASIDE—CONDITIONAL ALLOWANCE—ABANDONMENT—IMPLIED FINDING—LACHES—DISCRETION—TENDER.

1. Granting a motion to set aside a default implies a finding that defendant had not abandoned the motion.

2. Abandonment of a motion to set aside a default cannot be predicated on defendant's laches, unaccompanied by evidence of an intention to abandon it.

3. That defendant resisted a demurrer to his answer to an action on a default judgment for plaintiff, and secured time to file a brief, is no evidence that he intended to abandon his motion to set aside the default.

4. The detriment caused to plaintiff by the death of his chief witness, and the scattering of others, while a motion to set aside a default is pending, and the reasonableness of the time which has elapsed before the motion is disposed of, are matters bearing on the ultimate fact of defendant's laches, to be considered by the trial court, and within its discretion, in deciding whether the motion should be granted.

5. The rule of diligence required by Code Civ. Proc. § 473, in "making application" to set aside a default, does not control the subsequent proceedings. If the motion is filed within the time, it may be properly heard at such time as the court may direct.

6. The question of laches, considered in determining whether a motion to set aside a default has been abandoned, is within the sound discretion of the trial court.

7. A motion to set aside a default was granted on condition that defendant pay costs and an attorney's fee within 10 days, which was accordingly tendered and refused. Plaintiff appealed, and the order was affirmed. A tender of the amount was again made and refused within 10 days after the remittitur was filed, and, no subsequent demand being made therefor, defendant deposited it in court before finally moving to set aside the default. *Held*, that the tender had been kept good.

8. A condition to granting a motion to set aside a default that defendant should pay costs and an attorney's fee within 10 days is not a case in which no relief can be obtained, except by complying with Civ. Code, § 1500, providing for the extinguishment of a money obligation by a tender and deposit in a bank in the creditor's name, and notice thereof; and hence payment of the money into court after refusal to accept is sufficient.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Wm. Wolff & Co. against the Canadian Pacific Railway Company. From an order setting aside a default and a judgment entered thereon against defendant, plaintiff appeals. Affirmed.

Augustus Tilden, for appellant. Henry Eickhoff and Edward S. Salomon, for respondent.

PRINGLE, C. Appeal from an order setting aside default and judgment, with bill of exceptions. Judgment by default was entered on July 17, 1888. A motion was seasonably made to set aside default and judgment; and on January 25, 1889, an order was made that the "motion be, and the same is hereby, granted, on condition that defendant pay to plaintiff the sum of sixteen dollars and fifty cents costs and seventy-five dollars counsel fees within ten days." "And ordered that the proposed answer on file stand as the answer." A tender of the whole amount, \$91.50, was made within the 10 days to plaintiff's attorney, who refused to accept it, on the ground that his right of appeal from the order might be prejudiced by the acceptance. Thereupon, on application of the defendant to the court below, the order was modified by vacating that portion of it which required the payment of the counsel fees. Plaintiff appealed from both of these orders; and the first was affirmed by this court, and the sec-

ond reversed. 89 Cal. 332, 26 Pac. 825. The remittitur was filed below on July 1, 1891. The order appealed from recites that the same amount was again tendered to one of plaintiff's attorneys within 10 days from the filing of the remittitur. This recital or finding is not attacked in the bill of exceptions. But exception is taken by the appellant to a statement in the opinion of the lower court that there was no dispute as to the date of this tender. Plaintiff's attorneys refused to accept the tender, and stated by letter of July 20th the following as some of their grounds for refusal: (1) The original tender was not kept good; (2) that more than 10 days had elapsed since the remittitur was filed; (3) that plaintiff contemplated further proceedings, which would be jeopardized by accepting the tender; (4) that the judgment was not set aside, and could not be set aside. On July 17, 1893, plaintiff commenced an action on the judgment. Defendant answered on January 31, 1895, setting up the order of January 25, 1889, and the tender made within 10 days thereafter, and paid into court the amount tendered, \$91.50. The plaintiff demurred to the answer. While the demurrer was under submission to the court, on October 1, 1895, the defendant gave notice of motion that the default and judgment be fully and finally set aside. The motion was granted by order of October 25, 1895; and from that order this appeal is taken.

It is conceded that the order of January 25, 1889, granting the motion to set aside the default on condition of payment of counsel fees and costs, was not a complete disposition of the motion; and it would seem to follow necessarily from this, as was held by the court below, that the motion remained pending until finally disposed of in October, 1895, unless it had been abandoned by the defendant.

The following are the points argued by appellant in its points and authorities:

1. The point most relied upon by the appellant is that the motion was abandoned. Appellant's counsel complains that the court below did not pass upon the question of abandonment. By implication it certainly did, by granting the motion of respondent. But, however that may be, there is certainly nothing in the case to justify the conclusion that the respondent abandoned its motion. There is no evidence of any intention to abandon. Abandonment requires an intent, expressed or implied. It requires something more than mere "passivity,"—a term used by counsel. It differs widely from "laches," in this: that, in granting relief on the ground of abandonment, a court assumes to base its action upon the will of the party; in granting relief on the ground of laches, the action is in invitum. Cases showing that the intention is an essential element of abandonment are collected in *Moon v. Rollins*, 36 Cal. 333. In *Judson v. Malloy*, 40 Cal. 299, this court said: "The jury was charged that, if the plaintiffs and



those under whom they claim had left the premises vacant, unimproved, and without attention for more than five years before the commencement of the action, they were authorized to find therefrom the fact of abandonment. They should have been instructed that such fact must be taken into consideration in deciding the question of abandonment. The essential fact of intention to abandon is not necessarily inferable from the fact stated." In *Utt v. Frey*, 106 Cal. 397, 39 Pac. 809, the court says: "To constitute such abandonment, there must be a concurrence of act and intent, viz. the act of leaving the premises vacant, so that it may be appropriated by the next comer, and the intention of not returning. [Citing cases.] The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will the nonuser alone, without an intention to abandon, be held to amount to an abandonment."

Counsel says: "Even admitting that the intent to abandon did not exist, defendant's conduct was so unmistakably that of abandonment as to justify plaintiff in acting in accordance with that theory, and to estop defendant from denying it." But this court held in *Marquart v. Bradford*, 43 Cal. 526, that it is a confusion of ideas to attempt to found abandonment upon an estoppel in pais, and finds fault with an instruction given to the jury. "The instruction is, in our opinion, objectionable. It mingles together, in such manner as to mislead the jury, two legal propositions, which are quite distinct, and proceed on different principles,—abandonment and estoppel in pais. It appears to treat an estoppel in pais as constituting an element of abandonment, or as one of the circumstances from which it might be found by the jury." This is a logical conclusion from the essential idea on the one side of abandonment, which depends upon the will of the party, and from the idea, on the other side, of an estoppel in pais which operates in invitum. In some instances the delay, inaction, laches, of one party may justify the other party in taking some action adverse to him, and the first party may be estopped from making any defense; but this need not imply any intention of abandoning his rights. As evidence tending in this case to show abandonment, appellant cites the resistance of defendant to plaintiff's demurrer to the answer, in the suit brought on the judgment, and getting time to file a brief. But this would seem rather to negative any intention to abandon the original motion. There is nothing in the conduct of the respondent to warrant a reversal of the implied finding that there was no abandonment.

2. Appellant insists upon the detriment caused by the scattering of the witnesses of the appellant, and the death of its chief witness, during the long pendency of the motion. These are matters which bear upon the ulti-

mate fact of laches determined by the trial court, and within its discretion.

3. And the question of the reasonableness of the time which elapsed before the final disposal of the motion is one of the matters bearing upon the question of laches to be hereafter considered. Before reaching that question, it is only necessary, in answer to a point made by the appellant, to say that the rule of diligence required by Code Civ. Proc. § 473, in "making application" to set aside a default, does not control the subsequent proceedings; nor is six months necessarily a measure of reasonable time for the subsequent diligence. If the application is made within the six months, the court is free to dispose of it as the exigencies of business and the circumstances of the case, under the guidance of the court, will permit. Such was the ruling of this court on the appellant's first appeal.

4. Many of the points made by the appellant are embraced in the general question of laches. And upon that question there is no reason to interfere with the discretion exercised by the court below. "The matter is one which is left to the sound discretion of the chancellor in each case." *Chapman v. Bank*, 97 Cal. 155, 31 Pac. 896. "Laches is a question of fact on the evidence,—an equitable defense, determinable by the particular facts and circumstances of the case." *Pike v. Martindale*, 91 Mo. 285, 1 S. W. 864. In this case the court below seems to have examined with great care all the circumstances of the case, and its conclusion should be final. It is true that there was an exceptionally long delay before the final disposition of the motion. But many circumstances tended to explain it. The appellant is responsible for the first delay of more than two years from January 25, 1889, to July 1, 1891. Counsel insists much upon what he claims to have been decided by this court,—that the first tender was "rightly refused." But it was not rightly refused in any sense that would justify the delay by the appellant. It was not rightly refused from any defect in the tender. All that this court decided upon the appeal is that an acceptance of the tender would have jeopardized the plaintiff's appeal. But the plaintiff was not obliged to take an appeal from the order conditionally granting respondent's motion; and the affirmance of that order takes from appellant its excuse for the appeal and for the delay incident to it. The erroneous order of the court below, striking out the counsel fee as a part of the condition for relief, was matter arising after and growing out of the appellant's wrongful refusal to accept the tender; and, of course, the appeal from that order cannot be invoked as justifying the appellant's delay.

5. A circumstance tending to explain the subsequent delay on the part of the respondent is the impression that seemed to prevail, at first at least, on both sides, that the order

of January 25, 1889, was a final order, or that it became a finality by the performance of the condition. The proper practice would have been to apply to the court for a final order setting forth the performance or the nonperformance of the condition. But appeal was made and entertained, and the court below, in view of the facts, held this to be a circumstance tending to excuse the belief of the respondent's attorneys that their seasonable offer to perform the condition of the order had operated to set aside the default. How far this belief of the respondent's counsel should naturally have been removed by the letter of appellant's attorneys of July 20, 1891, stating that the judgment was not set aside, and could not now be set aside, and that they contemplated further proceedings in the matter, was within the province of the lower court to determine, passing upon the conduct and the good or bad faith of the parties. If the letter had stated only that the judgment was not set aside, and could not now be set aside, it would have been well calculated to arouse the attention of the respondent to the interlocutory nature of the order; but as its first insistence was that the tender had not been made in time, and had not been kept good, the subsequent statement that the judgment was not set aside might not unnaturally have been referred by the respondent to those alleged grounds of infirmity.

6. Without finding it necessary to decide the question, mooted by the appellant, whether the appellant or the respondent was properly the proponent, it certainly cannot, against the ruling of the court below, be said that there was fatal laches on the part of the respondent after its tender was well made and was seasonably renewed, and while the appellant might have brought the matter at any time before the court, if it questioned the status of the judgment. At this point the appellant's position is that this court, by its ruling on the first appeal, justified appellant's refusal to accept the tender, and hence that appellant could stand upon its successful resistance. But we have seen that the appellant gained nothing by its appeal from the order granting respondent's motion, except the ruling that the original tender was well made, but that it must be kept good, and that the appellant was entitled to receive the amount tendered.

The tender was kept good, under this ruling, by a renewal made within 10 days after the filing of the remittitur. It does not appear that, after this renewal of the tender, the money was applied by the respondent to its own use. Certainly, it was not demanded or refused, and it was deposited in court before the application for final relief from the judgment was made. This was a sufficient compliance with the ruling of this court, on the appeal: "That, to constitute the tender a payment, it must be kept good, and the

plaintiff is entitled to receive the amount tendered upon the affirmance of the order setting aside the default and judgment." The opinion of the court was addressed to the point whether the refusal to accept the tender was a waiver of the conditions or not. It does not necessarily mean that the account must be deposited in bank; for the decision was that the first tender, which was clearly made without deposit in bank, was "a sufficient performance of the condition to preserve the rights of the defendant under the order opening the default until the question of its validity should be determined."

This is not a case which demands the extinguishment of an obligation under section 1500, Civ. Code. There are, undoubtedly, situations where there is a fixed and recognized obligation, whose extinguishment is necessary to the relief demanded; as, where the mortgagor desires to have his mortgage discharged of record, he must extinguish his obligation. But there are many instances in which a tender of performance without deposit is sufficient to furnish the relief required; where there is no actual obligation to be extinguished, but only some condition to be performed or some option to be accepted; and other instances in which it would be unreasonable to require the extinguishment of an obligation as a condition of the collateral relief sought. The right of purchase under a contract is secured by a tender. *Miller v. Cox*, 96 Cal. 348, 31 Pac. 161; *Haile v. Smith*, 113 Cal. 602, 45 Pac. 872; *Sayward v. Houghton*, 119 Cal. 550, 51 Pac. 853, and 52 Pac. 44. A pledge is released by a tender. *Loughborough v. McNevin*, 74 Cal. 256, 14 Pac. 369, and 15 Pac. 773. A surety is discharged by a tender. *Randol v. Tatum*, 98 Cal. 390, 33 Pac. 433. To hold that a deposit in bank, under section 1500, is necessary in all cases of a tender, would make section 1500 wholly inconsistent with sections 1504 and 1498, and would efface those sections. Section 1504 provides that an offer of payment, etc., though the title does not pass, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance. Section 1498 provides: "When a debtor is entitled to the performance of a condition precedent to, or concurrent with, performance on his part, he may make his offer to depend upon the due performance of such condition." To require him in such case to extinguish his obligation without performance by the other would defeat this section. The tender in this case was effective, as a compliance with the condition imposed by the order of January 25, 1889. The court below found that both tenders were made in due season; this court held on the first appeal that the tender to the attorney was properly made. The sufficiency of the first tender rendered any tender of interest unnecessary.

Apart from the efficiency of the tender, all other matters in the case were within the



large discretion accorded to a trial court in such cases. There is nothing in the aspect of the case on this appeal which takes it out of the wholesome doctrines stated on the first appeal: "In the matter of opening defaults, much is confided to the discretion of the court [citing cases]; and, where the circumstances are such as to lead the court to hesitate, it is better to resolve the doubt in favor of the application, so as to secure a trial and judgment on the merits [citing cases]."

The foregoing disposes substantially of all the points argued by counsel. It is asking too much of the court to go beyond this, and to follow *seriatim*, through 44 folios, 30 exceptions, made, not to findings of fact, but to points in the opinion of the court below. I advise that the order appealed from be affirmed.

We concur: HAYNES, C.; BRITT, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(123 Cal. 584)

KENNEDY & SHAW LUMBER CO. v. S. S. CONSTRUCTION CO. et al. (S. F. 934.)

(Supreme Court of California. March 2, 1899.)  
GUARANTY—CONSIDERATION—ACTION ON NOTE—PLEADING—FINDINGS.

1. Where the complaint is the only pleading in the case which is divided into numbered subdivisions, a finding "that all the allegations contained in subdivisions 1, 3, 4, and 6 are true" is sufficiently definite.

2. Since an allegation in an action by the payee on a note "that plaintiff is still the owner and holder" of the note is mere surplusage, no finding on such issue is necessary, although denied in the answer.

3. A guaranty of a note, made before delivery, is valid, although without separate consideration.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Suit by the Kennedy & Shaw Lumber Company against the S. S. Construction Company and others. From a judgment against defendant Behrend Joost, and from an order denying a new trial, he appeals. Affirmed.

M. H. Gilson, for appellant. Wm. H. Jordan, for respondent.

HAYNES, C. Suit upon a promissory note made by the S. S. Construction Company to the plaintiff, and indorsed by the defendants the San Francisco & San Mateo Railway Company and J. G. and I. N. Day, and which also bears words of guaranty signed by appellant, Behrend Joost. Upon the trial the action was dismissed as to all the defendants except Mr. Joost, and findings and judgment were against him, and he appeals from the judgment and an order denying a new trial.

The note here in suit was given in renewal

of a prior note made by said construction company, and indorsed by the railway company and J. G. and I. N. Day, but to which Mr. Joost was not a party, either as maker, indorser, or guarantor; but upon said renewal note Mr. Joost wrote and signed a guaranty of the payment thereof, and, as appears from the statement on motion for a new trial, "the only contention at the trial was that the said guaranty was given by defendant Behrend Joost after the delivery of the note without a separate consideration from the note itself, or any consideration whatever"; and appellant contends that the findings do not support the judgment, or, if it should be held that they do, that they are not justified by the evidence.

The first finding is as follows: "That all the allegations contained in subdivisions 1, 3, 4, and 6 are true;" and appellant contends that said finding is indefinite and insufficient to support the judgment; that, for all that appears, the subdivisions intended may be of defendant's answer. The findings, when signed and filed, are part of the record (*Reynolds v. Harris*, 8 Cal. 618), as are also the pleadings and judgment. The findings always relate to matters contained in the pleadings,—that is, they determine the material issues of fact raised by the pleadings,—and as to matters of fact admitted by the pleadings no finding is necessary, and as to such facts the pleadings, in effect, become part of the findings. It is clear, therefore, that the reference in said finding to "subdivisions" can only refer to a pleading, to which we must always look, not only to ascertain what facts are admitted, but to determine whether the findings are within the issues; and on looking at the pleadings we find the complaint contains "subdivisions" corresponding to those mentioned in said finding, while there are no subdivisions or paragraphs numbered in the answer. In *Swift v. Muygridge*, 8 Cal. 445, it was said: "The findings of fact by the court are like the special verdict of a jury. They must be taken in connection with the pleadings to support the judgment." And in *Whitlock v. Manciet*, 10 Or. 166, it was held that, "when the language of a finding is equivocal, the construction which accords with the pleadings and supports the judgment should be adopted." See, also, *Barnes v. Sabron*, 10 Nev. 248, and *Edwards v. Nelson*, 51 Mich. 121, 16 N. W. 261. It is true, the findings should be specific; but, as the record itself removes any uncertainty, we do not feel justified in reversing the judgment upon this ground.

It is also contended that there is no finding upon a material issue. The complaint alleged that the plaintiff "is still the owner and holder of said promissory note," and this allegation is denied by the answer. The allegation in the complaint was surplusage. The complaint showed title to the note in the plaintiff, and the additional allegation that plaintiff is the owner and holder is a conclu-

sion of law. *Wedderspoon v. Rogers*, 32 Cal. 569; *Poorman v. Mills*, 35 Cal. 118; *Hook v. White*, 36 Cal. 302; *Pryce v. Jordan*, 69 Cal. 571, 11 Pac. 185. The issue was, therefore, immaterial. The findings as made cover all material issues, and show plaintiff's title to the note at the time of the trial.

The third finding, appellant contends, is against the evidence. It is to the effect that the contract of guaranty was made by defendant Joost prior to the delivery of said promissory note, and appellant insists that it was made after its delivery, and without consideration, and it is also insisted by appellant that the finding that the guaranty was given "prior to the delivery" is not sufficient; that it must appear that the guaranty was given "contemporaneously with the acceptance of the note," there being no distinct or separate consideration for it. The note was dated the 5th, and the guaranty was made and the note was delivered on the 7th, but no obligation or liability was incurred by any party to the note until it was delivered, and hence, if the guaranty was written and signed before delivery, the obligation of all the parties to the note, including that of the guarantor, became effective at the same moment, and there was a good consideration for the guaranty; and the only remaining question is whether the guaranty was in fact written and signed after the note was delivered. Upon this point there was a plain and material conflict in the evidence. Mr. Smith, on the part of the defendant, testified that he delivered the new note to Mr. Jordan, the attorney for plaintiff, and received from him the old note, and that the guaranty of Mr. Joost was not on the note when he delivered it; while Mr. Jordan testified that after Mr. Joost had written the contract of guaranty on the back of the note it was lying on witness' desk, and Mr. Smith came in and witness handed Mr. Smith the old note and Mr. Kennedy the new one. There was much other testimony, most of it conflicting, and ample room for argument as to which way it preponderated. I find no error in the record which would justify a reversal, and advise that the judgment and order be affirmed.

We concur: BRITT, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

123 Cal. 525

In re LA SOCIETE FRANCAISE D'EPARGNES  
ET DE PREVOYANCE MUTU-  
ELLE. (S. F. 846.)<sup>1</sup>

(Supreme Court of California. Feb. 28, 1899.)

CONSTITUTIONAL LAW — LEGISLATIVE POWERS —  
CHANGE OF NAME—CORPORATIONS.

1. Const. art. 4, § 25, provides that the legislature shall not pass local or special laws changing the names of persons or places.

<sup>1</sup> For modification of opinion, see 56 Pac. 787.

Code Civ. Proc. §§ 1275-1279, provide that a change of name may be made by the superior court, in its discretion, on a petition therefor, stating, among other things, the reasons for such change, and on notice of hearing. *Held*, that such provisions of the Code are not unconstitutional, as casting upon the court the exercise of legislative power, contrary to Const. art. 3.

2. Code Civ. Proc. § 1276, providing that any religious, benevolent, literary, scientific, "or other corporation," or any corporation having, or being known by, the name of any benevolent or charitable society, may apply to the superior court for a change of its corporate name, is not restricted in its application to corporations of the kind specially enumerated, but applies to a corporation organized for profit.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Application of *La Société Française d'Epargnes et de Prevoyance Mutuelle*, a corporation, for a change of its name to "French Savings Bank." From a judgment granting the application, Victor Marchebout, a stockholder, appeals. Affirmed.

Warren Olney, Jr., for appellant. Stanly, McKinstry, Bradley & McKinstry, for respondent.

HAYNES, C. Said corporation filed in the superior court a petition praying that its name be changed to "French Savings Bank," assigning as reasons therefor that its name is cumbersome, unwieldy, and inconvenient in the transaction of business; that its meaning is only understood by persons having a knowledge of the French language, or by those to whom its meaning has been explained; that it is frequently referred to in the community as the "French Savings Bank"; and that the business and best interests of the bank would be promoted by the change. Said petition was signed by all the officers of the bank, and was approved by nearly all the stockholders. The appellant, Victor Marchebout, also a stockholder, filed an opposition to said petition, in the nature of a demurrer, presenting two questions,—one of constitutional law, and the other of statutory construction. After due notice, the petition was heard, witnesses examined, and findings and judgment granting the petition were made and entered, and Marchebout appeals. This proceeding was had under Code Civ. Proc. §§ 1275-1279, and appellant contends—First, that said sections of the Code are unconstitutional; and, second, that, if said provisions are constitutional, the said corporation is not one of those authorized to have its name changed by such proceeding.

1. The ground upon which appellant contends that said Code provisions are unconstitutional is that they cast upon the court the exercise of a legislative power, in violation of article 3 of the constitution, which provides: "The powers of the government of the state of California shall be divided into three separate departments—the legislative, executive and judicial—and no person charged with the



exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this constitution expressly directed or permitted." General definitions clearly distinguish these several departments or powers of the government, but the lines separating them are often indistinct and difficult to trace. The Code provides, in substance, that applications for change of name must be heard and determined by the superior court, the application therefor to be by petition, in which, among other things, must be stated "the reason for such change of name." Notice of the hearing is provided for, and objections may be filed by any person who can therein show "good reason against such change of name." Witnesses may be examined, and the court "may make an order changing the name, or dismissing the application, as to the court may seem right and proper." It is contended that the change of name of a person or corporation is, in the first instance at least, a legislative act, and that such legislative power has been exercised; citing *Bank v. De Ro*, 37 Cal. 538, and *Wallace v. Loomis*, 97 U. S. 146. In the first of these cases the power of the legislature to change the name of a corporation by special statute, in view of the constitutional provision that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes," was considered, but not decided; but, under the same provision in the constitution of Alabama, it was held in the second of said cases that the name of a railroad corporation could be changed by a special act, the court saying that "no new corporate powers or franchises were created by the act." Our present constitution (article 12, § 1) provides that "corporations may be formed under general laws, but shall not be created by special act. \* \* \*". And section 25 of article 4 provides: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: \* \* \* Sixth. Changing the names of persons or places." The constitution does not forbid a change of names, but prohibits the legislature from changing them by special act, which would seem to be the only way by which the legislature by its own exclusive action could effect a change of name in any case, since the reason for the change must be special, and the new name must necessarily be inserted in the legislative act. It would therefore appear that the legislature has done all it could, under the restrictions of the constitution, to prescribe the grounds upon which the court may grant the petition, namely, upon reason for such change being alleged and shown, and further prescribing that the court "may make an order changing the name, or dismissing the application, as to the court may seem right and proper." We do not dispute appellant's contention that the determination of the grounds upon which a change of name may be granted may, in the absence of con-

stitutional prohibition, be the subject of legislative action; but we also think it is one of those questions which the legislature may remit to the judiciary. In *Wayman v. Southard*, 10 Wheat. 1, 46, Chief Justice Marshall, in speaking of the distinction between these co-ordinate branches of the government, said: "The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes, the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily." In that case it appears that the process act passed by congress in 1789 adopted the state laws regulating the modes of proceeding in suits at common law, "subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same." It was contended that this clause, if extended beyond the mere regulation of practice in the court, would be a delegation of legislative authority which congress had not power to make. To this contention the court replied: "It will not be contended that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But congress may certainly delegate to others powers which the legislature may rightfully exercise itself. \* \* \* The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details." See, also, *Beers v. Houghton*, 9 Pet. 355. So, in this state the courts are permitted to make rules and regulations upon many matters, which rules might have been enacted by the legislature in the form of statute law, if it could have anticipated the various circumstances giving rise to their adoption; but the adoption of these rules, as well as the many matters named in the Codes as to which the courts are expressly authorized to exercise their discretion, is based, not upon the supposition that definite enactments in relation to them were not within the legislative power, but because all the facts and circumstances calling for the adoption of such rules, or the exercise of such discretion, could not be anticipated by the legislature, and put in the form of specific enactment covering all cases that could possibly arise. The statute under consideration clearly vests in the superior court a discretion; but, as in all cases where the courts are permitted to exercise a discretion, it is not arbitrary, but guided and controlled by the principles of law and of justice. Indeed, from the very nature of the

case, the exercise of the power to change the name of a person or corporation is quite as appropriate to the judicial as to the legislative branch of the government; nor can it be regarded as an encroachment upon the legislative department, which has itself expressly authorized the courts to exercise it. Appellant concedes that, if the Code prescribed the conditions and circumstances upon which the court should grant a change of name, the action of the court would not be legislative. This, we think, the legislature has done, as far as the nature and grounds of such proceedings will permit. Appellant's argument that the power of creating corporations is legislative, that the giving a corporation a name is part of the act creating it, and that the power to amend the creative act is the same as the power to create the corporation, is specious and without controlling force, since the change of name confers no new corporate powers or franchises. *Wallace v. Loomis*, supra. The Tennessee cases cited by appellant are entirely consistent with the views we have expressed. It was there held that, in order to confer upon the court of chancery the power to grant charters of incorporation, the legislature must specify the terms upon which they should be granted, and the powers to be given; while in the act there considered these were all left to the discretion of the chancellor, and the act was properly held to be void. *State v. Armstrong*, 3 Sneed, 634; *Ex parte Chadwell*, 3 Baxt. 98. In forming corporations under a general act, the name is not given by the legislature, but by the corporators; and it is only in the case of corporations organized under special charters where the name is given by the legislature; and, if corporators may in the first instance select and adopt a name under authority given by the legislature, it is difficult to perceive why the legislature may not permit such name to be changed upon their application to the court, a reason being shown therefor.

2. Appellant's second contention is that the statute under which these proceedings were taken does not include corporations formed for private gain. Section 1276, Code Civ. Proc., so far as material, is as follows: "Any religious, benevolent, literary, scientific or other corporation, or any corporation having for its name, or using or being known by the name of any benevolent or charitable order or society, may apply to the superior court \* \* \* for a change of its corporate name. \* \* \* Upon filing such petition on behalf of such corporation, the same proceedings shall be had as upon applications for change of names of natural persons, and no banking corporations hereafter organized shall adopt or use the name of any friendly association." The contention is that the general expression "or other corporation" is limited to include only corporations ejusdem generis with those specially enumerated; and appellant quotes one of the maxims of jurispru-

dence stated in Civ. Code, § 3534: "Particular expressions qualify those which are general." Section 3509 of the same Code, however, declares: "The maxims of jurisprudence hereinafter set forth are intended not to qualify any of the foregoing provisions of this Code, but to aid in their just application." The cases in which this question is discussed and applied are too numerous to be cited or discussed within the limits of this opinion. There is little, if any, controversy as to the maxim in its application to penal statutes, and of that class is the leading case of *Sandiman v. Breach*, 7 Barn. & C. 99, and the other English cases cited by appellant; and in this category may also be placed the following cases cited by him, viz.: *U. S. v. Garretson*, 42 Fed. 22, which imposes a penalty for cutting timber on land reserved by the government for certain enumerated purposes; and *Fox v. Mining Co.*, 108 Cal. 369, 41 Pac. 308, where the liability of the directors of a corporation for moneys "embezzled or misappropriated" was considered. Of a different class is the case of *In re Hermance*, 71 N. Y. 481, which appellant cites and claims to be "exactly in point." There the question was as to what errors could be corrected by a board of supervisors under statutory authority "to correct any manifest, clerical or other error in any assessments or returns," etc. The court said: "It is evident that the legislature did not intend to subject all assessments to review under the act and upon every question that could arise affecting its legality and propriety. If it had been intended to permit a correction by this new tribunal of all errors of judgment, errors of fact, errors of law, jurisdictional questions, why were certain errors specified and others of more importance omitted?" That case is a good illustration of the application of the maxim "*Noscitur a sociis*," for it is clear that the errors intended to be corrected were not errors of judgment, since that would be to substitute their judgment for that of the assessor, nor was it within their jurisdiction to correct errors of law, as they were not clothed by the act with judicial powers. But in this case the necessity or desirability of a change of name is as likely to occur in the case of a private corporation organized for profit as any other; and there is no reason suggested why a change of name should not be permitted to such corporations as well as to those specifically named; and especially must this be true since, if such corporations cannot have their names changed under these provisions of the Code, they cannot be changed at all. It could only be done by the legislature by a special act, and that, as we have seen, is prohibited by the constitution. I advise that the judgment be affirmed.

We concur: GRAY, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.



123 Cal. 614

In re ROYER'S ESTATE. (S. F. 1,439.)  
(Supreme Court of California. March 3, 1899.)

CHARITABLE BEQUESTS—VALIDITY—INTENTION OF  
TESTATOR.

1. An unincorporated state university, recognized by various state statutes relating to its organization, government, and functions as having an existence distinct from that of its regents, who are incorporated, is capable of taking a devise, notwithstanding that its organic act provides that gifts to it may be made to the regents and to the state.

2. Under Civ. Code, § 1275, providing that corporations organized for scientific, literary, or educational purposes may take testamentary dispositions of property, though not specially authorized by law, the state university can take a testamentary gift, though not specially authorized to receive it.

3. Though the state university is a governmental institution, it is not clothed with state sovereignty, exempting it from the operation of Civ. Code, § 1313, which provides that charitable bequests shall not exceed one-third of the distributable estate.

4. A resolution of regents of a university directing the investment of a fund bequeathed to establish a professorship is insufficient to show that the fund is inadequate to carry out the testator's intent.

5. Under Civ. Code, § 1317, which provides that, if the intention of the testator with respect to a charitable gift cannot have effect to its full extent, it must have effect as far as possible, a bequest to establish a professorship is not invalid because the amount is inadequate to establish the professorship.

Commissioners' decision. Department 1.  
Appeal from superior court, city and county of San Francisco.

In the matter of the estate of Herman Royer, deceased, the heirs and the Regents of the University of California filed conflicting petitions for distribution. From an order denying the petition of the regents, and ordering distribution to the heirs, the regents appeal. Reversed.

John B. Mhoon, for University of California.  
W. F. Williamson, for executors. Jos. Leggett, for certain heirs.

CHIPMAN, C. The controversy arises upon conflicting petitions for distribution filed by the heirs at law of deceased and by the Regents of the University of California, and involves the right to the residue of the estate of deceased under the provisions of his will. After making certain specific bequests, the testator, in the sixth clause of his will, declared as follows: "Sixth. All the rest and residue of my property and estate I do hereby give, devise, and bequeath unto the University of the State of California, for the sole purpose of founding a professorship of political economy, and for no other purpose whatever. If the said gift and devise shall for any reason fail, the same shall revert to my next of kin." The court found that neither the University of the State of California, nor the University of California, is now, or ever has been, a corporation under the laws of this state, and is not a person, and that each is an entity distinct from the Regents of the Uni-

versity of California, which latter are a corporation duly organized under the laws of the state. The court also found that the residue of the estate is insufficient for the purpose of founding a professorship of political economy, and that the gift has failed, and has, by the express provisions of the will, reverted to the next of kin of the testator. The court denied the petition of the Regents of the University of California, and granted that of the heirs at law, and ordered distribution accordingly, from which this appeal was taken.

But little evidence was submitted at the hearing. In addition to the introduction of the will, it appeared that on October 12, 1897, appellant adopted a resolution "that the funds devised to the university by Herman Royer, deceased, together with such other funds as are now available for that purpose, or may become available hereafter, in aid of founding a professorship of political economy, be invested so as to produce an income, and that no part of the principal funds so invested shall ever be expended." It was admitted that the Regents of the University of California are now, and have been since 1868, a duly incorporated and existing corporation under an act of the legislature approved March 23, 1868, and that a chair of political economy of said university was established in 1878, and is now existing. It also appeared that the residue of the estate of deceased amounts to \$5,467.10. This was all the evidence. The findings of fact are obviously drawn, not only from this evidence, but also to some extent from the statutes, and are practically findings of mixed law and fact. They are attacked as against both the law and the evidence. It seems to be admitted that the "University of California" and the "University of the State of California" mean the same entity, whatever that entity may be. We shall therefore disregard any distinction between the two designations, and for brevity will refer to the University of California as the "university," and the Regents of the University of California as the "regents." The questions involved are of much importance, as they concern, not only the bequest in issue, but previous gifts and grants, as well as the legal status of the university. This must be our apology for entering somewhat fully into the consideration of the matter.

1. The constitution of 1849 (article 9, § 4) directed the legislature to take measures for the disposition of such lands as had then been, or might thereafter be, granted by the United States, or any person or persons, to this state, "for the use of a university," pursuant to which provision the act of March 23, 1868, was passed. St. 1867-68, p. 248. Section 1 of the act reads: "A state university is hereby created. \* \* \* The said university shall be called the University of California. \* \* \* The said university shall be under the charge and control of a board of directors, to be known and styled 'The Regents of the University of California.'

The university shall have for its design, to provide instruction and complete education in all the departments of science, literature, art, industrial and professional pursuits and general education," and also various special courses of instruction named in the act. The act provides for the establishment of different colleges of which the university is to consist. Section 11 provides: "The general government and superintendence of the university shall vest in a board of regents, to be denominated the 'Regents of the University of California,' who shall become incorporated under the general laws of the state of California by that corporate name and style. \* \* \*" Section 12 provides: "The said board of regents, when so incorporated, shall have the custody of the books, records, buildings and all other property of the university." This section also provides for vesting the title of certain property in the state, where donated for the purpose of the university, and also provides how the regents shall dispose of property donated or conveyed to them, and also for the affiliation of certain colleges with the university, in which case the regents are to have no right of property in or over the same, but "such college so affiliated may retain its own property," etc. Section 13 gives the regents, when incorporated, power "to enact laws for the government of the university, to elect a president of the university, and the requisite number of professors, instructors, officers and employes, and to fix their salaries, also the term of office of each, and to determine the moral and educational qualification of applicants for admission to the various courses of instruction." Section 14 speaks of the income of the university, and when the regents may provide for free tuition. Section 15 makes the president of the university "the president of the several faculties and the executive head of the institution in all its departments, except as herein otherwise provided." This section also provides for the selection of a secretary and a treasurer of the university. Section 20 provides "for the endowment and support of the university and its buildings and improvements." Then follows a designation of the various funds or income arising out of the sales of lands granted to the state by congress. Some of these funds are to be paid over to the regents; in other cases to the state treasury, "and paid over to the treasurer of the university, for the use and behoof of the said university and expended by said board," etc. The section also appropriates contributions to the endowment appropriated by the state "or from public or private bounty." The income of these funds is placed at the disposal of the regents "for the support of the university and of the several colleges and schools thereof," etc. The section also gives the regents authority to appoint persons "to solicit and collect private contributions for the endowment of the university," etc. Section 21 provides "for the current expenditures of the uni-

versity, and payment is to be made by warrants of the president of the board drawn upon the treasurer of the university." Section 23 refers to the buildings of the university, and section 24 provides that "the collections by the state geological survey shall belong to the university," and directs that they be arranged in a building denominated the "Museum of the University." Section 25 directs the regents to construct "such buildings as shall be needed for the immediate use of the university," and to take steps for the improvement of its grounds, etc. The general appropriation act of March 30, 1868 (St. 1867-68, p. 583), appropriated \$200,000 of the moneys derived from the sale of overflowed or tide lands, "which shall be paid into the university fund, and paid out therefrom to the regents of the university upon their order, to be by them expended for university purposes as provided by law." The various land grants of the government in aid of the university made necessary a "land agent of the university," and such officer is frequently mentioned in the acts of the legislature (Pol. Code, § 3534; Act March 13, 1874; St. 1873-74, p. 356), who is authorized to select state land, and "issue certificates of purchase and patents." When the act of 1868 was codified and brought into the Political Code (section 1385 et seq.) the university was treated as an institution of the state, having its location in Alameda county. The "endowment" is to the university. Id. § 1415. An academic senate of the university is created. Id. § 1461. By the act of March 19, 1878, certain funds were consolidated, to be known as the "Consolidated Perpetual Endowment Fund of the University of California," and all interest, etc., arising out of the same "shall be placed in the general fund of the university and subject to disbursement to meet the current annual expenses of the University of California." Throughout the entire legislation of the state the university is spoken of as having some sort of an existence, a part of which, rather than distinct from it, are the regents. The latter seem to be a corporation formed in aid of the objects and purposes of the university, but not to displace nor destroy nor to absorb its entity. Acts are found "for the endowment of the university" (St. 1869-70, p. 668); "for the support of the university" (St. 1871-72, p. 554); "concerning university lands" (St. 1873-74, p. 356). General appropriations run in the same way: "For the aid of the State University, eighty thousand dollars" (Id. p. 902); "to reimburse the University of California" (St. 1881, p. 50).

The constitution of 1879 (article 9, § 9) declares: "The University of California shall constitute a public trust, and its organization and government shall be perpetually continued in the form and character prescribed in the organic act creating the same passed March 23, 1868 (and the several acts amendatory thereof)," etc. It is the university or-



ganized by the act of 1868, and not the regents—one of its constituent parts—which the constitution declares to be a public trust. In *Foltz v. Hoge*, 54 Cal. 28, and *People v. Kewen*, 69 Cal. 215, 10 Pac. 393, where the status of the Hastings College of Law as an affiliated college of the university was considered, this court seems to have treated the university as a state institution to which a college might be attached under the organic act of 1868. Looking to the origin and purposes of the university, and the constitution and legislation respecting it, we cannot doubt its existence as an entity capable of taking by bequest. It is a governmental agency created by the lawmaking power, and endowed with very important functions, which it has been exercising for a long period of years. It may be unique, but it is nevertheless an instrumentality of the state, created by the legislature acting within its just powers. That the regents are by law made the governing body of the university, and are required to incorporate under the laws of the state, is by no means inconsistent with the continued existence of the university as a public corporation; and the fact that the organic act in terms provides that grants and gifts may be made to the regents and to the state, and does not provide in terms that grants and gifts may be made to the university, does not, in our opinion, indicate that it was intended that the university was to be incapable of taking by gift, grant, or bequest. The organic act leaves the property of the university with it, and only gives to the regents the custody and control of it. Mr. Justice Story, in the *Dartmouth College Case*, 4 Wheat. 518, said: "Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties, and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. \* \* \* For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation; so, a hospital created and endowed by the government for general charity." And he adds that the reasoning by which private and public corporations are distinguished applies in its full force to eleemosynary corporations such as colleges and hospitals. Mr. Morawetz describes the difference between private and public corporations as radical, the former being associations formed by voluntary agreement of their members, while of the latter he says they "are not voluntary associations at all, and there is no contractual relation between the corporators who compose them. They are merely governmental institutions created by law for the administration of the affairs of the community." *Mor. Priv. Corp.* (2d Ed.) § 3. To corporations proper, authors and courts have added a species called "quasi

corporations," or "corporations sub modo"; i. e. associations and government institutions possessing only a portion of the attributes which distinguish ordinary public or private corporations. *Id.* § 6; 2 Kent, Comm. 274. These quasi corporations may be either public or private, and are to be distinguished upon the same principle as ordinary corporations. It would seem clear enough that the university comes plainly within the commonly accepted definition of a "public corporation." It was founded by the state. Its original and primary endowment was by the United States, by grant to the state for this special purpose. All its property is property of the state. It was created by the state, and is subject to the laws of the state as a state institution, within the limits of the new constitution, which has declared it to be a public trust, and that its organization and government shall be perpetually continued in the form and character prescribed by the organic act. This latter act is the charter of the university. In many respects it is modeled after the *Dartmouth College* charter. But in the *Dartmouth College* charter all doubt was removed as to what constituted the corporate body, by the terms of the charter itself, in which the trustees were made the body corporate "by the name of the Trustees of *Dartmouth College*," and the letters patent were to the trustees. 4 Wheat, supra. In the present case the law created the university, and, while it provided for a governing body called "regents," it did not create or designate them as the body corporate, as the charter created the trustees of *Dartmouth College*. The university was created first, and the trustees became incorporated afterwards, as was directed in the organic act. But the act nowhere provides, in terms or by implication, that when incorporated the regents should become, and thereafter be, the university.

Respondents' counsel seems to think it an absurdity to suppose that it was intended by the legislature to give any sort of corporate existence to an institution officered only by a president, treasurer, secretary, and land agent. It is altogether too narrow a view of the university to say that it is composed only of these officers. The organic act declares that it shall consist of various colleges of arts, letters, and such other professional and other colleges as may be added thereto or connected therewith. Included in these are colleges of agriculture, mechanic arts, mines, civil engineering, medicine, and law. The property previously belonging to the College of California, now the site of the university, was conveyed to the state "for the benefit of the State University," and said college was to go out of existence "as soon as the state shall organize the university." The regents are in fact a part of the university, with specifically defined powers in their custody and control of the property and the management of university affairs. The act designates them "The Regents of the University of Cal-

ifornia." It may seem anomalous that the law should require the regents to incorporate, or that we should have apparently a corporation within a corporation; but the legislature created the university upon that plan, and, however novel it may be, the power existed in the legislature not only to create the university, but to prescribe the mode and manner of the exercise of its functions. I can conceive of no imperative necessity for the requirement that the regents should incorporate, but that it was so required did not change their relation to the university. It only endowed the regents with certain corporate powers, and prescribed the mode and manner by which they were to exercise the control given them over the affairs of the university. They have no duties or powers beyond the purpose of their creation, which was to take the custody and control of the university property, and to perform certain prescribed duties in the management of the university. The law intrusts "the immediate government and discipline of the several colleges" to their respective faculties, "to consist of the president and the resident professors of the same." These faculties are part of the university, and not of the regents. All endowments are to the university, and all funds, whether coming directly to the regents, to the state, or to the university, are for the benefit of the university. Indeed, the central idea of the law was to create and organize a state university, upon broad lines of expanding usefulness. How this university, when created, was to be managed and controlled—the machinery to be provided in its organization for the purpose of practically carrying out the design—was for the legislature to determine. I cannot regard the regents as a legal corporate entity, except as a part of, and ancillary to, the parent and principal institution,—the public corporation created by law as such, and entitled "The University of California." It cannot be doubted that a legislative appropriation to the university would be a legal appropriation available and enforceable; and, if it is capable of taking by appropriation in that name, it is capable of taking by grant or bequest. A recent and important appropriation to the university is found in the act of February 27, 1897 (St. 1897, p. 44). It provides that, "in addition to all other sources and means of support \* \* \* of the University of California, there is hereby levied, annually, \* \* \* an 'ad valorem' tax of one cent on each one hundred dollars of value of the taxable property of the state \* \* \* for the use and support of the University of California." Section 1. This money must be paid into the state treasury, and "converted into the State University fund" (section 3), and "must be applied only for the uses and purposes of the University of California" (section 5). This money may be drawn out upon the order of the board of regents, but, when paid out by the state treasurer, it must be made "payable to the order of the treasurer

of the University of California, out of said 'State University fund.'" Section 4. This is clearly an appropriation of money to and for the uses of the university, and it goes from the state into the hands of the treasurer of the university, and to our minds is an unmistakable legislative recognition of the public corporation created by the act of 1868, called "The University of California."

I have examined the reported cases decided by several states and territories of the Union where the congressional grant has been taken advantage of, and institutions similar to the University of California have been created. These institutions differ in some respects from each other in the machinery of their organization, and in none of them do I find an exact parallel with the university of this state. But everywhere the courts have held them to be public corporations. *Trustees v. Winston*, 5 Stew. & P. 17; *Trustees v. Maultsby*, 53 N. C. 241; *State v. Knowles*, 16 Fla. 577; *State v. Regents* (Kan. Sup.) 40 Pac. 656; *Mechanical College v. Willis* (Okla.) 52 Pac. 921; *Dunn v. University of Oregon*, 9 Or. 357. The Oklahoma court said: "It seemingly needs no argument to show that the public educational institutions of a state are as much a part of its sovereignty as are its counties." In speaking of the university of that state, the Oregon court said: "It is true, the legislature has not declared it to be a corporation in express terms, but this was not essential;" and so the Kansas court spoke of the university "as a public corporation created to carry on special work for the benefit of the state or the public interest."

2. Respondents contend (1) that the university not being expressly authorized by section 1275, Civ. Code, it cannot take by will; and, (2) even if it could take, the bequest, being in its nature charitable, must not exceed one-third of the distributable estate, under section 1313, Id. The university, as we have seen, is a public corporation "formed for scientific, literary or solely educational purposes," and, if the statute includes such a corporation at all, it is by its terms capable of taking by will. In *re Bulmer's Estate*, 59 Cal. 131. Appellant contends that section 1313, Id., does not apply, because it is a general rule in the interpretation of statutes limiting rights and interests not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intended by necessary implication; citing 1 Kent, Comm. 460; *U. S. v. Hoar*, 26 Fed. Cas. 330; *Mayrhofer v. Board*, 89 Cal. 110, 26 Pac. 646; *Bish. Writ. Laws*, §§ 103, 142; *Sedgwick*, St. Const. p. 395. There is nothing in the record from which we can determine whether the residue of the estate "exceeds one-third of the estate of the testator." There is no finding on this question of fact. As it will arise hereafter, however, the law governing the point should be stated. We do not think the principle upon which appellant relies should govern in this case. The university, while a gov-



ernmental institution, and an instrumentality of the state, is not clothed with the sovereignty of the state, and is not the sovereign. As we understand the rule, it is only the sovereign that is exempt from the operation of statutes affecting its interest or rights. We think the statute applies to the university as a public corporation.

3. Respondents contend that the bequest has failed because the fund is inadequate to carry out the testator's original intent, and that the court has so found the fact upon sufficient evidence. The only evidence claimed by respondents to support this finding is the resolution of the regents. We cannot see that this resolution, which directs the investment of the fund, bequeathed by deceased, indicates its insufficiency. It was admitted that there was a chair of political economy of the university established in 1878, and now existing. Nor can we say that the residue (\$5,467.10) is necessarily insufficient for the purpose intended by the testator. Section 1317, Civ. Code, provides that, where the intention of the testator "cannot have effect to its full extent, it must have effect as far as possible." Conceding that the probate court could nullify the bequest on the ground of inadequacy alone, there is no evidence to justify a finding that the gift has failed for this reason. The decree should be reversed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the decree is reversed.

123 Cal. 650

TOZER v. GEORGE et al. (S. F. 997.)  
(Supreme Court of California. March 4, 1899.)

CONTRACTS—PLEADING—SUFFICIENCY.

A complaint in an action to determine the amount unpaid under an agreement, the consideration of which defendant was to pay in monthly installments, with privilege of paying more at any time, and to fix the time within which the amount should be paid, alleging only that defendant had not paid any money in accordance with its terms after a named date, is insufficient, since it should have averred the amount that had been paid, so the court might determine whether defendant was in default.

Department 1. Appeal from superior court, Alameda county.

Action by one Tozer against one George and others. From a judgment for plaintiff, defendants appeal. Reversed.

J. H. Lucas, for appellants. Geo. E. De Golia, for respondent.

HARRISON, J. The plaintiff and the defendants entered into an agreement July 19, 1892, by which the plaintiff agreed to sell and convey to the defendants a certain parcel of land for the sum of \$1,500, and in consideration thereof the defendants agreed to pay said sum of money to the plaintiff "at the time and in the manner hereinafter mentioned,

to wit, one hundred and seventy dollars upon execution hereof, the receipt whereof is hereby acknowledged, and the balance of thirteen hundred and thirty dollars payable as follows, to wit, twenty dollars on the first day of each and every month thereafter until said principal sum of fifteen hundred dollars has been fully paid in accordance herewith. The privilege is reserved to second party to pay more than said stipulated payment of twenty dollars at any time during the continuance of this contract." The present action is brought for the purpose of having the court determine the amount unpaid upon the agreement, and fix a time within which said amount shall be paid, failing in which the defendant shall be foreclosed of all interest and right in the land. It is alleged in the complaint that "defendants have not paid any money under said contract, or in accordance with the terms and conditions thereof, since November 2, 1895." No other breach of the agreement than in the payment of the purchase price of the land is charged by the plaintiff. The defendants demurred to the complaint for want of facts to constitute a cause of action, and also for ambiguity, in that "it does not show the amount actually paid on the contract therein set out by said defendants, or the amount due and unpaid, or that the said defendants are in default in the payment of any of the installments provided for in said contract." Their demurrer was overruled, and the cause was heard by the court as upon their default, and judgment rendered determining that the balance due under said contract, April 1, 1896, is the sum of \$340, and that there will be \$20 further due on the 1st of each month thereafter, and giving to the defendants six months after the entry thereof in which to pay the amount found to be due, failing in which, and in the further payment of \$20 on the 1st of each month thereafter, their rights in the premises should be foreclosed.

The court should have sustained the demurrer to the complaint. The only breach therein alleged of the defendants' agreement is that they had not paid any money in accordance with the terms of the contract since November 2, 1895. The complaint does not, however, allege the amount of money that had been paid prior to that date, nor does it contain any allegation from which it can be determined whether at the date of commencing the action the defendants were in default. While the agreement provided for payments of \$20 each on the 1st of each month, it also provided that the defendants might at any time pay more than this sum; and the plaintiff should have averred the amount that had been paid, so that the court might determine, upon the face of the complaint, whether the defendants were in default. The plaintiff does not seek by this action to have it declared that the contract is at an end, or that his obligation thereunder has terminated; but by asking the court to determine the amount unpaid thereon, and

to fix a time within which the defendants shall pay the same, he treats the contract as still existing and obligatory on him. Treating the action as one to foreclose the rights of the defendants in the land, the plaintiff should have alleged the precise amount of the purchase money unpaid at the date of commencing the action. The defendants were entitled to know the amount of this claim, for the purpose of determining whether they would suffer a default and an entry of the judgment as prayed for, or, by contesting the amount claimed, would protect their rights against a judgment for more than was actually due. The insufficiency of the complaint as against the demurrer is emphasized by a consideration of the judgment which was entered thereon. It does not appear from the record at what date the complaint was filed, but it is recited in the judgment that the demurrer was overruled on the 16th of March, 1896, and the court finds that the balance due from the defendants under the contract on the 1st of April, 1896, was \$340. The complaint must be construed as admitting that all the terms of the contract to be performed on the part of the defendants prior to November 2, 1895, had been performed; and, if so, only four installments of \$20 each could have accrued between the 2d of November, 1895, and the commencement of the action. The judgment of the court, that \$340 was due at the time of the entry of judgment, is largely in excess of the claim made by the plaintiff, and cannot be sustained. The contract is also treated by the judgment herein as still existing, since, after determining the amount already due, it declares that on the 1st of each and every month thereafter there will be due the further sum of \$20, and makes provision for the payment thereof by the defendants. Assuming that only four installments of \$20 each were due at the commencement of the action, the judgment directing the payment of \$340 within six months after its entry would change the obligation of the defendants under the contract, since the installments which had then accrued, together with those which would accrue during the six months after the entry of the judgment, would amount to only \$220. The judgment is reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

6 Cal. Unrep. 242

DOWNING v. MULCAHY et al. (S. F. 786.)  
(Supreme Court of California. March 4, 1899.)

MONEY RECEIVED—PLEADING—SUFFICIENCY—APPEAL.

1. In an action for money received it is not essential to jurisdiction of the parties or of the subject of the action to allege where the cause of action accrued.

2. It is not essential to a complaint in an action for money received that it recite every detail out of which the cause of action arises, since, under Code Civ. Proc. § 454, defendant

can demand a bill of particulars, if the complaint is too general.

3. The appellate court cannot decide on the weight of the evidence.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by F. O. Downing, doing business as Downing & Co., against R. E. Mulcahy and E. De Kay Townsend, partners as Mulcahy, Townsend & Co. From a judgment for plaintiff, and an order denying defendants' motion for a new trial, they appeal. Affirmed.

Henry H. Davis, for appellants. Mastick & Mastick, for respondent.

CHIPMAN, C. Action for money had and received by defendants, as brokers, for the use of plaintiffs. The cause was tried by the court without a jury, and plaintiff had judgment, from which, and from the order denying defendants' motion for new trial, this appeal is taken.

1. Defendants demurred to the complaint on the grounds: (1) Insufficiency of facts; (2) want of jurisdiction of the subject-matter of the action and of the parties; (3) for ambiguity and uncertainty. The objections on the last two grounds alone are insisted upon. Want of jurisdiction is claimed because "the complaint does not allege the place where the alleged cause of action accrued." The complaint is in the usual form for money had and received by defendants as brokers for plaintiffs between certain stated dates, and we think the pleading sufficient. It was not essential to jurisdiction of the parties or the subject of the action to allege where the cause of action accrued. The alleged ambiguity is that the complaint is uncertain because it does not show at what place defendants received the money, nor for what it was paid, nor the kind of brokerage defendants were engaged in, nor the times when the payment was made, nor whether paid at one time or several times, nor where demand was made, nor where the debt became due, nor where the parties, plaintiff and defendants, were doing business. These facts were not essential to a good complaint for money had and received. Defendants could have had a bill of particulars had they demanded it. Code Civ. Proc. § 454.

2. It is claimed by appellants that "plaintiff failed to establish his case by a preponderance of evidence." Plaintiff testified to certain statements of account between the parties rendered by defendants to plaintiff from time to time and up to November 1, 1894, which showed a balance due plaintiff at that time of \$3,883.40. He also testified to certain credits to which defendants were entitled, leaving an actual balance due plaintiff of \$431.45, for which amount the court gave judgment. There is much evidence in the record explanatory of the nature of the brokerage business, out of which the cause of action



arose, and the state of the account between the parties. At most this evidence may be said to show its preponderance to be against plaintiff's claim. But we cannot decide upon the weight or preponderance of the evidence. There was sufficient evidence to sustain the findings, and, as the findings sustain the judgment, we think the judgment and order should be affirmed, and so advise.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

123 Cal. 607

DE JARNATT v. PEAKE et al. (Sac. 474.)  
(Supreme Court of California. March 3, 1899.)

APPEAL—REVIEW—CONFLICTING EVIDENCE—RECEIVER—VIOLATION OF DUTY.

1. Findings of the lower court on conflicting evidence will not be disturbed.

2. Pending foreclosure of a mortgage, plaintiff was appointed receiver. Defendants purchased the note and mortgage from the mortgagee, paying therefor the full face value, with interest and accrued costs. The receiver assisted defendants as their agent, at their request, in bringing about the purchase. There was no evidence that the receiver was, through his official position, seeking any advantage against the purchaser inconsistent with his duties. *Held* that, in his acting as defendants' agent, he did not violate his duties as receiver, so as to prevent his recovering from defendants for services rendered.

Commissioners' decision. Department 1. Appeal from superior court, Tehama county.

Action by J. B. De Jarnatt against W. H. Peake and Asa Peake, partners as Peake Bros. Judgment for plaintiff. Defendants appeal. Affirmed.

J. T. Matlock, for appellants. John T. Harrington, for respondent.

CHIPMAN, C. Plaintiff sues to recover the sum of \$771.50, the amount of defendants' check, as follows: "Red Bluff, Cal., Jan. 20, 1897. No. 1. Bank of Tehama County of Red Bluff, Calif. Pay to J. B. De Jarnatt or order (\$771.50) seven hundred and seventy-one 50/100 dollars. Peake Bros." The amended complaint alleges due presentation to the bank, its refusal to pay, notice of nonpayment to defendants before action commenced, notice by defendants to the bank before presentation for payment not to pay said check if presented, and nonpayment by defendants. The answer alleges want of consideration for the check, and also sets up facts tending to show that plaintiff obtained the check by fraudulent representations. The court found the allegations of the complaint to be true, and found that the check was not given without consideration, nor was it issued through plaintiff's false or fraudulent representations, and that the allegations of fraud are not sustained by the evidence. Judgment passed for

plaintiff, from which, and from the order denying motion for a new trial, defendants appeal.

The evidence of plaintiff tends to establish the following facts: One Scoggins executed his note to the German Savings & Loan Society of San Francisco, which he secured by mortgage to it on certain real estate in Colusa county. Scoggins died, leaving the note unpaid, and an administrator was duly appointed. The mortgagee brought its foreclosure suit, making the administrator defendant, and in the action plaintiff herein was appointed the receiver. Pending the action, defendants purchased the note and mortgage from the loan society, paying therefor the full face value and all interest and accrued costs, with the view of acquiring the title to the land by that proceeding. In the negotiations for this purchase, defendants employed plaintiff as their agent, and agreed to pay him 5 per cent. commission on the amount due and paid to the loan society. The check in question was drawn at the same time and place as the check given to the loan society for the note and mortgage, and was delivered to plaintiff by defendants, but defendants not long thereafter stopped payment.

The contention of defendants is that there was an agreement between the parties that plaintiff was to give defendants the benefit of his commissions as receiver, which they affirm were represented by plaintiff to be a sum equal to the amount of the check, and that plaintiff falsely represented the facts to defendants, and that there was therefore no consideration for the check. The court found against defendants, and in favor of plaintiff, upon these issues of fact, and, as the evidence is conflicting, the findings cannot be disturbed.

It is further contended that the contract evidenced by the check was void, under section 1667, Civ. Code, because contrary to an express provision of law, and contrary to the policy of express law, and also contrary to good morals, and therefore cannot support the action. For the reason that there is a conflict in the evidence introduced by defendants to establish the foregoing propositions, we cannot pursue the argument of the learned counsel as to the facts. There is sufficient evidence to support the findings.

The stress of appellants' contention lies in their claim that a receiver appointed by the court in such a case as this becomes a public officer, charged with a trust as such officer, and that he cannot, while holding that office, enter into any contract for private gain respecting the subject of the trust. It nowhere appears that plaintiff did any act as receiver by which defendants were misled. All he did was to assist, as their agent, at their request, in bringing about a purchase by them, from the mortgagee, of its ownership of the note and mortgage, so that defendants might stand in its shoes. No creditors of the deceased mortgagor are complaining, and nothing ap-

pears from which it may be inferred that the receiver was, through his official position, seeking any advantage for or against defendants inconsistent with his official duties. The public was in no wise concerned. Stripped of all fraud, as the findings leave the transaction, it is simply a question whether plaintiff, as receiver, could, without violating his duty in his trust relation, act as defendants' agent to bring about the transfer of the mortgage debt and security to defendants. We can perceive no reason why such a transaction is obnoxious to any principles of law or sound morals. The judgment and order should be affirmed.

We concur: PRINGLE, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

123 Cal. 163

HAWLEY BROS. HARDWARE CO. v.  
BROWNSTONE et al. (S. F. 870.)

(Supreme Court of California. March 3, 1899.)

BILLS AND NOTES—ACTION—PLEADING—APPEAL—REVERSAL.

1. A complaint which in the caption describes defendants as two persons doing business as a firm, but in the body of the complaint alleges a cause of action against "above-named defendant," without designating which of the defendants is a firm, or which of them executed the note in suit, is fatally ambiguous.

2. Where a complaint is so defective that it does not support the judgment, the supreme court, after trial on merits, will reverse a judgment overruling a demurrer to the complaint.

3. In an action on a note, the answer alleging that defendant pledged collateral notes which plaintiff failed to collect, though urged to do so by defendant, is insufficient, as it does not allege that the collateral became uncollectible through plaintiff's negligence.

4. Where collateral notes have become barred by limitation through the neglect of the pledgee to enforce them, in an action on the principal note, defendant is entitled to credit for the amount of the collateral, though it is not certain that the maker of the collateral note will interpose limitations as a defense to an action thereon.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county.

Action by Hawley Bros. Hardware Company, a corporation, against Isaac Brownstone and Joseph Brownstone, partners as I. Brownstone & Co. From a judgment overruling a demurrer to the complaint, sustaining a demurrer to the answer, and a judgment for plaintiff, defendants appeal. Reversed.

L. L. Cory, for appellants. W. B. Good and Chickering, Thomas & Gregory, for respondents.

CHIPMAN, C. Action upon certain six promissory notes by verified complaint. A demurrer, on the grounds (1) of insufficiency of facts, and (2) ambiguity, was overruled. Defendants answered, denying that they had not

paid the notes in suit, and, as a separate defense, alleged that, prior to the commencement of the action, defendants transferred to plaintiff certain promissory notes as collateral security for the indebtedness sued upon; that as to one of said collateral notes, made by one J. S. Branch, for the sum of \$602.42, "plaintiff neglected and refused to take proceedings to enforce its collection, and permitted the same, without the consent and against the will of defendants, to become barred by the statute of limitations"; and that, if plaintiff had used reasonable diligence, the said note could have been collected. As to the other collateral notes it is alleged, on information and belief, that plaintiff could have enforced collection sufficient to pay and discharge defendants' indebtedness to plaintiff by the exercise of reasonable diligence; that, at different times before the commencement of the action, defendants demanded of plaintiff to take immediate steps to enforce the collection of the said collateral notes, or return the same to defendants, but plaintiff refused to do the one or the other; that, by reason of plaintiff's gross carelessness and negligence in failing and refusing to enforce collection of said notes, defendants have been damaged in a sum largely in excess of any amount due plaintiff upon the obligations in suit; that all said collateral notes were, when transferred to plaintiff, due, owing, and payable from the parties respectively executing them; "that some amounts have been paid upon said notes, the amount and time of payment being unknown to the defendants." An accounting between plaintiff and defendants with reference to the notes sued upon and the payment made upon said transferred notes is asked, and that plaintiff be charged with the face value of all said assigned collateral notes, and that they be applied in payment of the notes sued upon. A demurrer for insufficiency of facts was interposed to the answer, and on the further ground of uncertainty. The court sustained the demurrer to the answer, and gave plaintiff judgment, from which defendants appeal.

1. It does not appear anywhere in the complaint who are the defendants, except in the caption or title of the cause of action. They are there stated to be "Isaac Brownstone and Joseph Brownstone, partners, doing business under the firm name and style of I. Brownstone & Company, Defendants." The references to defendants in first count in the body of the complaint are as follows: "Comes now plaintiff, \* \* \* and, for a first cause of action herein against defendant, alleges: \* \* \* During all the time in this second amended complaint mentioned, \* \* \* the above-named defendant was a co-partnership, and carrying on business as merchants and traders, \* \* \* under the firm name and style of I. Brownstone & Company, and that the members of said firm of I. Brownstone & Company are residents of the county and state aforesaid." But there is here no allegation



as to who constitute the firm. "Defendant, by its firm name, made and delivered to plaintiff its certain promissory note," etc. The note is signed, "I. Brownstone & Co." "The defendant has not paid the said note," etc. The subsequent separate causes of action, of which there are five, read: "For a \* \* \* cause of action in this, its second amended complaint [the words "against defendant," as alleged in first count, are omitted], plaintiff alleges: \* \* \* Defendant, by its firm name, made and delivered to the plaintiff its certain promissory note," etc.; "defendant has not paid the said note." Each subsequent count contains the same allegations. The notes are all signed, "I. Brownstone & Co." "Plaintiff prays for judgment against said defendant for the aggregate principal sum of," etc. The demurrer is upon the grounds (1) of insufficiency of facts; and (2) "each and every cause of action \* \* \* is ambiguous, in that it alleges that the above-named defendant (singular) was a co-partnership, but it does not appear upon the face of the complaint, or any of the causes of action therein stated, which, if any, of the defendants, was a co-partnership, and whether or not said defendants were or either of said defendants was a co-partnership at the time of the commencement of the action"; nor does it appear who, if any, were the members of I. Brownstone & Co.; nor does it appear by whom or by which of the defendants, if any, the note in each cause of action was made or delivered to plaintiff.

It is essential to a good complaint that non-payment be alleged, as failure to pay constitutes the breach. *Scroufe v. Clay*, 71 Cal. 123, 11 Pac. 882; *Notman v. Green*, 90 Cal. 172, 27 Pac. 157; *Barney v. Vigoreaux*, 92 Cal. 631, 28 Pac. 678; and numerous other cases. To allege that "the note nor no part thereof has been paid," or to allege that "defendant (where there is but one defendant) has not paid said note nor any part thereof," is sufficient. The question here is whether it can be ascertained from the complaint who are the defendants, or who is the defendant. The caption is no part of the complaint, unless referred to by appropriate allegation in the body of the complaint. To have alleged that "the defendants above named," etc., would have been a good reference as would have been "the defendants" (plural) without the words "above named." And where the caption shows two or more defendants, and in the body of the complaint the word "defendant" (singular number) is used, but is manifestly a clerical error, which could not have misled the defendants, this has been held good on demurrer for ambiguity. *Fay v. McKeever*, 59 Cal. 307. The rule generally is that, if the party was not misled to his prejudice, the ambiguity cannot be said to affect his substantial rights, and a judgment should not be reversed by reason of such defect or error; and so held if the pleading is easy of comprehension, and free from reasonable doubt. *Gassen v. Bower*, 72 Cal. 555, 14 Pac. 206;

*Alexander v. Mill Co.*, 104 Cal. 532, 38 Pac. 410; *Salmon v. Wilson*, 41 Cal. 595.

No general rule can be laid down to determine the exact degree of ambiguity which will be fatal on demurrer. The case here is wholly unlike that of *Fay v. McKeever*, supra, where the court thought the error clearly clerical. Here the error is persistent, and runs through six separate counts; and in the use of the possessive pronoun, referring to the defendant, the neuter gender singular number is used, showing that the pleader had in mind the co-partnership as the defendant, and not the persons or one of the persons composing the partnership. It is not possible by any reading of the complaint, without interpolation, to say whether one, and, if one, which one, of the persons named in the caption, or whether both, or whether the partnership by its common name, is the defendant. To make the pleading intelligible and free from ambiguity, we must change the language in several material particulars. We must change the word "defendant" to "defendants" in all the counts, wherever the word "defendant" appears; we must change the word "its" to "their," so that it will refer to the persons sued as co-partners; and we must make the complaint show, what it does not, that they (the defendants named) were co-partners as I. Brownstone & Co., and that the several notes were executed by these defendants in the co-partnership name. To do this would extend the liberal rules of construction beyond reasonable bounds.

The allegation that the "defendant" has not paid said notes, etc., is not an allegation as to both defendants; non constat but that one of them did pay them. The complaint has some semblance of an action under section 388, Code Civ. Proc., by which an association may be sued by its common name; but the caption shows, and respondent says, that this was not the theory of the action. Besides, the judgment is against the defendants, naming the persons, as members of the firm, and runs against them jointly and severally, although the prayer is that plaintiff have judgment against the defendant (singular). Other objections to the complaint might be pointed out, but we deem these to be sufficient.

Respondent cites numerous cases to show the reluctance of the appellate court to reverse a judgment on demurrer for ambiguity. It will be found, I think, that an important difference exists between cases where there was no answer or trial on the merits and cases where the defendant has answered and there was a trial, for in the latter case the court is in better position to judge whether the defendant was misled to his prejudice. Where, however, plaintiff refuses to amend when the imperfection to his complaint is pointed out, and takes judgment on the default of defendant to answer, this court has no guide but the complaint itself by which to determine whether it is so radically defective as to fail to support the judgment, or is so ambiguous

as to mislead as to its meaning. In the cases cited by respondent, the answer and the trial were factors which aided the court in determining the essential fact. An example is *Alexander v. Mill Co.*, 104 Cal. 532, 38 Pac. 410. The demurrer to the complaint should have been sustained.

2. The demurrer to the answer ought not to have been sustained. Appellant claims that the answer denied payment, and, at least, presented that issue. The denial reads: "Deny that the defendant has not paid the said note, \* \* \* but alleges in that behalf that said note has been fully paid, \* \* \* as more fully appears in the separate answer and defense hereinafter set forth." This is not an unequivocal denial, but is a qualified denial, as the separate answer alleges how payment was made. If, however, the facts constituting the alleged payment have the effect to discharge the notes, and are properly cognizable as a defense, we think the demurrer should have been overruled. In substance, the answer is that defendants gave to plaintiff certain notes as collateral security, which plaintiff, through its gross negligence, failed to collect, although urged to do so by defendants; and that as to one note (that signed by J. S. Branch), for \$602.42, plaintiff allowed it to become barred by the statute of limitations. As to all of these collateral notes, except the Branch note, the answer fails to show that they were no longer enforceable by reason of plaintiff's neglect, or had thereby become lost to defendants. The allegations as to these securities are insufficient. The securities were but a pledge (Civ. Code, §§ 2986, 2987); and the pledgee could recover the debt for which the pledge was given without first exhausting the pledge. *Ehrlich v. Ewald*, 66 Cal. 97, 4 Pac. 1062.

As to the Branch note, respondent concedes that defendants have a good cause of action against plaintiff, but that relief must be sought in a separate action; citing *Bank v. Middlekauff*, 113 Cal. 463, 45 Pac. 840, as conclusive of the question. We do not think this case at all conclusive of the question, nor does the governing principle of that case apply. Defendant had mortgaged real property to plaintiff to secure a debt. He also transferred to plaintiff a fire insurance policy upon the buildings situated on the mortgaged premises as additional security for the debt. The buildings burned. Plaintiff thereafter brought suit to foreclose its mortgage, and defendant answered that he had made due proofs of loss on the policy, and had requested plaintiff to collect the insurance money, and apply it to the mortgage debt, which plaintiff refused to do. But defendant did not allege that the policy had become lost to him. These facts were set up by way of answer and cross complaint. Held here that the trial court properly refused to allow the answer to be filed. The reasons given for the decision do not apply to such a case as we

have here. That a pledgee may become liable through his gross negligence or by his tortious dealings with the pledge where the pledgor is injured thereby, and that the pledgee of negotiable paper as collateral security is bound to use ordinary diligence in preserving the legal validity of the pledge, and is answerable for a loss through a corresponding degree of negligence to the extent of such loss, are propositions well established. *Coleb. Coll. Sec. § 114*, and notes; *Lamberton v. Windom*, 12 Minn. 232 (Gil. 151), and 90 Am. Dec. 301. The authorities are quite fully presented in this case. *Jennison v. Parker*, 7 Mich. 355; *Griggs v. Day*, 136 N. Y. 152, 32 N. E. 612 (see extended note, 32 Am. St. Rep., at page 718); Civ. Code, § 1714. It has been held also that where, by the negligence of the pledgee, the collection of collateral securities has been lost by operation of the statute of limitations, and such statutory defense has become perfect, the pledgor may, by a counterclaim, recover the value of his collateral, even though it be not known that his debtor will, when sued on such collateral, plead the statute in defense. *Bank v. O'Connell*, 84 Iowa, 377, 51 N. W. 162, and 35 Am. St. Rep. 313; *McQueen's Appeal*, 104 Pa. St. 595, 49 Am. Rep. 592; *Miller v. Bank*, 8 Watts, 192, 34 Am. Dec. 451, note. The question is fully considered in the foregoing cases, and illustrated in the notes where reported in the *American Decisions and Reports*. We think it was error to sustain the demurrer to the answer. The judgment should be reversed.

We concur: HAYNES, C; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.



6 Cal. Unrep. 244

MOTT et al. v. CLARKE. (S. F. 783.)  
(Supreme Court of California. March 7, 1899.)

CONTEMPT—RIGHT OF APPEAL.

Under Code Civ. Proc. § 1222, a judgment in contempt proceedings is not appealable.

Commissioners' decision. Department 1.  
Appeal from superior court, city and county of San Francisco.

Action by C. W. Mott and others against Alfred Clarke. From an order adjudging defendant guilty of contempt, he appeals. Appeal dismissed.

Alfred Clarke, in pro. per. Warren Olney, for respondents.

PRINGLE, C. This is an attempted appeal from an order of the superior court of the city and county of San Francisco, made December 4, 1895, adjudging appellant "guilty of contempt, and that he be confined in the county jail twenty-four hours, and pay to Eli T. Sheppard two hundred and seventy-five dollars on or before December 6, 1895." The order is not appealable. Ex parte Clancy, 90

Cal. 553, 27 Pac. 411; *Cosby v. Superior Court*, 110 Cal. 45, 42 Pac. 460. I advise that the appeal be dismissed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal is dismissed.

123 Cal. 677

**STRAUBE v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA.** (S. F. 1,065.)<sup>1</sup>

(Supreme Court of California. March 7, 1899.)

LIFE INSURANCE—PREMIUMS—PAYMENT—FORFEITURE—"PAID-UP INSURANCE"—NONFORFEITURE STATUTE—VIOLATION—EFFECT—DIVIDENDS—APPLICATION.

1. A policy providing that it shall be forfeited and void on nonpayment of any premium within 30 days after due at the office of the company, "or to duly-authorized agents, when they produce receipts signed," etc., does not require the production of such receipt, as a condition precedent to the assured's obligation to pay the premium, but the policy is forfeited if premiums are not paid as provided.

2. Under the provisions of a policy, assured was entitled to a "paid-up policy" after premiums for three years had been received by the company, provided the policy was surrendered by assured while "by its terms in full force." *Held*, that assured's right to a paid-up policy was dependent on the policy in force at the date of surrender, and that a policy forfeited for nonpayment of premium and surrendered was not valuable, as entitling assured to a paid-up policy.

3. Civ. Code, § 450, requires every insurance contract, unless otherwise specially provided, to contain a stipulation for nonforfeiture after three premium payments, and declares that every insurance company violating such provision shall forfeit its right to do business within the state. *Held*, that this statute did not become part of a policy issued in violation thereof, nor did it relieve assured from forfeiture for nonpayment of premiums, as provided by such policy, though more than three premiums had been paid.

4. Where a policy became void on failure to pay premiums as stipulated, and provided for paid-up insurance, "without profits," on surrender during the life of the policy, after three premium payments, assured was not entitled to the application of accumulated dividends to unpaid premiums to keep the policy in force.

Department 1. Appeal from superior court, Fresno county.

Action by Laura M. Straube against the Pacific Mutual Life Insurance Company of California. From a judgment for defendant, plaintiff appeals. Affirmed.

O. Scribner and Meux & Johnston, for appellant. M. Kellogg and F. E. Cook, for respondent.

GAROUTTE, J. Plaintiff, Laura M. Straube, insured the life of her husband for her benefit in the sum of \$10,000, under a contract of insurance known as the "Ordinary Life Dividend Insurance Policy." The premiums upon this policy were paid for several years, when a failure to pay the annual premium occurred. Some time thereafter the plaintiff surrendered the policy to the company for a cash consid-

eration. Thereafter, and within 18 months of the default in the payment of said premium, Straube, the insured, died. This action was thereupon brought against the company by plaintiff, the wife, upon a complaint claiming and alleging damages by reason of fraud and deceit practiced by the company in the procurement of the policy of insurance from her. A demurrer was sustained to the complaint, and judgment for defendant rendered, no answer being filed.

The single question presented is, does the complaint state a cause of action? As to the special grounds of demurrer, we pass them, as involving questions of no great importance to the disposition of the appeal. It appears to be conceded that the question before the court is, was this policy of insurance of substantial value to the plaintiff at the time the defendant company obtained it from her? It is insisted that the complaint shows the policy to have been of substantial pecuniary value at that time, and four specified grounds are relied upon to support this proposition. We pass to the consideration of these grounds of contention.

1. The policy of insurance provides: "This policy shall become forfeited and void if the premiums shall not be paid, within thirty days of the time they become due, at the office of the company in the city of San Francisco, or to other duly-authorized agents, when they produce receipts signed by the president, vice president, secretary, or assistant secretary." It is now contended that the policy remained in force, because the agent did not produce the "receipt" mentioned by this provision of the contract; it being claimed that the proper construction of the policy did not demand that the premium should be paid until such event had taken place. In other words, it is claimed that the production of this receipt was a condition precedent to the payment of the premium. The language of the policy bears no such construction. No demand for the payment of the premium is nominated in the bond. It is provided that the policy shall be forfeited if the premium is not paid within 30 days after it is due, and the contract then declares that it may be paid either at the office of the company, in the city of San Francisco, or to the authorized agent, when he has produced a receipt of a certain kind. By appellant's construction of the contract, the premium could not be paid at the general office at all, for by the contract the production of a receipt at that place is not demanded.

2. It is next contended that plaintiff was entitled to a paid-up policy, and this contention is based upon the following covenant in the contract: "The assured, if premiums on this policy have been duly received by said company for not less than three years, shall be entitled to a paid-up policy, without profits, for the same amount as is allowed by the rules of the company on the surrender of corresponding ordinary policy: provided, always, that surrender of the policy, duly receipted by the assured, be made to the company at San Fran-

<sup>1</sup> Rehearing denied April 5, 1899.



cisco, Cal., while this policy is by its terms in full force and effect." It is provided in this policy, and seems to be conceded by appellant's counsel, that the application for the paid-up policy must be made while the policy is in force. Under these conditions, the question presented under this head seems to be immaterial. For, if the policy were in force when the company obtained it from plaintiff, then it was of substantial value, by the mere fact of its vitality; and, even if it be conceded that the right to take out a paid-up policy was present at that time, still it adds no weight to appellant's position, for, as already suggested, this right is dependent upon a policy in force and effect at the time the application is made. In other words, the right to a paid-up policy is dependent upon an original policy, of present, substantial value, and that fact is all that appellant needs to support the sufficiency of her complaint.

3. It is next contended that the policy was in full force and effect by virtue of section 450 of the Civil Code. That part of the section material here is as follows: "Every contract or policy of insurance hereafter made by any person or corporation organized under the laws of this state, or under those of any other state or country, with and upon the life of a resident of this state, and delivered within this state, shall contain, unless specifically contracted between the insurer and the insured for ton-tine insurance, or for other term or paid-up insurance, a stipulation that when, after three full annual premiums shall have been paid on such policy it shall cease or become void solely by the nonpayment of any premium when due" (and further providing that the net reserve shall be applied as a premium). In the latter part of the section it is declared: "If any life insurance corporation or company shall deliver to any person in this state a policy of insurance upon the life of any person residing in this state, not in conformity with the provisions of this section, the right of such corporation or company to transact business in this state shall thereupon and thereby cease and terminate," etc. It is now claimed that by application of the net reserve fund, referred to in this section, as a premium, the policy was alive and in force and effect. As we construe this section, it becomes unnecessary to decide whether or not this policy contracts for "ton-tine insurance, or for other term or paid-up insurance." That question would squarely present itself, if it was sought to enforce the penalty provided by the section for a failure upon the part of the company to insert the nonforfeitable stipulation in the policy. We find no such stipulation in this policy, and, assuming for present purposes only that it is a policy which comes within the scope and intent of section 450, the question presents itself, what is the effect upon the status of the insured by reason of the omission of this stipulation therefrom? It is contended by the appellant that the stipulation should be read into the policy as matter of law. This position is

denied, and it is insisted that the penalty fixed by the section itself is exclusive, and a remedy for the violation of the law rests with the state alone. The court is well assured that this statute is no part of the contract. If the statute had contained a flat declaration that no policy of insurance should be forfeitable after three annual premiums had been paid upon it, or a declaration of any such general import, we should then have something which would become a part of the contract. In such an enactment there would be a declaration fixing the rights of all subsequent contracting parties. But there is no such attempt here. The legislature has not said there shall be no forfeitable contract of insurance made in this state, but, in effect, has said, "If you issue such a policy, you are liable to certain penalties for your act." Whether that penalty be a forfeiture of the right to do business, or a fine simply, in no way changes the conditions. Again, appellant cannot take the position that such a policy would be void as violative of an express declaration of law. Indeed, the statute appears to recognize the power of the company to make such a policy, but declares a severe penalty for the doing of the act. It is plain that the legislature never contemplated that the statute should be read into the policy; for, if that may be done, no injury to any one could possibly follow a failure to insert the written stipulation therein, and consequently there would be no reason why a failure to do it should visit upon the company the drastic treatment provided by law. If the law inserts the stipulation in the policy, there is no reason why the company should be required to do it. For all practical purposes, it is immaterial who inserts the stipulation, or how that result is brought about. We find none of the authorities cited by appellant opposing these views. Indeed, we find no statute of any other state similar to the one before us.

4. There is no merit in appellant's final contention, to the effect that the accumulated dividends should have been applied to the payment of premiums upon the policy. For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

123 Cal. 681  
HOCHSTEIN v. BERGHAUSER et al.

(S. F. 849.) 1

(Supreme Court of California. March 8, 1899.)  
REFORMATION OF INSTRUMENTS—EVIDENCE—SUFFICIENCY—HUSBAND AND WIFE—AGREEMENT—ENFORCEMENT—EXECUTION—ASSUMPTION—DEED—CONSTRUCTION—REVIEW—QUESTION OF FACT—PREMATURE ACTION.

1. Reformation of a written instrument cannot be had unless it is shown, by clear and satisfactory evidence, that both parties thereto intended to execute it according to the terms of the reformation sought.

2. The decision of the trial court on conflicting evidence is not reviewable.

3. An agreement by a husband, pending a suit for divorce, to convey his wife a life estate in

<sup>1</sup> Rehearing denied April 5, 1899.

property, remainder to their children, if a decree should be granted, could not be enforced by the children, as being without consideration running to them.

4. A husband, pending a suit for divorce, agreed to convey to his wife a life estate in certain property if a decree was granted, but conveyed her a fee instead, and she accepted the deed, and retained it until her death, with full opportunity to know its contents. *Held*, that the agreement being executory in its nature, and subject to change, under Civ. Code, § 1698, it would be assumed that he intended to convey a fee, and that she was satisfied therewith.

5. A husband's deed to his wife provided that the property should, on her death, go to their children then living, equally, "and, in the case of the death of any such children, then to their heir or heirs." *Held*, that the words "heir or heirs" did not refer to children, but included all the heirs of such children as the law appointed to succeed to their estates.

6. Facts averred in the pleadings, on which a claim on appeal that the action is premature is based, unsupported by the findings of the court, or by any fact or evidence in the bill of exceptions, will be regarded as nonexistent.

Department 1. Appeal from superior court, city and county of San Francisco.

Action of partition by Nathalie G. Hochstein against John G. F. Berghauser and others. From an interlocutory decree, Theodore Blanckenburg and other defendants appeal. Reversed.

W. W. Davidson, Julius Reimer, Otto Tum Suden, and George T. Wright, for appellants. W. S. Goodfellow, W. B. Bosley, and Tobin & Tobin, for respondent.

HARRISON, J. Appeal from an interlocutory decree in partition. The property involved herein originally belonged to John Berghauser, who, by an instrument bearing date October 31, 1873, conveyed to his wife, Margarethe, an undivided third part thereof, with the exception of one parcel to be hereinafter mentioned. At that date an action for divorce was pending between the parties, and an agreement was entered into between them providing that, in case the court should render a judgment of divorce, Berghauser should convey to his wife certain described property, including an undivided third of a portion of that involved herein. A judgment of divorce between them was rendered by the court, but no disposition or mention of property was made in the judgment, nor did the above deed of conveyance executed to Margarethe purport to be made in pursuance of the agreement or of the decree. One parcel of the property, known as the "Prescott House," was within the district affected by the opening of Montgomery avenue, then in process of accomplishment; and it was provided by the agreement that Margarethe should be entitled to an individual third of all moneys or bonds which might be received for damages awarded under the statute authorizing this improvement, and that, "as soon as these moneys or bonds are received by defendant, plaintiff shall be entitled to her aforesaid share of the income or interest thereof; and, as soon as

said moneys or said bonds are invested in property by defendant, he shall forthwith convey to plaintiff, by a good and sufficient deed, free and clear from all incumbrances, her aforesaid share of the property so obtained." It was further provided in the agreement that the deeds to Margarethe should convey to her only a life estate in the above property, with a remainder in fee to the six children of the plaintiff and defendant, share and share alike, and, in case of the death of any such children, then to their heir or heirs; and in the above deed executed to her the estate conveyed was limited and defined as follows: "To have and to hold the said lots of land, with the improvement thereon, unto the said party of the second part during her life, and upon her death to the children of said parties of the first and second part then living, share and share alike, and, in case of the death of any such children, then to their heir or heirs."

By the opening of Montgomery avenue, a portion of this property was taken for the street, and the sum of \$54,000 was awarded as damages therefor. Under a provision therefor in the aforesaid agreement, Berghauser mortgaged the Prescott House property for the sum of \$15,000, and with this money, and a portion of the \$54,000 received for the property taken for Montgomery avenue, he purchased a parcel of land fronting upon the avenue, and directly west of and adjoining the Prescott House, and constructed thereon an addition to the old Prescott House, and reconstructed the whole upon the line of the new street. After the completion of the improvement, viz. April 1, 1875, he executed to Margarethe a conveyance in fee simple absolute of an undivided third of the lot of land thus purchased by him. John Berghauser died February 10, 1878, and Margarethe died December 9, 1893, leaving a last will and testament, and under proceedings had in the administration of her estate an undivided third of the property conveyed to her by the deed of April 1, 1875, was distributed to four of her six children, the other two having died in her lifetime.

1. It is alleged in the answer of certain of the defendants herein that the deed of April 1, 1875, did not correctly express the intention of the parties thereto, and that by inadvertence and a mistake of both parties, as well as of the scrivener, the deed as prepared and executed conveyed to Margarethe the fee in the property therein described, whereas it was the intention of both John and Margarethe that the deed should convey to her only a life estate, with a remainder over to her six children and their heirs; and these defendants ask that the deed be reformed in accordance with this intention. The court, however, found that there was no inadvertence or mistake on the part of either of the parties to the deed, or of the scrivener, and that it was not the intention of said parties, or of either of them, that the said deed should vest in Margarethe a life estate only. This finding



of the court is attacked by the appellants as not sustained by the evidence.

A court is not authorized to reform a written instrument upon the ground of mistake, unless it is shown, by clear and satisfactory evidence, that the instrument as written does not express the intention of both of the parties thereto. Unless the mistake was mutual, or was accompanied by fraud, the parties are to be governed by the terms of the instrument as it is executed. Pom. Eq. Jur. §§ 859, 1376. "The party alleging the mistake must show exactly in what it consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified." *Hearne v. Insurance Co.*, 20 Wall. 488. The defendants were not entitled to have the instrument reformed as they had asked, unless they should show, by satisfactory evidence, that the conveyance was to be executed as they had alleged, and was so intended by both John and Margarethe at the time of its execution. The court could not make a new deed for the parties, nor could it reform the deed which was executed, in accordance with the claim of the defendants, unless it should be shown that the grantor intended to execute it according to those terms. See *Ward v. Yorba* (Cal.) 56 Pac. 58.

Whether the evidence in any particular case is sufficient to establish such intention contrary to the terms of the instrument is a question of fact to be presented to, and determined by, the trial court, and, like any other question of fact, its decision upon the weight or conflict of the evidence thereon is not open to review in the appellate court. In the present case the court expressly finds that the evidence is insufficient to show that there was a mistake on the part of either of the parties to the deed in its terms or conditions, and from the evidence presented in the bill of exceptions we are unable to say that its conclusion was incorrect. More than 20 years had elapsed since the transaction and the execution of the instrument. Both of the parties thereto had been dead for many years. The instrument was witnessed by one who had been the legal adviser of John Berghauser in the divorce suit and in the preparation of the agreement for a conveyance of the property, and this witness had also been dead for many years. Margarethe, the grantee in the deed, was absent from the state at the time of its execution, and did not return until after the death of John, the grantor. The deed was executed at the request of her agent, and was delivered to him, and by him placed upon record, and sent to her in Virginia. This

agent was a witness at the trial, and was unable to remember the exact conversation between him and John Berghauser when the deed was executed. It is further contended by the appellants that they were entitled to the relief they seek, irrespective of the reformation of the deed, by virtue of the provision in the agreement that the deed should convey to Margarethe only a life estate, with a remainder over to the children of the parties. The agreement of October 31, 1873, was, however, only executory in its character, and so long as it remained executory the parties thereto could change its terms or rescind its provisions, or make such disposition of its subject-matter as they might choose. Civ. Code, § 1698. The children had no interest in the property referred to in the agreement, nor could they enforce its execution. It was entered into without any consideration moving from them, and, so far as appears, without their knowledge. They were not parties thereto, but were only beneficiaries contemplated by their parents as persons upon whom they would bestow their bounty. There was no obligation upon John and Margarethe to adhere to the terms of this agreement, and when on April 1, 1875, he made a conveyance to her in fee of an undivided third of the property, it must be assumed, in the absence of any evidence to the contrary, that this was his intention, and as she accepted the deed and retained it until her death, with full opportunity to know its contents and purport, and made no objection thereto, it may be assumed that she was satisfied therewith.

2. The deed to Margarethe of October 31, 1873, provided that upon her death the property should go to the children then living, share and share alike, "and, in the case of the death of any such children, then to their heir or heirs." Two of the daughters died in the lifetime of their mother, each leaving a husband and issue. The court below excluded the husbands of these daughters from any share of the property. It is claimed by the appellants that these husbands are entitled to a portion of the estate thus given to the "heirs" of the deceased daughters, while, on the other hand, it is contended that the term "heirs," as used in the deed, is limited to the "children" of the daughters. The "heirs" of a person are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will. In this state the heirs of a person to whom, under section 1384, Civ. Code, his estate passes when not disposed of by will, are determined by the provisions of section 1386, Civ. Code, and the use of the term "heirs" in an instrument of conveyance to designate the persons in whom the estate granted is to vest will, in the absence of any qualifying terms, be construed to mean his heirs as thus ascertained. "Like all other legal terms, the word 'heirs,' when unexplained and uncontrolled by the context, is to be construed according to its strict technical import, in which sense it designates the per-

sons who would by the statute succeed to the real estate in case of intestacy." *Clarke v. Cordis*, 4 Allen, 466. "If there are no words in a deed to indicate that a grantor uses the word 'heirs' any otherwise than in its strict legal sense, then it must be taken in that sense." *Jones*, Conv. § 232. Many cases have been cited in support of the judgment of the superior court in which it has been held that the term "heirs" was construed as synonymous with "children," but an examination of these cases will show that this construction was given by reason of some qualifying word or some other provision in the instrument by which it could be interpreted or explained. The object of all construction of an instrument is to ascertain the intention of the parties thereto, and thus determine the meaning to be given to the terms; and, if the instrument contains a glossary of its own terms, or if a term used in one part of the instrument can be interpreted by its use in another part, courts will avail themselves of this means of ascertaining the meaning of the term. The intention is to be gathered from a consideration of the entire instrument, but, in the absence of any qualifying term or language in the instrument itself, the words used are to receive their legal significance. In the conveyance of October 31, 1873, there is no language used which in any respect qualifies the direction that, in the event of the children dying before their mother, their share of the property should go to their heirs, or indicating that the term "heirs" was used in any qualified or limited sense; and it must be held that the word was used to describe the persons who on the death of the mother would have succeeded to her estate in case of her dying intestate. Under the provisions of section 1386, Civ. Code, the husband would have been one of these persons (*In re Dobbel*, 104 Cal. 432, 38 Pac. 87) and the court should therefore have decided that he was entitled to a portion of the estate.

3. The appellants Vocke urge that the action was prematurely brought, for the reason that by the terms of the will of John Berghauser it was provided that the property devised by him to the trustees therein named should be conveyed to his children when the youngest of them should arrive at the age of 21 years, and should be held by such children, or the survivor of them, until the youngest should attain the age of 30 years; that, in pursuance of this provision, the trustees conveyed the land to said children on the 10th day of February, 1891, with the condition that the property should be held in common by them until the 7th day of March, 1898, that being the date at which the youngest child would arrive at the age of 30 years. The answer of these appellants contains averments to this effect, but neither in the findings of the court nor in the bill of exceptions is there any fact or evidence in support of these averments, and, for the purposes of this appeal,

the facts thus averred must be regarded as nonexistent.

The order appealed from is reversed, and the superior court is directed to modify the interlocutory decree in accordance with the foregoing opinion. One half of the costs of the appeal is to be borne by the respondent John C. Jordan, and the other half, together with the costs of the plaintiff, by the appellants.

We concur: GAROUTTE, J.; VAN DYKE, J.

128 Cal. 1

In re WILLEY'S ESTATE. (S. F. 1,336.)

(Supreme Court of California. March 4, 1899.)

EXECUTORS—DISTRIBUTION—FINDING—WILLS—ATTESTATION—TRUSTS—DEEDS—PROBATE—CONSTRUCTION—VALIDITY—REVOCATION—CHARITABLE TRUSTS—REVIEW.

1. In a proceeding by an heir for the partial distribution of an estate, consisting of land conveyed to trustees by deed, which was referred to and made part of the grantor's will, a finding that the deed, independent of the will, was void, was erroneous, as beyond the court's jurisdiction.

2. Where a will referred to a deed creating a trust of testator's land, it was not necessary, for a proper attestation of the will, that the deed should have been presented and exhibited to the witnesses to the will.

3. It was not necessary, in order to consider the deed in connection with the will, that the deed itself should have been presented to the probate court, and formally and expressly certified as probated.

4. The intention of the testator and grantor, as expressed in a will and deed of trust of his property referred to therein, must be carried out, notwithstanding a defect, where it is possible without contravening some established principle.

5. Civ. Code, § 863, declares that every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject, only, to the execution of the trust. Section 2230 provides that a trust may be revoked if the declaration reserves a power of revocation. *Held*, that a deed of trust conveying the fee to trustees absolutely, subject, only, to a trust for the use of the grantor for life, remainder to the use of other persons and objects declared, was not rendered void by a reservation of a right in the grantor to revoke the trust, which he never exercised, such right amounting to a mere privilege only, in no way affecting the estate conveyed to the trustees.

6. A deed conveying a testator's property in trust required the trustees to pay from the income certain annuities, to various persons for life and to certain charities. A separate clause provided that the trustees, before making any payments, should set aside \$25, or other necessary sum, for the care of the testator's cemetery lot. *Held* that, though this clause was void, not being a bequest for a charity, it being disconnected and separable from the other valid provisions, the deed was not thereby rendered void, under Civ. Code, § 1317, providing that, where a testator's intent to its full extent cannot be given effect, it must be carried out as far as possible.

7. Devises in trust to trustees, for the use of the "widows' and orphans' fund" of certain associations, are valid charitable trusts, notwithstanding such associations are not themselves charitable bodies, since it is not necessary that



the trustee of such a trust should be a charitable institution, as it will be presumed, to support the trust, that such trustee will properly apply the funds.

8. A bequest intended as a charity is not void, and will not be legally construed void, if it can possibly be made good.

9. On an appeal from a decree declaring a conveyance in trust and by a will void, and that no bequest or devise of the testator's property was made, the contention that the trust was void because more than one-third of the income was given to charities, in contravention of Civ. Code, § 1313, is not presented by the record.

Department 2. Appeal from superior court, city and county of San Francisco.

Application by Elisha V. S. Cook, as grantee of Charles W. Willey, against Edwin Wallace Carpenter and William Boericke, executors of the estate of Amasa P. Willey, for partial distribution. From a decree in favor of petitioner, defendants appeal. Reversed.

E. B. & Geo. H. Mastick, for appellants. Timothy J. Lyons, for respondent Cook. John H. Durst, for respondent Willey.

McFARLAND, J. This is an appeal by Edwin Wallace Carpenter and William Boericke from an order of partial distribution to Elisha V. S. Cook, made December 17, 1897. Amasa P. Willey, deceased, made in his lifetime a certain deed of trust to the appellants, Carpenter and Boericke, dated October 27, 1892, and executed and delivered on the next day. Three days afterwards, on October 31, 1892, he made a will, which was properly declared and attested, and in every way duly executed. The will is very brief, and the important part of it is as follows: "I give, devise, and bequeath all the property, real and personal, of what kind and nature soever, and wheresoever situated, of which I may die seised or possessed, or to which at the time of my death I may be entitled, or in or to which at said time I may have any interest, whether in possession, reversion, remainder, or expectancy, to Edwin Wallace Carpenter and William Boericke, in trust, however, for the uses and purposes set forth and declared in that certain deed of trust, bearing date the 27th day of October, 1892, made and executed by me to the said Edwin Wallace Carpenter and William Boericke." Carpenter and Boericke are made executors of the will without bonds, and given power to sell any of the property of the estate, etc. They presented the will for probate on the 27th day of February, 1893, and such proceedings were had that the will was regularly admitted to probate by the superior court on the 13th day of March, 1893, and on the 16th of March, 1893, letters testamentary were duly issued to Carpenter and Boericke, who qualified, and have ever since been, and now are, the executors of said will. About four years afterwards, to wit, on February 26, 1897, Elisha V. S. Cook filed a petition for the partial distribution to him, as grantee of Charles Walter Willey, the

son and only heir at law of the deceased, of certain lands of the estate, which seem to be all the lands belonging to said estate, and are the lands mentioned in the said deed of trust, dated October 27, 1892, hereinbefore mentioned. The appellants, Carpenter and Boericke, filed a written opposition to the application for distribution, upon the grounds (1) that said lands were not the property of the estate, but were the property of appellants, conveyed to them by the said deed of trust; and (2) that if the property, or any part thereof, was the property of the estate, it had been devised to them by the terms of the last will of said decedent. The court granted the application for a distribution. It made certain findings, from which we gather that it held the will void for uncertainty; and this finding seems to have been based upon the propositions that, when the will was executed, the deed of trust to which it refers was not present, and therefore not attested by the witnesses, and that, when the will was probated, the said deed of trust was not presented to the probate court, and was not, therefore, probated, and that, therefore, nothing can be considered except the words actually contained in the document which was witnessed and probated as a will, and that, as so considered, it is too indefinite and uncertain to pass any rights. We also understand, however, that the decision also went upon the theory that, if the trust deed can be considered as a part of the will, it is void for the reasons stated by counsel for respondent hereinafter noticed.

The validity of the will and the deed of trust is assailed by the respondent from a great many standpoints. The briefs of respondents filed in the present case consist of several hundred pages of printed matter, and in addition they refer to their briefs in an associated case, now pending in this court, of Carpenter v. Cook (No. 1,234) which briefs include several hundred pages more. A great many points are made, and innumerable authorities cited; and to follow the argument in detail, and notice any considerable number of the authorities cited, would extend this opinion to an intolerable length. We must content ourselves, therefore, with briefly stating our conclusions as to the material questions in the case. Case No. 1,234, above alluded to, is an action brought by the appellants herein, Carpenter and Boericke, against the respondent herein, Cook, and Willey, the heir at law, to quiet the title of the plaintiffs therein to the lands covered by the decree of distribution in the case at bar; and in that case the plaintiffs rely upon title derived through the said deed of trust. In the case at bar the court further decided that the land involved here "was not conveyed, nor any part of it, by the said Amasa P. Willey, by his certain deed, or any deed, bearing date the 27th day of October, 1894." But this part of the decision, so far as it refers to the deed of trust as unconnected with the will, and as

establishing an adverse title of the appellants as against the estate, was beyond the jurisdiction of the court. The court had jurisdiction to determine to whom, as heirs or devisees under the will, the estate went, but not to determine an adverse and hostile claim. It is apparent, however, that the ultimate rights of these litigants must depend upon the validity of the deed of trust; and, therefore, many points made by respondents on this present appeal, touching probate matters alone, are only of temporary importance.

We think that it was legitimate for the testator to refer in his will to the deed of trust, and that it was not necessary, for a proper attestation of the will, that the deed should have been present and exhibited to the witnesses. We are of opinion, also, that it was not necessary, in order to consider the deed in connection with the written instrument executed and witnessed, that the deed itself should have been presented to the probate court, and formally and expressly certified as probated. Many authorities have been cited to these points, and some of them are conflicting. We think that the correct rule, as to both questions, is stated in Redfield on the Law of Wills (volume 1, \*264) as follows: "The effect of a reference, in a duly-executed will, to an extraneous paper, in incorporating that paper into the will, so as to make it, ipso facto, a portion of the will itself, is a highly important point to be borne in mind in determining all questions connected with the mode of procedure in the probate of the will under such circumstances. The cases already referred to show very clearly that a will required to be witnessed by two or more persons, or executed with any other prescribed formalities, may nevertheless adopt an existing paper by reference. And this is true of others, soon to be referred to, many of which were decided during the existence of statutes requiring such formalities; so that we cannot escape from the force of these cases by supposing they had reference, exclusively, to wills of personal estate, where no particular formalities were required under the earlier English statutes. This 'incorporation' of the paper referred to into the will so makes it a part of the instrument that no distinct proof of the paper is required, or even filing, in the probate court. The proof of the will sets up and establishes the paper, as a portion of itself, by proof of the reference to the consequent incorporation." The same principle is announced in 1 Jarm. Wills (6th Ed.) p. 130, par. 14. The principle is also substantially declared in the case of *In re Soher*, 78 Cal. 481, 21 Pac. 8. Of course, the reference must be certain, and to an instrument then in existence. As to the validity of the trust deed, considered as part of the will, it is to be observed that a will or deed, solemnly executed, which disposes of one's property, is not to be lightly disregarded or held for naught; and the main intention of the testator or grantor must be carried out, notwithstanding a

defect in some particular, where that can be done without the clear violation of some established principle.

The first attack made by respondent upon the deed relates to the first trust declared. By the deed the grantor first does "grant, bargain, alien, remise, release, convey," etc., certain parcels of real property, being the same as those included in the decree of distribution to the respondent herein, upon certain trusts. By the said first declared trust it is provided that the trustees are to hold the property, and all its rents, profits, etc., for the benefit of the grantor during his lifetime, and to sell, convey, etc., any part of the property to such person or persons as the grantor shall direct; and it is also provided, in another part of the deed, that the grantor "reserves the right at any time to revoke this trust, or any of the provisions therein contained," or to modify it, the revocation or modification to be made by a deed recorded by him in the recorder's office in San Francisco. The second declaration of trust provides that after the death of the grantor the trustees are to hold the "residue and remainder" of the property, and to receive the income, and distribute it to certain named beneficiaries. Now, it is contended that the first declared trust makes all the subsequent ones invalid, upon the common-law principle that a remainder cannot be limited on a fee simple. It is contended, in some parts of respondent's various briefs, that by the first declared trust a fee simple was created—or rather left—in the grantor, and therefore there was no remainder or residue to be disposed of; and in other parts of the arguments it is contended that there was vested in the trustees two fees: "First, a fee to serve the purposes of the trust during Willey's lifetime; and, second, a fee by way of executory devise, or, more properly speaking, a springing use (being by deed) to serve the trust after Willey's death." Many of the intricacies which attended the creation of estates at common law have been swept away by our Codes (Civ. Code, §§ 772, 773, et seq.); and we are not able to see the effectiveness of respondent's assaults on the deed from the standpoint of the objections now being considered. The deed vested the fee in the trustees, subject, only, to the declared trust. The reserved right to revoke was a mere privilege, and, as it was never exercised, it had no effect upon the estate granted. "Except as hereinafter provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust." *Id.* § 863. Section 2280 expressly provides that a trust may be revoked, if the declaration of trust reserves a power of revocation; and to hold that a power of revocation prevents the vesting of an estate in the trustee would be to throw statutory provisions on the subject into utter confusion. There was, at furthest, nothing more left in the grantor than the equivalent of a life estate; and we think



that the contentions of the respondent on this point are fully answered by the opinion of this court rendered by Mr. Justice Henshaw in *Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1089.

The main point of respondents—at least, the one most extensively argued and most strenuously insisted on—is that the tenth clause of the deed is void, because it creates a perpetuity which is not for eleemosynary purposes, and that, being for an unascertainable portion of the estate, and the other trusts being dependent on it, the whole fails. By prior parts of the deed all the income of the property conveyed is given to the trustees. By the sixth and subsequent clauses of the deed, prior to the tenth clause, it is provided that the trustees, out of the income and profits of the property, shall “pay annually” certain specified sums to various beneficiaries, many of them being private individuals, to whom bequests are given for their own benefit during their lives, and others being certain persons and associations, to whom bequests are given for charitable purposes. By clause 8 it is provided that, if the income of the property in any one year shall exceed or be less than the total amounts directed to be paid annually to the beneficiaries, the amount to be paid each “shall be increased or diminished in proportion to the amount so directed to be paid to them, respectively.” Then comes the tenth clause, which is as follows: “Tenth. The said trustees shall, at all times before making any payments of income under this trust, set aside and retain the sum of twenty-five dollars in each year, and any further sum that may be necessary, to provide for the care and preservation of the cemetery lot of the party of the first part in the Masonic Cemetery in San Francisco.” We will assume, for the purposes of the case, that this trust, being for the preservation of a single cemetery lot, is not for a charity, and therefore invalid; but we do not agree with respondents that this vitiates all, or any, of the other declared trusts. Counsel for respondents repeatedly speak of this tenth clause as establishing “the primary trust”; but we do not see that its relative position in the deed, or its magnitude or importance, or the whole deed construed together, or the evident main purpose of the trustor, to be gleaned from the whole instrument, at all warrants the assertion that the trust declared in the tenth clause should be considered as a primary trust, and it is not so interwoven with the entire deed that it cannot be easily separated from the other trusts, so as not to invalidate the latter.

The rule of construction involved here, as crystallized in section 1317 of the Civil Code, is: “A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.” The principle which should govern courts in determining questions like the one now under

review, whether they arise out of wills or deeds, is expressed by the maxim, “*Ut res magis valeat quam pereat*.” And, under the inspiration of that maxim, courts have firmly established the principle that valid trusts should not be disregarded because, in the instrument creating them one particular invalid trust is declared, unless the latter is so inseparably blended with the others that it cannot be eliminated without destroying the main intent of the trustor, or working manifest injustice to other beneficiaries. Among the various authorities cited by appellants to this point, *Darling v. Rogers*, 22 Wend. 483; *Van Schuyver v. Mulford*, 59 N. Y. 432; *Kennedy v. Hoy*, 105 N. Y. 134, 11 N. E. 390; and *Kane v. Gott*, 24 Wend. 641,—may be mentioned as cases where the subject is fully discussed and the principle aptly stated. And the rule is naturally and justly applicable to the case at bar. By the clauses of the deed which precede the tenth, the trustees are to receive all the income of the property conveyed, and to pay it annually to a large number of named beneficiaries; and afterwards it is provided by the tenth clause that there shall be retained from the aggregate amount of the income and annuities \$25, or as much more as may be necessary, to care for the cemetery lot. It requires no strained view to see that this provision is incidental and subordinate to the main scheme, and is a mere charge upon the bequests or annuities, and that, if the charge be invalid, the beneficiaries take the bequests free of the invalid charge. The valid trusts can be easily carried into effect, after eliminating the tenth clause, without interfering with what were evidently the main purposes of the trustor, and without doing any injustice whatever to any one of the other beneficiaries. The reservation for the cemetery lot is in an independent and single clause, it appears in the instrument after clauses which dispose of the entire income, it is easily separable from all the other provisions of the instrument, and, therefore, its invalidity does not carry with it, or affect, the trusts which are valid.

It is contended by respondents that the provisions for the payment of certain sums to Corinthian Lodge, Washington Chapter, and Marysville Commandery—all being Masonic bodies—are invalid, because they are not charitable bodies, and because they are not bound to use the bequests for charitable purposes. But, in the first place, it is not necessary to determine whether a Masonic body is or is not a charitable institution; for it is not necessary that a trustee for charitable purposes should be, itself, a charitable institution. It is sufficient if the bequest be for a charitable purpose. In each of the instances the bequest is made to the Masonic body “for the use of the widows’ and orphans’ fund of said lodge,” or chapter, or commandery. This is a compliance with the legal essence of a valid charity; that is, that it is public, and is vague and uncertain as to the individuals to be benefited or relieved.

It is not to be presumed that the Masonic bodies named will not, as trustees, use the trust funds for the purposes expressly declared by the trust; and, on the other hand, for the purpose of making the trust operative, it will be presumed that the trustee will properly apply the funds. As was said in *Re Hinckley's Estate*, 58 Cal. 457: "Courts look with favor upon all attempted charitable donations, and will endeavor to carry them into effect, if it can be done consistently with the rules of law. A bequest intended as a charity is not void, and there is no authority to construe it to be legally void, if it can possibly be made good."

Counsel for respondents present the point that by the deed, construed as a part of the will, more than one-third of the estate of the testator is given for charitable purposes, in contravention of section 1313 of the Civil Code. With respect to this matter it may be said, in the first place, that it does not appear that more than one-third of the estate is thus given, for the amount of the annuities which go to charitable purposes is less than one-third of the whole income; so that, at least for the present, the excess does not appear, and it is only by speculations leading into the distant future that the result alleged could be in any way arrived at. The point, however, does not arise at all on the record in this appeal. Under section 1313 the only consequences following charitable devises or bequests of more than one-third of a testator's estate are that "in such case a pro rata deduction from such devises or bequests shall be made, so as to reduce the aggregate thereof to one-third of such estate." But, in the case at bar, the petition for distribution and the findings and decree of the court make no reference whatever to any question that might arise under section 1313. It is alleged, and found and decreed, not that appellants are entitled to only one-third, but that they are not entitled to any part whatever, of the estate. It is decided that all attempts to devise or convey any part of the property to appellants in trust are void; "that no bequest or devise is made of any property or estate of the testator in or by said will, or any of its provisions, and no bequest or devise at all was or has been made by the aforesaid testator"; and that by the deed dated October 27, 1892, from the deceased to the appellants, "the said real property was not conveyed, nor any part of it." Moreover, upon the theory that appellants were entitled to one-third of the property, the court could not, in a decree of partial distribution, have segregated appellants' undivided interest in all the property, and set off all the land in severalty to other claimants. But, as before stated, this was not attempted.

The foregoing views make it unnecessary to discuss other points made by appellants, and we have endeavored, as far as possible, to consider those questions upon which the rights of the parties ultimately depend. We see no other points made by respondents which are necessary to be considered, except that it is proper to say that the trust deed was in evidence for

the general purposes of the case, and that it was fully identified as the instrument referred to in the will. For the reasons above stated the decree of distribution was erroneous. The order of partial distribution, appealed from, is reversed.

We concur: HENSHAW, J.; TEMPLE, J.

123 Cal. 653

McMULLIN v. McMULLIN. (S. F. 887.) 1

(Supreme Court of California. March 4, 1899.)

HUSBAND AND WIFE—DESERTION—ACTION FOR MAINTENANCE BY WIFE—DEFENSE—MARITAL RELATIONS—OFFER TO RESUME—GOOD FAITH—REVIEW—ACCEPTANCE OF OFFER—WIFE'S FUTURE RIGHTS—PREJUDICE—CONDONATION.

1. Where an action is brought by a wife against her husband for maintenance without divorce, on the ground of willful desertion, as authorized by Civ. Code, § 137, and, while the action is pending, the husband in good faith offers to provide her a home and resume marital relations, which she refused, it constitutes a defense to the action, though made after the period of desertion has exceeded that required to entitle her to a divorce on that ground.

2. Where a wife's action for maintenance against her husband was dismissed because of her refusal to accept his offer to resume marital relations, which the court found was made in good faith, the case will not be reversed on appeal, on the ground that her refusal was justified by his cruelty, which occurred 18 years previously; her refusal not having been made on that ground at the trial, but on a denial of defendant's good faith.

3. Where a husband pleaded a bona fide offer to resume marital relations as a defense to his wife's action for maintenance on the ground of desertion, whether such offer was in good faith is a question of fact; and the finding that it was so made will not be disturbed, on appeal, where there was evidence to support it.

4. Acceptance by a wife of her husband's offer to resume marital relations, made in an action by her for maintenance, does not prejudice her future rights against him.

5. Civ. Code, § 102, declares that if a party to a marriage, who has deserted the other, returns and "solicits condonation," the desertion is cured. *Held*, that where a husband, who had deserted his wife, offered her a home with him, expressed his willingness for a reconciliation, and asked her to fulfill the marriage contract, and offered himself to do so, he had impliedly requested conditional forgiveness, which section 115 declares is condonation.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Virginia McMullin against Thurlow McMullin. From a judgment for defendant, plaintiff appeals. Affirmed.

Lloyd & Wood and Rodgers & Paterson, for appellant. Chas. S. Wheeler and Garber, Boalt & Bishop, for respondent.

BRITT, C. Plaintiff is the wife of defendant. She prosecutes this action against him under section 137, Civ. Code, for maintenance without divorce. The parties were married to each other on February 15, 1871, and defendant deserted the plaintiff November 15, 1877. This action was begun January 4, 1894.

1 Rehearing denied April 3, 1899.



The court found that defendant's desertion of plaintiff was willful, and that it continued until April 10, 1895,—a time above 15 months after the commencement of the action,—but that on said April 10th defendant offered to provide a home for plaintiff "at any reasonable place of her own choosing, and to return and live with her as husband and wife, and also requested plaintiff to return and fulfill the marriage contract; that said offer was made by defendant in good faith"; and that plaintiff rejected it. The court allowed plaintiff certain sums for temporary alimony and expenses of the action, but rendered judgment denying her demand for permanent support.

Willful desertion must continue for one year before it is a ground for divorce. Civ. Code, § 107. And it is provided in section 102, preceding, that if, prior to the expiration of such time, the party deserting "returns and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured." And in *Benkert v. Benkert*, 32 Cal. 467, it was held that an offer to return, made after expiration of the time necessary to give the ground for divorce, will not, if refused, defeat the action of the injured party for divorce. Plaintiff contends, in support of her appeal, that a rule like that in *Benkert v. Benkert* should obtain in this case, and that the defendant's offer to return came too late. The cases, however, differ materially. See *Hardy v. Hardy*, 97 Cal. 125, 130, 31 Pac. 306. In *Benkert v. Benkert* dissolution of the marriage bond was sought. Here the plaintiff, as she testified at the trial, and as her suit shows, desires no divorce, but insists that the marriage relation shall continue. Manifestly, to enforce the duty of support against defendant, when, as the court finds, he seeks in good faith to fulfill his obligations, and at the same time to exonerate plaintiff from the correlative duty of dwelling with defendant at some reasonable place of abode (Civ. Code, § 156), would be the granting of a limited divorce, for which our law makes no provision. *Hagle v. Hagle*, 74 Cal. 608, 612, 16 Pac. 518; *Peyre v. Peyre*, 79 Cal. 336, 21 Pac. 838. The cases touching this subject quite uniformly hold or imply that, although the husband may have deserted the wife, yet the door for repentance is open for him, and is not necessarily closed by the fact of suit brought for maintenance; so, not because of any tenderness of the law for delinquent husbands, but because of its aversion to separation of the spouses. *Schraeder v. Schraeder*, 26 Ill. App. 524; *Johnson v. Johnson*, 125 Ill. 510, 519, 16 N. E. 891; *Taylor v. Taylor*, 4 Desaus. Eq. 165; *Briggs v. Briggs*, 24 S. C. 377; *Almond v. Almond*, 4 Rand. (Va.) 662, 667; *Head v. Head*, 3 Atk. 547, 551; *Walker v. Lightham*, 31 N. H. 111.

It is strongly urged that the plaintiff was justified in refusing defendant's overtures, first, it is said, because of his cruelty to her before the desertion. At the trial plaintiff did not specify cruelty as a ground for her

refusal. She claimed only that defendant's offer was not made in good faith. True, the former relations of the parties justly have an influence upon the question of good faith of the husband's offer; but, if there was any cruelty in the case,—which defendant denies,—it occurred more than 18 years before the attempt at reconciliation, and there was no showing in that behalf such as would warrant this court in reversing the decision that defendant's offer was made in good faith, which necessarily implies a finding that he intended to treat the plaintiff with conjugal kindness.

It is also contended that defendant's proposal was made with the expectation and desire that it would be refused, and in a manner to induce that result. The question of the good faith of the offer is one of fact. See, besides the cases cited above, the following: *Wagner v. Wagner*, 104 Cal. 295, 37 Pac. 935; *Olcott v. Olcott* (N. J. Ch.) 26 Atl. 469; *Musgrave v. Musgrave*, 185 Pa. St. 260, 39 Atl. 961; *Porter v. Porter*, 162 Ill. 398, 44 N. E. 740. To detail the evidence on this issue would unnecessarily extend the opinion. It appeared that defendant repeated his offer, which was made through counsel, varying it to meet plaintiff's objections; that he solicited a personal interview with plaintiff for the purpose of "talking it over"; and that she steadily refused. Indeed, it was conceded at the trial that defendant could have made no offer to live with plaintiff which she would have accepted. It is probably true that the cause immediately moving defendant to endeavor to effect a reconciliation was the pendency of this suit, and the apprehension of a judgment coercing from him performance of the duty to support his wife; but while this consideration might affect, it certainly could not conclude, the question of the integrity of his intentions towards plaintiff. No higher motives than those of convenience, it unfortunately must be allowed, have both induced and preserved multitudes of matrimonial unions. We are satisfied that there was evidence to support the substance of the court's finding; and it follows that the plaintiff should have tested defendant's professions by acceptance. Had he thereafter proved derelict, her complaisance would not have prejudiced her claims upon him. She could not capriciously refuse to be satisfied of the good faith of his offer. *Newing v. Newing*, 45 N. J. Eq. 498, 502, 18 Atl. 166.

It is said, further, that defendant did not solicit condonation for his offense of desertion (Civ. Code, § 102), and that for this reason plaintiff need not have accepted his offer. We think he preferred such request, in substance and effect. He offered plaintiff a home with him, and expressed his willingness for a reconciliation. He asked her to fulfill the marriage contract, and offered himself to do likewise. These things certainly imply a request for "conditional forgiveness," which is condonation. Civ. Code, § 115. The judgment

and order denying a new trial should be affirmed.

We concur: HAYNES, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

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124 Cal. 69

BUTLER v. SOULE et al. (S. F. 1,168.)

(Supreme Court of California. March 20,  
1899.)**JUDGMENTS — CONCLUSIVENESS — COLLATERAL AT-  
TACK—VACATION.**

1. The judgment of a court of general jurisdiction is conclusively presumed to be correct, unless the record itself of the judgment shows that the court did not have jurisdiction of the subject-matter of the action or of the person of defendant.

2. An order vacating a judgment as having been inadvertently entered cannot be attacked on motion to vacate a second judgment.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by John W. Butler against A. C. Soule and others. Motions of A. C. Soule and another to vacate the judgment rendered therein were denied, and movants appeal. Affirmed.

Robert Ash, for appellants. Joseph Hutchinson, for respondent.

VAN DYKE, J. This appeal is taken from an order of the court below, entered the 15th day of February, 1897, denying the motions of the appellants, said defendant Soule and said Burt, a tenant in possession of said premises under the mortgagor, Soule, to vacate and set aside a judgment and decree of foreclosure made and entered in said court on the 6th of April, 1896. The motion to vacate and set aside said judgment, as stated in the notice for the same, is based upon the ground that it "was and is absolutely void, for the reason that the said court never acquired jurisdiction

over the premises described in the so-called decree, or any part thereof, or over the person of the defendant A. C. Soule in said action, who was the owner in fee of the said premises, to give or make said so-called judgment or decree"; and that the right of Burt, the said tenant in possession of the premises described in the judgment or decree of foreclosure, is independent of, and beyond the reach or control of, said judgment or decree. The said judgment or decree of April 6, 1896, recites: "And due proof was made to the court that the defendants, A. C. Soule, Grace N. Soule, Alfred J. Rich, W. J. Adams, San Francisco Lumber Company (a corporation), and Thomas Fanning (sued as John Doe), were each duly served with summons and copy of the complaint herein, and, the time for them to appear and plead herein allowed by law having expired, and none of them except the said Thomas Fanning having made appearance, the default of each of them except the said Thomas Fanning was heretofore duly entered herein;" and further recites that said A. C. Soule and Grace N. Soule, and J. J. Rauer, assignee of A. C. Soule, insolvent, sued herein as Richard Roe, were each duly served with a copy of the answer and cross complaint of the defendant Thomas Fanning, and, the time for them to appear and plead therein allowed by law having expired, and having made no appearance, their default for not answering said cross complaint was duly entered. There is nothing in the judgment to contradict or impeach the recitals contained in the decree, and therefore the facts recited are deemed to be true, and they show that the court had jurisdiction of the subject-matter and of the parties. "The judgment of a court of general jurisdiction is conclusively presumed to be correct, unless the record itself of the judgment shows that the court did not have jurisdiction of the subject-matter of the action or of the person of the defendant. When the court has such jurisdiction, its record speaks absolute verity, because it is the court's record of its own acts; and such jurisdiction will be conclusively presumed, unless the contrary appears upon the face of the record." *Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1074. "The maxim of the law is that the judgment of a court of general jurisdiction imports absolute verity, and its truth cannot be questioned either by showing otherwise than by the record itself that the court had no jurisdiction, or that the jurisdiction was fraudulently procured. Both upon the merits of the cause of action and upon all jurisdictional facts the record imports absolute verity in law, and is to be tried by the court on inspection of the record only." *Carpentier v. City of Oakland*, 30 Cal. 439; *Drake v. Duvenick*, 45 Cal. 455. "A judgment void upon its face is one that appears to be void by inspection of the judgment roll. The mere absence from the roll of the paper—for example, the return of the officer showing a service of the summons—cannot invalidate the judgment

when the judgment itself recites the fact that the defendant was duly served with process." *People v. Harrison*, 84 Cal. 607, 24 Pac. 311. To the same effect is *Freem. Judgm.* § 130.

But it is claimed on the part of these appellants that the judgment in question is void for the reason that it is a second judgment or decree, a former one having been set aside by the court; and it is claimed that said order of the court setting aside the former judgment was void, and that said former judgment still remains in full force; hence the one in question is void. From the bill of exceptions it appears that the action was brought by the plaintiff to foreclose a mortgage covering the premises in question, made and executed on the 19th day of June, 1893, by the defendants A. C. Soule and Grace N. Soule to the plaintiff, to secure their promissory note of even date for the sum of \$5,350. The defendant and cross complainant Thomas Fanning held a second mortgage executed by the defendant A. C. Soule, dated June 22, 1893, to secure a promissory note of even date therewith, in the sum of \$500, and by the recitals in the last decree, as already shown, Fanning was brought in as defendant on the plaintiff's suit under the fictitious name of John Doe. The first decree was entered June 28, 1895, and it appears therefrom that Fanning, as the holder of the second mortgage, was entirely ignored, and the decree and order of sale was in behalf of the plaintiff only. On October 8, 1895, appears a minute order, reciting that upon motion of the plaintiff's attorney, "and it appearing to the court that the judgment heretofore entered herein was inadvertently entered, it is hereby ordered by the court that said judgment be, and the same is hereby, set aside." Thereupon, November 5, 1895, the defendant Fanning filed an answer, together with a cross complaint, setting up his junior mortgage, and asking for judgment thereon as against defendant Soule, and for a sale of the mortgaged premises. Attached to the cross complaint the following entry was made: "In this action the defendants A. C. Soule, Grace N. Soule, Alfred J. Rich, W. J. Adams, and San Francisco Lumber Company, having been regularly served with process, and having failed to appear and answer the cross complaint of Thomas Fanning on file herein, and the time allowed by law for answering having expired, the default of said defendants in the premises is hereby duly entered according to law," and dated April 6, 1896. And there is nothing in the bill of exceptions to show that the service of the cross complaint recited in the indorsement was not made as stated. No appeal has been taken from this order vacating and setting aside the first judgment, nor was there any motion made by these appellants, or any one, to vacate, set aside, or modify the same. The inadvertence mentioned by the court may have been the fact that the decree did not cover all the controversies involved in the action, to wit, the



rights of the defendant Fanning, the second mortgagee, or it may have been for some other reason not disclosed by the record. The court had jurisdiction of the subject-matter and of the parties, and every presumption will be indulged in to support its judgments and orders. "Circumstances may have arisen wherein the trial court would have been justified under the law in setting aside the first findings and judgment, and in filing the second findings and judgment; and, with no showing to the contrary, we must assume that such circumstances did arise." *Paige v. Roeding*, 96 Cal. 391, 31 Pac. 264. "It is within the jurisdiction of the superior court to vacate a judgment entered by it by other proceedings than a motion for a new trial. If it has committed error in thus vacating the judgment, it can be corrected on a direct appeal; but on a collateral attack the order will be deemed to have been properly made." *Storke v. Storke*, 111 Cal. 514, 44 Pac. 173. See, also, *Water Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878.

The decree in question not being void upon its face, and no fraud or imposition upon the court being shown so as to bring the case within the rule of *Norton v. Railroad Co.*, 97 Cal. 388, 30 Pac. 585, and 32 Pac. 452, the motion to vacate and set it aside came too late. The notice of motion was served and filed nearly 10 months after the entry of the decree, whereas the code provision requires it shall be made within a reasonable time, but in no case exceeding 6 months. *Code Civ. Proc.* § 473; *People v. Greene*, 74 Cal. 400, 16 Pac. 197; *People v. Harrison*, supra; *Jacks v. Baldez*, 97 Cal. 91, 31 Pac. 899; *Wharton v. Harlan*, 68 Cal. 422, 9 Pac. 727; *People v. Temple*, 103 Cal. 447, 37 Pac. 414.

The defendant and cross complainant Fanning was not served with notice, or brought in on the motion to vacate and set aside the final decree in which his junior mortgage is foreclosed, and his rights, therefore, are unaffected. There is no merit in the appeal. Order affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

124 Cal. 22

WILLIAMS v. MARX. (Sac. 608.)

(Supreme Court of California. March 15, 1899.)

ADMINISTRATION—DECREE OF DISTRIBUTION—  
COLLATERAL ATTACK.

In an action by a distributee of land, against a purchaser thereof, to compel specific performance, the decree of distribution cannot be attacked because the will was improperly construed.

Commissioners' decision. Department 1. Appeal from superior court, Sacramento county.

Action by Thomas H. Williams, Jr., against M. Marx. From a judgment for plaintiff, defendant appeals. Affirmed.

R. M. F. Soto, for appellant. Rothchild & Ach, for respondent.

HAYNES, C. On April 11, 1898, the parties to this suit entered into an agreement in writing whereby the plaintiff agreed to sell, and the defendant agreed to buy, certain real estate situate on Grand Island, in the Sacramento river, for a price therein specified. The defendant paid to the plaintiff \$1,000 of the purchase money, but it was provided that, if the title to the land should not prove to be good and marketable, the plaintiff should repay said sum of \$1,000, but, if the title should be found to be good and marketable, the defendant should pay the remainder of the purchase price. Defendant, claiming the title was not good and marketable, refused to complete the purchase, and demanded a return of his deposit. The plaintiff refused to comply, tendered a conveyance, demanded payment, and brought this action to compel a specific performance. The plaintiff had judgment, and the defendant appeals. The facts were stipulated, and stand as the findings of the court.

Thomas H. Williams, Sr., the father of the plaintiff, died testate in 1886, leaving a large estate. His will was duly probated, and George E. Williams, the executor therein named, was duly appointed executor thereof, was duly qualified, and administered said estate. On January 5, 1897, upon the petition of the plaintiff herein, a decree of final distribution of said estate was duly made and entered, by which the land agreed to be purchased by the defendant from the plaintiff, and which is involved in this action, was distributed in fee to the plaintiff; and said decree was recorded in the office of the county recorder of Sacramento county on January 27, 1898. The only objections made by the defendant to the title to the land embraced in said contract are based upon the construction which he gives to said will, which construction, he contends, leaves the title questionable. But it is stipulated that more than a year had elapsed after the decree of distribution was entered, and that it remained unmodified, unreversed, and unappealed from. Nor is the jurisdiction of the court which made the decree assailed. The decree was necessarily a judicial construction of the will and of the several interests of the distributees, and cannot be assailed collaterally. There is no doubt or uncertainty in the decree itself, as to plaintiff's title, and to that alone are we permitted to look. In *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38, it was held that the distribution of an estate is a proceeding in rem, and the action of the court making the distribution binds the whole world, and is equally conclusive upon every claimant, whether his claim is presented, or whether he fails to appear, subject only to be reversed, set aside, or modified upon appeal; and its decree cannot be collaterally attacked for any error committed therein. See, also, *In*

re Trescony, 119 Cal. 570, 51 Pac. 951; Goldtree v. Allison, 119 Cal. 344, 51 Pac. 561; Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681; Cunha v. Hughes (Cal.) 54 Pac. 535. The judgment should be affirmed.

We concur: GRAY, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

123 Cal. 689

PENINSULAR TRADING & FISHING CO.  
v. PACIFIC STEAM WHALING  
CO. (S. F. 886.)

(Supreme Court of California. March 8, 1899.)  
EQUITABLE MORTGAGES—ESTABLISHMENT—ESTOPPEL  
—REDEMPTION—TIME—ACCOUNTING—JURISDICTION OF SUPERIOR COURT—EQUITY.

1. The fact that an agreement purports to be a contract of sale, and that it recites that the vendor is the owner of the property, does not estop the purchaser from showing that the vendor acquired and holds the property merely as security; and this, though the vendor is in possession.

2. A debt of a salmon-canning company fell due February 1, 1894, and to secure it the cannery was transferred to the creditor absolutely in March, 1893, upon an agreement for a reconveyance on payment of what should remain of the debt after the creditor should apply thereon whatever profits he might make beyond a certain sum in operating the cannery for the season of 1893. *Held*, that the fact that time was made of the essence of the contract, and that the debt was not paid when due, did not end the debtor's rights in the property, where the creditor continued to operate the cannery under the agreement during the following seasons.

3. Const. art. 6, § 5, provides that actions in the superior court to recover possession of real estate, to quiet title thereto, and to enforce liens thereon, shall be commenced in the county wherein the property or a part thereof is situate. *Held*, that an action against a resident to have an absolute conveyance of real property situate without the state declared to be a mortgage, and to redeem therefrom, and to obtain an accounting of profits thereunder, is within the jurisdiction of the superior court, so far as the accounting is concerned, though no accounting can be ordered until the court determines that the conveyance is a mortgage.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by the Peninsular Trading & Fishing Company against the Pacific Steam Whaling Company. From a judgment dismissing the action, plaintiff appeals. Reversed.

E. H. Wakeman and E. P. Pillsbury, for appellant. Geo. W. Towle, Jr., for respondent.

CHIPMAN, C. Action for an accounting. Defendant demurred to the complaint on the grounds: (1) Insufficiency of facts; (2) want of jurisdiction of the subject of the action. The court sustained the demurrer, and gave defendant judgment dismissing the action, from which plaintiff appeals.

The complaint sets forth the following facts:

Plaintiff and defendant are corporations organized under the laws of California, having their principal place of business at San Francisco. On and after January 15, 1892, plaintiff was, and now is, the owner of a certain salmon cannery situated in the district of Alaska, and, until possession thereof was given to defendant, plaintiff was operating said cannery. About January 15, 1892, plaintiff made its note to defendant for \$25,000, payable January 15, 1893, with annual interest at 10 per cent. At the delivery of said note, and to secure the same, and as part of the transaction, plaintiff executed an instrument in writing purporting to transfer to defendant certain personal property then at or near said cannery, and then being used by plaintiff in operating the same. As part of the same transaction, it was mutually agreed that defendant should take possession of said cannery and of said personal property, and should operate the cannery during the canning season of 1892, "and should pay itself, out of the profits, if any, which it should realize during said canning season of 1892 from the operation of said cannery, the amount which should be due to it from the plaintiff at the end of the said canning season; and that upon being repaid the whole of the said sum of twenty-five thousand dollars, with interest as specified in said promissory note, and also such other sums as should be or become due from the plaintiff to the defendant during said canning season of 1892, the defendant should deliver to the plaintiff the possession of the said cannery, and should retransfer and redeliver to the plaintiff so much of said personal property as should not have been used up in the operation of the said cannery." Defendant went into possession of said property, and operated the cannery for the season of 1892, and at the end thereof rendered an account to plaintiff, from which it appeared that there then remained due on said note, from plaintiff to defendant, the sum of \$21,801.43. Thereafter, on March 15, 1893, to secure said balance, plaintiff and defendant executed a certain agreement in writing. This agreement is quite lengthy, and is set out in the complaint. As respondent relies much on the terms of this agreement, it becomes necessary to state them somewhat fully. We quote as follows: "Whereas, the party of the first part [defendant] is now the owner of the residue of that certain property \* \* \* [referring to the property mentioned in the agreement of January 15, 1892]; and whereas, the party of the second part [plaintiff] now desires to repurchase the same from the party of the first part for the sum of \$21,801.43 [the balance as above stated in the complaint to be due]; and whereas, the party of the first part is willing to sell said property and all thereof \* \* \* for said sum: Now, therefore, the party of the first part agrees with the party of the second part that it will sell \* \* \* the above-mentioned property \* \* \* to the party of the second part, upon the receipt from it, prior to the 1st day of February, 1894, of said sum,



with interest \* \* \* from the 15th day of March, 1893 (the date of said alleged account and balance), until said sum and interest thereon shall be fully paid, and in consideration thereof the party of the second part hereby promises and agrees to pay to the party of the first part, for said specified property, the said sum, \* \* \* with interest thereon as aforesaid, on or before the 1st day of February, 1894. And whereas, the party of the first part desires to operate and use said property during the season of 1893, and the party of the second part consents to such use: Now, therefore, it is in consideration of the premises hereby further agreed that the party of the first part shall bear all the expenses of operating and using such property in canning or salting fish thereat, both or either, and shall assume and shall suffer all loss, if any, incurred or suffered \* \* \* in connection with such use, and that the proceeds of such use, and of the fish caught, canned, or salted thereat, when received by the party of the first part, shall be applied as follows." Then follow provisions for the application of the proceeds—First, to the repayment to first party of all expenses incurred by it in operating the cannery; second, after such repayment first party is to retain \$10,000; third, from the surplus of the proceeds, after above payments, "there shall be paid to the party of the first part the sum that shall be due to it as interest from the party of the second part, and, if such surplus shall not be sufficient to pay such interest, then the same, or the deficiency thereof, shall be paid by the party of the second part"; fourth, if any proceeds remain after above payments are made, they "shall be divided between the parties hereto share and share alike." An inventory of the property was attached to the agreement, and it was provided that first party should have the use of such inventoried property without charge therefor. "It is further understood that the expense of keeping said property insured shall be a charge against and shall be paid by the party of the second part. It is further expressly understood and agreed that time is of the essence of this agreement." The complaint then alleges that during the canning seasons of 1893, 1894, 1895, and 1896 "the defendant continued in possession of said cannery and of said personal property referred to in said agreement, and operated the said cannery under the terms of said last-mentioned agreement, and in each of the said canning seasons realized, as plaintiff is informed and believes, by and from the said operation of the said cannery and use of said personal property, \* \* \* and by and from the proceeds of the fish caught, canned, and salted at said cannery, a sum of money more than sufficient for the repayment to itself of all sums expended by it in connection with such operation, \* \* \* and for the payment to itself of the sum due to it as interest, \* \* \* and of all other sums which, by the terms of the said agreement, the defendant was entitled to pay to or retain for itself"; and upon informa-

tion and belief alleges "that defendant has realized and received, by and from the operation of the said cannery and use of the said personal property" (during said seasons), "and by and from the proceeds of the fish caught, canned, and salted at the said cannery, a sum of money more than sufficient for the repayment to itself of all sums expended by it in connection with such of its operation of said cannery and use of said property, \* \* \* and for the payment of the said sum of \$21,801.43 and all interest due thereon, and all other sums which by the terms of said agreement the defendant is entitled to pay to or retain for itself; but the plaintiff does not know, and without the aid of this honorable court cannot ascertain, the precise sum realized and received by the defendant," etc. The complaint then avers the necessity for an accounting; that plaintiff requested defendant to account before the commencement of the action; avers that defendant is still in possession of all the property; that plaintiff is willing and offers to pay to defendant any balance which upon an accounting may be found to be due defendant; and prays accordingly, and for general relief.

1. Respondent contends that the complaint does not state a cause of action against it. The contention of respondent is that the complaint shows that certain property was mortgaged to secure the payment of \$25,000; that after the time fixed in the original agreement for payment the mortgaged property was surrendered to respondent, an accounting was had, and a new agreement made, which recites that the respondent "is now the owner" of the property, and proceeds to state the terms upon which the same would be sold to appellant; that this recital is conclusive evidence of the fact that appellant had, prior to the date of the agreement, transferred the property to respondent; that this recital operates to estop appellant from asserting that respondent was not the owner; that the allegation in the complaint that this agreement was entered into for the purpose "of securing the payment to the defendant of the said sum of \$21,801.43, with the interest due thereon," can in no way modify or change the effect of that recital; and, finally, that time was expressly made of the essence of the contract, and, as there is no allegation of payment or tender, the right to purchase terminated February 1, 1894.

As we read the complaint, the averments of which are admitted by the demurrer to be true, defendant came into possession of the property as security for the payment of the original indebtedness of \$25,000. No transfer of the property, other than as a mortgage, is alleged, or anywhere in the complaint appears, and plaintiff alleges ownership of the property at all the times mentioned. At the accounting upon the first season's use of the property by defendant a balance was still due defendant. A new agreement was then entered into, which, tak-

en in all its parts, bears, we think, inherent evidence that defendant was not in fact the owner of the property, although the agreement begins with the recital that defendant "is the owner" of the property. But, conceding that the contract bears no visible earmarks of a mortgage, still, if the fact be, as the complaint alleges and the demurrer admits, that it was entered into for the purpose of securing to defendant the payment of the balance then due to it, no form of words, however adroitly used to conceal this purpose, can estop plaintiff from pleading and proving the fact. As was said in *Russell v. Southard*, 12 How. 139: "To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be." It is settled beyond controversy that though a deed be absolute in form, yet if in fact it be intended by the parties to it as security for the payment of money or the performance of any lawful act, it is a mortgage; and we know of no principle of estoppel which can be invoked to prevent the fact from being disclosed. It is the real character, not the form, of the instrument to which the court will look. *Civ. Code*, §§ 2924, 2925; *Husheon v. Husheon*, 71 Cal. 407, 12 Pac. 410; *Campbell v. Freeman*, 99 Cal. 546, 34 Pac. 113; *Taylor v. McLain*, 64 Cal. 513, 2 Pac. 399. Possession of the grantee does not enlarge his interest in the property. *Murdock v. Clarke*, 90 Cal. 427, 27 Pac. 275. See, also, *Adair v. Adair*, 22 Or. 115, 29 Pac. 193. The complaint distinctly alleges that the agreement of March 15, 1893, was intended as security for the debt then due; and whether that was its real purpose, or whether the object was to establish different relations between the parties, such as vendor and purchaser, is a question of fact which plaintiff, under the allegations of the complaint, is entitled to have tried as an issue of fact upon answer. *Wallace v. Johnstone*, 129 U. S. 58, 9 Sup. Ct. 243; *Smith v. Smith*, 80 Cal. 323, 21 Pac. 4, and 22 Pac. 186, 549; *Malone v. Roy*, 94 Cal. 341, 29 Pac. 712; *Mahoney v. Bostwick*, 96 Cal. 53, 30 Pac. 1020.

The demurrer admits the allegation that plaintiff is the owner of the property; that the agreement was for the purpose of securing the amount mentioned in it; and that, being so, the argument of respondent, based upon its assumed ownership of the property, is unavailing. The fact may be as respondent claims, but that fact must be put in issue and tried as an issue of fact.

The claim of respondent that, where time is of the essence of the contract, the vendee can claim no right when he has failed to pay or to tender payment within the stipulated time, proceeds upon the assumption that the relation of vendor and vendee exists. But this is mere assumption, based upon the recital of the contract that respon-

ent "is the owner" of the property, and that it imports merely a right in appellant to purchase. But the complaint alleges, and the demurrer admits, the fact to be that the relation is that of mortgagor and mortgagee. The clause as to time, being of the essence, cannot "end appellant's rights," as is claimed by respondent, for the reason, if no other, that the complaint alleges that respondent held and operated the property, during the canning seasons following that of 1893, under the agreement as it had done in 1892 and 1893.

2. Respondent contends that the court was without jurisdiction. This contention is made upon the ground that the action is in part to redeem from a mortgage upon land, and therefore is not within the jurisdiction of the superior court of this state, the property being in Alaska (*Const. art. 6, § 5*); and that no accounting can be ordered until the court shall have first determined that respondent is a mortgagee, which latter it has not jurisdiction to do. The clause of the constitution referred to provides that the process of the superior court "shall extend to all parts of the state, provided that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon, real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated." So far as the action may be said to seek to redeem, the reason the superior court would have no jurisdiction, in the present case, rests rather upon its having no extraterritorial jurisdiction than upon this clause of the constitution. But, conceding that plaintiff cannot maintain an action to redeem, the real question is, is plaintiff entitled to an accounting in the superior court of this state, at the principal place of business of defendant? The language of the constitution does not preclude an inquiry into the character of the agreement in aid of such jurisdiction as the court may properly exercise. The provision is "that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens, \* \* \* shall be commenced in the county," etc. To ascertain whether the agreement is a mortgage does not necessarily involve the recovery of the possession of the mortgaged land. The facts alleged may be such as to entitle plaintiff to a larger measure of relief, if the action were pending in the courts of Alaska, than can be awarded in the superior court of the city and county of San Francisco, but the latter court is not for that reason deprived of jurisdiction to grant such relief as may be within its power. Appellant cites an apt case—*Cartwright v. Pettus*, 2 Ch. Cas. 214 (decided 200 years ago)—in illustration of the principle. The full report is brief: "Cartwright exhibits a bill against Pettus. They were joint tenants of lands in Ireland. The plaintiff prays an account of the profits and



a partition of the lands. 12 Feb., 1675. The lord chancellor declared that as to the profits the bill was good, the person being in England, for they are in the personalty; but as to the partition, which was in the realty, he could not here proceed, for he could not award a commission into Ireland; and the bill for a partition was in the nature of a writ of partition at the common law, which lieth not in England for lands in Ireland." See, also, *Angus v. Angus* (1736) West, Ch. 23. The principle is further sustained in *Van Etten v. Jilson*, 6 Cal. 19; *Howard v. Valentine*, 20 Cal. 282; *Armstrong v. Paul*, 1 Nev. 134; *Taylor v. Hollander*, 4 Mart. (N. S.) 535. The complaint asks for an accounting, under the direction of the court, as to the operation of the cannery and the use of the personal property, and that defendant pay over any balance found due to plaintiff upon such accounting. We think plaintiff is clearly entitled to this much relief, and that the court has jurisdiction to compel an account of the profits realized from the use of the property.

The principle of equity is that generally the decree operates in personam, and operates in rem only by virtue of some statute conferring jurisdiction; and, if the court has jurisdiction of the person of defendant, the decree may run against him, though it may affect property outside the jurisdiction of the court. In *Sutphen v. Fowler*, 9 Paige, 280, the court compelled the execution of a deed to land situated outside the jurisdiction of the court where the defendant was within its jurisdiction. In *Smith v. Davis*, 90 Cal. 25, 27 Pac. 26, this court upheld the appointment, by the decree of a superior court, of a trustee in respect of lands situated in Washington Territory, and directing him to execute the trust. In this case numerous illustrations are given of the decrees of equity courts acting in personam, and only collaterally in rem. In further illustration of the principle, see *Smith v. Smith*, 88 Cal. 572, 26 Pac. 356; *Le Breton v. Superior Court*, 66 Cal. 27, 4 Pac. 777; *White v. Adler* (Cal.) 42 Pac. 1070. The judgment should be reversed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

6 Cal. Unrep. 245

**BANK OF ORLAND v. FINNELL.**  
(Sac. 380.)

(Supreme Court of California. March 8, 1899.)

**FINDINGS—SUFFICIENCY.**

Plaintiff alleged an agreement whereby third parties were to summer-fallow land for defendant, and that defendant should pay plaintiff the reasonable value thereof; that, after said plowing had been completed, said third parties directed defendant to pay plaintiff, and

defendant agreed so to do. Defendant alleged execution of a two-years lease to such third parties in payment of said agreement, and that plaintiff and such third parties accepted the same in full satisfaction of the claim. Held to require a finding as to whether, after the plowing was done, defendant, for a valuable consideration, promised to pay plaintiff therefor, as alleged in the complaint.

Commissioners' decision. Department 1. Appeal from superior court, Glenn county.

Action by the Bank of Orland against John Finnell. From a judgment in favor of defendant, and from an order denying a motion for a new trial, plaintiff appeals. Reversed.

Ben F. Geis, for appellant. Seth Millington, for respondent.

GRAY, C. The complaint sets forth, in substance, that in August, 1894, it was agreed between plaintiff, defendant, and James and William Deveney that the Deveneys should summer-fallow 2,500 acres of land for defendant, and that defendant should pay plaintiff the reasonable value thereof; that in the summer-fallowing season next ensuing, and subsequent to such agreement, the Deveneys did the summer-fallowing; that it was worth \$1.50 an acre, or a total of \$3,750. Then follows, in the complaint, this allegation: "That at the time of the entering into the said agreement, after the said plowing had been completed, the said Deveneys, for a valuable consideration, directed the said John Finnell to pay to plaintiff, and the said John Finnell agreed to pay plaintiff, for the said plowing, as aforesaid." The pleadings were not verified. The answer contained a general denial; also, an affirmative defense, in the nature of a novation, in which it was alleged that in October, 1894, defendant executed a two-years lease to the Deveneys of the land in question, and that plaintiff and the Deveneys accepted the same in full satisfaction and discharge of the claim set up in said complaint. After a finding of plaintiff's corporate capacity, the findings read as follows: "(2) That on the 9th day of August, 1894, the defendant entered into the following agreement, and no other, with the plaintiff and James O. Deveney and William Deveney, to wit: Defendant agreed to lease certain lands, consisting of five thousand acres, more or less, upon the Capay Rancho, in said Glenn county, state of California, unto the said James O. Deveney and William Deveney, for the term of one year from the 1st day of October, 1894, for a certain rental, and did further agree to pay a reasonable price per acre for any and all summer fallow plowed by the said Deveneys upon said leased land, during said term of leasing, if said lease should for any cause be terminated and cease at the end of the said one year. (3) That defendant did not agree to pay for said summer fallow, in any and all events, as in the complaint set out, but only in case the said James O. Deveney and William Deveney should cease to be his tenants

at the end of the said term of one year. (4) That under and in pursuance of said agreement the said James O. Deveney and William Deveney did accept said oral lease, and did occupy said lands as tenants, and did summer-fallow two thousand one hundred and thirteen acres of said land. (5) That the reasonable value or price per acre for said summer-fallowing was and is \$—— per acre. (6) That during the pendency of said lease, and before said summer-fallowing was done, the defendant did make, execute, and deliver unto the said James O. Deveney and William Deveney his certain indenture of lease, in writing, whereby he did lease all of said lands, theretofore held by them by oral lease, unto the said James O. Deveney and William Deveney for the term of two years from the 1st day of October, 1894. (7) That the plaintiff and the said James O. Deveney and William Deveney agreed thereto, and did accept said written lease in full satisfaction and discharge of all claims by them against defendant, and of the agreement hereinbefore found and set out, as made by defendant August 9, 1894."

The evidence would seem to be lacking to support that portion of the last finding relative to plaintiff accepting the written lease in satisfaction of the claim of plaintiff for the value of the plowing under the first contract mentioned in the findings; but as there is another ground upon which a new trial must be had, and the evidence may not be the same upon such new trial, it will not be necessary to notice this point any further.

I am of opinion that the point made in appellant's specifications and brief, that the court failed to find on the issue as to whether, after the plowing was done, defendant, for a valuable consideration, promised to pay plaintiff for it, is well taken. The question is whether the finding that, before the summer-fallowing was done, the execution of a lease for two years superseded the agreement for one year, of August 9, 1894, and so rendered any further finding unnecessary. But the record does not show satisfactorily that the situation was such that the defendant could not bind himself by the express contract charged. It is contended by respondent that the allegation of the complaint quoted above is confined, as to its date, to the time of the first agreement mentioned in the complaint, and must be taken as a part of such agreement, and that that agreement was completely disposed of in the findings. This allegation of the complaint seems to be somewhat ambiguous as to time, but there was no demurrer to it on that or any other ground, so it became the duty of the court to determine what it meant; and, if it was material, the findings should have covered it. It may as well be said that the allegation in question refers to a time after the plowing was completed, as to say it refers to any time prior thereto, and this construction must have been placed upon it by both court and counsel on the trial; for much evidence was introduced on behalf of

the plaintiff to show that long after the making of the two-years lease, after much of the plowing had been done, and about the last of March or first of April, 1895, the defendant had requested plaintiff to procure a written order from the Deveney, directing him to pay the price of the plowing, and promised to pay the same. This was denied by defendant on the witness stand. Plaintiff put in evidence a written order drawn on defendant by the Deveney, in favor of plaintiff, for the price of plowing. This order was dated in August, 1895; and plaintiff's cashier testified that he had obtained it pursuant to such request of defendant. So that there was a sharp conflict in the evidence upon the question as to whether defendant, after the plowing had been done, had promised to pay plaintiff for it. The reception of all this evidence shows that the allegation was deemed to be material, and perhaps to refer to a time other than that of the first agreement mentioned in the complaint. We will suppose that the court had, in addition to the facts already found, gone on to say, in the language of the complaint, as follows: "After the said plowing had been completed, the said Deveney, for a valuable consideration, directed the said John Finnell to pay to the plaintiff, and the said John Finnell agreed to pay plaintiff, for the said plowing, as aforesaid." Would not a judgment for plaintiff on the findings have necessarily followed? This supposed finding would cover a part of the same page with the actual findings, with the utmost harmony, and, had the court made such a finding, it is doubtful, from the condition of the record, whether it could have been disturbed on appeal; and certainly the judgment on the findings would necessarily have been for the plaintiff, and directly contrary to the way it is now. All this seems to show—First, that the allegation referred to in the complaint is not covered by the findings as they stand; and, second, such allegation is material, and plaintiff is entitled to a finding upon it. And for these reasons I advise that the judgment be reversed, and a new trial ordered.

We concur: HAYNES, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and a new trial ordered.

6 Cal. Unrep. 248

SCHWARTZ et al. v. WRIGHT. (S. F. 843.)<sup>1</sup>  
(Supreme Court of California. March 9, 1899.)  
APPEAL—REVIEW—CONFLICTING EVIDENCE—CHECK  
—DELIVERY—EVIDENCE.

1. Where the evidence is conflicting, and a motion for new trial was denied, the verdict will not be set aside.

2. In an action on a check, defendants denied delivery, and in proof thereof introduced evidence showing that the check was made in payment of certain stock to be delivered, and entry of the other parties in the agreement into a pooling contract, and that the check was tak-

<sup>1</sup> Rehearing denied April 5, 1899.



en without consent by one of the parties, to whom it had been given for inspection. *Held*, that evidence of failure of the consideration for which the check was to be given was admissible as tending to show want of delivery.

3. Where the payee of a check had notice of what was to be done by third parties before the check was to be delivered, evidence of negotiations with such third parties in the absence of the payee of the check is admissible to show nondelivery.

4. A general objection to evidence of a certain conversation as not had in the presence of one of the parties to the suit was insufficient as affecting certain offensive words used in the conversation, where there was no motion made to strike them out, and they were thereafter repeated to such party in person.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Henry Schwartz and others against William H. Wright. Judgment for defendant, and plaintiffs appeal. Affirmed.

F. W. Van Reynegom, P. F. Demand, and J. J. Roche, for appellants. Daniel Titus, for respondent.

PRINGLE, C. Appeal from order denying motion for new trial and from judgment. Action brought upon the following check:

"San Francisco, Cal., Nov. 14, 1894. Union Savings Bank of San Jose, Cal.: Pay to F. W. Van Reynegom, or order, \$3,300—three thousand three hundred dollars. Wm. H. Wright, by H. W. Wright, Attorney in Fact. "Anglo-Cala. Bank: Please pay."

The jury rendered a verdict in favor of the defendant. There is a painful conflict of testimony in the case. The defense is that the check was never absolutely delivered, and that there was no completed consideration for it. The facts are peculiar. The testimony on behalf of the defendant is that William H. Wright was anxious to obtain the control of the majority of the stock of the Oceanic Phosphate Company, and for that purpose entered into negotiations with M. C. Chapman, who undertook to put into his hands 2,707 shares of the stock, the requisite majority being 5,070 shares. Chapman and John A. Magee owned 2,461 shares, but they were in the hands of Judge Van Reynegom, who held them in pledge to secure a note of Chapman and Magee to Bayle, Lacoste & Co. They could be released and put into the pool by payment to Van Reynegom, for Bayle, Lacoste & Co., of \$3,300. In order to accomplish this, W. H. Wright agreed to obtain the \$3,300, if Chapman would secure other stock to make up 2,707 shares, and would complete the pool of 5,070 shares. The negotiations lasted some weeks, and before they were completed W. H. Wright went to the Eastern states, leaving power of attorney with his brother, H. W. Wright, with instructions to complete the transaction. On November 14, 1894, H. W. Wright came from San Jose to San Francisco with W. I. Gill, his attorney, and met Chapman and Magee in the office of Magee. A

pooling agreement was prepared in duplicate or triplicate, to be signed by stockholders for 5,070 shares of stock, including Chapman and Magee for 2,707 shares. The arrangement was complicated, and involved the preparation also of two notes by stockholders, which were to aid Wright in obtaining the required \$3,300, and also a contract between Wright and Chapman and Magee, by which Wright was to be secured for his advance. The morning was consumed in arranging details, and at 2 o'clock Judge Van Reynegom was sent for to bring the stock held by him in pledge, and complete the transaction. Here the stories diverge. The statement of H. W. Wright and Gill, his attorney, is that the pooling contract was fully and freely discussed in the presence of Judge Van Reynegom and John Lacoste, of the firm of Bayle, Lacoste & Co., as part of the transaction; that Mr. Wright then explained that he had not brought any money, or any certified check, but that he could give his check upon the San Jose Union Savings Bank of San Jose, payable at the Anglo-California Bank in San Francisco, if that would be acceptable, and that he thereupon drew the check in question, and passed it over to Judge Van Reynegom for his inspection; that Van Reynegom took out the certificates of stock held by him, indorsed them, and passed them over to Mr. Gill; that 246 shares were wanting to make up the 2,707 that Chapman and Magee were to supply; that Chapman took from his pocket 83 shares more, and promised to supply the remaining 163; that all the papers connected with the pooling contract were on the table, and while Wright was signing the pooling papers, and Gill was talking with Chapman about making up the deficiency, Judge Van Reynegom took the check, and retired; that just as Mr. Gill noticed that Van Reynegom had gone out with the check, he learned from Chapman and Magee that they both made objection to signing the pooling contract, whereupon Gill said that it was a fraud and a swindle, and called upon Mr. Wright to go with him to the Anglo-California Bank, and stop the payment of the check, which they did, and then went immediately to the office of Judge Van Reynegom, and used the same strong language, tendering back the stock, and demanding the check; that Van Reynegom expressed surprise at the failure of Chapman and Magee to finish the pooling transaction, and promised not to negotiate the check, and not to part with it "until it was all fixed up satisfactorily." On the other hand, the statement of Judge Van Reynegom is that he never promised to hold the check; that he had no knowledge whatever of any other matter being connected with the transfer of his stock, or the delivery of the check; that the delivery was absolute and unconditional, and that otherwise he would never have parted with the stock. John Lacoste fully corroborates him. These are the strong points of discrepancy. There

is great conflict. But the story of the defendant does not necessarily involve what Mr. Gill said, "This is all a fraud." It might well be that Judge Van Reynegom took the check and delivered the stock supposing that all matters between the other parties were, or would immediately be, adjusted; and that obstruction on the part of Chapman unexpectedly arose, and changed the aspect of affairs. But, however that may be, the question was fairly submitted to the jury. The court stated the case from both points of view, and said, "The one great point to be determined here is whether or not there was an absolute or conditional delivery of this check." The verdict was in favor of the defendant. There is clearly conflict of evidence. The motion for new trial was denied by the court in which the trial was had, and the verdict cannot be set aside without violating the well-settled rule of this court.

The appellant claims that errors were committed by the court below in the admission of evidence. Most of these errors are charged to be in admitting evidence to show the whole consideration for or inducement to the giving of the check, as has been stated above. It is to be observed that the true question is not whether there was a sufficient consideration for the check, for, if the check had been unconditionally delivered, its payment could not have been defeated if Wright had relied upon the promise of Chapman to furnish the missing 163 shares of stock and the required signatures to the pooling contract, and he had failed to do so. Hence this evidence, touching the consideration, was admissible, not as tending to show insufficiency of the consideration of a check delivered, but as showing, in a consideration unperformed, a circumstance tending strongly to show that the check was undelivered. And the criticism of the appellant that evidence was admitted of negotiations had between Chapman and Wright when Van Reynegom and Lacoste were not present is not just, because the object of those negotiations was to establish the contemplated consideration; and it was sufficient to require, as the court in its ruling very plainly did, that Van Reynegom and Lacoste had notice of all that was to be done before the check was to be delivered. Negotiations uncompleted, with notice to the payee of the want of completion, would certainly be a strong circumstance tending to show that the transaction was not ripe for completion. The payees need not have been present at all such negotiations if they were seasonably affected with notice of them.

Appellant insists also upon the fact that Judge Van Reynegom and John Lacoste were not parties to the pooling contract, and hence could not be affected by any evidence concerning that contract or the two promissory notes that were to be signed with it. But the answer to this is involved in the answer to the last position. The pooling contract was to be a part of the consideration for the check; and the failure to complete it within the

knowledge of appellant's assignors was a circumstance tending to show that there was no intention to deliver the check. It is claimed that there was no issue in the pleadings under which this evidence was admissible. But it tended to sustain the averment that there was no delivery of the check.

Appellant contends that it was error to admit the statement of Mr. Gill of his conversations with Chapman and Magee in the office of Magee after Judge Van Reynegom and John Lacoste had left with the check. But those were the conversations by which Chapman and Magee both refused to sign the pooling contract. It became necessary to show them as an important ingredient in the failure to complete the consideration. Connected with this statement of facts is the declaration made by Gill, upon Magee's declining to sign: "Mr. Wright, let us go to the bank and stop that check. This is a fraud and a swindle,"—the admission of which is relied on as error. There was no motion made to strike out this characterization of the transaction. A general objection to allowing the witness to state what happened in the absence of Van Reynegom and Lacoste preceded these statements of Mr. Gill. But the objection was not good, and no objection was made separately to these offensive words by motion to strike them out. Besides, the same expressions were repeated by Mr. Gill in the presence of Judge Van Reynegom and went to the jury without objection. The rights of appellant's assignors were fully protected by the following charge: "I have instructed the jury that, if it was known to Judge Van Reynegom and Mr. Lacoste that something else was to be done at the time of the giving of the check, then it was a conditional delivery, and Mr. Wright would not be liable unless that agreement was carried out. I do not mean to instruct them as to any secret understanding in Mr. Wright's mind or Mr. Gill's mind, but it must have been an agreement that was understood by all of the parties."

Other points are made by appellant, presenting in different aspects objections to the admission of evidence and to the instructions given by the court, but they are sufficiently answered by the above. I advise that the judgment and order appealed from be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(124 Cal. 24)

BIANCHI v. HUGHES et al. (S. F. 1,165.)<sup>1</sup>  
(Supreme Court of California. March 15, 1899.)  
MECHANICS' LIENS—TIME FOR FILING—PERFORMANCE OF CONTRACT—NOTICE TO OWNER  
—APPEAL—REVIEW.

1. A "trivial imperfection" in a building, as used in Code Civ. Proc. § 1187, which is "not

<sup>1</sup> Rehearing denied April 14, 1899.



to be deemed such a lack of completion as to prevent the filing of any lien," refers to imperfect or defective performance of work claimed to be done therein, not to work not claimed to be completed, and is not determined by its relative cost. If the omitted portion of a building is so substantial a part thereof that the contractor could not recover on his contract, he cannot enforce a lien therefor. Hence a finding that marble steps, by which the basement of a building was to be reached, were a substantial portion thereof, rather than a trivial imperfection, was justified.

2. Code Civ. Proc. § 1194, provides for service of notice on the owner of a building that a party has performed labor or furnished materials in the construction thereof, stating the value, and requesting the owner to withhold from the contractor sufficient money therefor. *Held*, that the remedy is limited to cases where the property may be made subject to a mechanic's lien, under section 1183, for the value of the materials furnished or labor performed.

3. Where there is a decided conflict of evidence on a question, the finding of the lower court will not be disturbed.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by one Bianchi against one Hughes and others for foreclosure of a mechanic's lien. From a judgment in favor of plaintiff for the amount sued for, but not declaring the same a lien on the property, as prayed, plaintiff appeals. Affirmed.

Geo. C. Sargent, for appellant. A. G. Eells, for respondent Vance. W. H. Fowler and Duncan Hayne, for other respondents.

HARRISON, J. Action for the foreclosure of a mechanic's lien upon the Parrott Building, in San Francisco. The court found that the notice of lien was not filed within 30 days after the completion of the building, and rendered judgment in favor of the plaintiff for the amount sued for, but without declaring the same a lien upon the property. The plaintiff contends that the findings are not sustained by the evidence, and appealed from the judgment within 60 days after its rendition, bringing the evidence here in a bill of exceptions. There was no original contract or with the owner for the construction of the entire building, but the owner made contracts with different persons for constructing different portions of the building. In May, and also in June, 1896, the owner entered into two contracts, each for a sum greater than \$1,000, with the San Francisco Furniture Company, for the construction and completion of a portion of the basement of the building. Neither of said contracts, or any memorandum thereof, was filed with the county recorder. The plaintiff furnished to this corporation a portion of the material for the performance of these contracts, and the present action is for the enforcement of a lien therefor.

1. The court found that he filed a notice of his claim of lien with the county recorder on the 16th of September, 1896, but that it was not filed within 30 days after the completion of the building. It appears from the evidence that the building was not actually com-

pleted at that date or for some time thereafter, but it is contended by the appellant that the particulars in which it was uncompleted were but "trivial imperfections," which under section 1187, Code Civ. Proc., are "not to be deemed such a lack of completion as to prevent the filing of any lien." The record upon this appeal does not contain the plans and specifications of the building or of the owner's contracts with the furniture company, from which the extent of this incompleteness can be determined by comparison therewith, but it was shown that certain substantial portions of the basement, including a flight of marble steps thereto, were constructed after the above date; and the finding of the court that the building was not then completed carries with it the additional finding that in its opinion the uncompleted portions were not trivial imperfections. "Trivial imperfection," as used in the Code, relates to the question whether or not there has been an actual completion of the building." *Marble Lime Co. v. Lordsburg Hotel Co.*, 96 Cal. 332, 31 Pac. 164. "What constitutes a 'trivial imperfection' is a question of fact in each instance" (*Willamette Steam Mills Lumbering & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 29 Pac. 629); and the decision of the trial court cannot be disregarded, unless the party complaining makes it clearly appear to be without any evidence in its support (*Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686). The "trivial imperfections" mentioned in the above section refer to imperfect or defective performance of the work upon a building which is claimed to have been completed, and not to a case in which the building is admittedly uncompleted, and workmen are still engaged in constructing substantial portions thereof. See *Mill Co. v. Hage*, 119 Cal. 376, 51 Pac. 555. Whether an omitted portion of the building is a trivial imperfection, or is a substantial failure in its completion, is not to be determined by its relative cost to that of the entire building. If the omissions are so substantial that the contractor would not have a right of recovery upon his contract, he cannot enforce a lien therefor. See *Marchant v. Hayes*, 117 Cal. 669, 49 Pac. 840. The court was, therefore, justified in considering that the marble steps by which the basement was to be reached was a substantial portion of the building rather than a trivial imperfection, even though its cost was small in comparison with the cost of the entire building.

2. After the plaintiff had furnished the materials to the furniture company, and before filing his notice of lien, he served upon the owner a notice in writing, under the provision of section 1194 of the Code of Civil Procedure stating in general terms that he had performed labor and furnished material in the construction of the building, and also the value thereof, and requesting the owner to withhold from the contractor sufficient money therefor. It is contended by the appellant that by virtue

of this notice he is entitled to recover from the owner the amount claimed therein, irrespective of the notice of lien filed with the county recorder. The notice authorized by this section has the effect of a garnishment of the moneys coming to the contractor which are in the hands of the owner, and, in the absence of any claim upon such moneys in behalf of other lien claimants, the owner will be liable to the material man or subcontractor for the amount of the claim to the extent of his liability to the contractor. *Bates v. Santa Barbara Co.*, 90 Cal. 543, 27 Pac. 438; *First Nat. Bank of Bridgeport v. Perris Irr. Dist.*, 107 Cal. 55, 40 Pac. 45. This right to garnishee the moneys of the contractor in the hands of the owner is limited by the terms of the section to "the persons mentioned in section 1183," and is but a cumulative or additional remedy given for the purpose of enforcing in another mode the right for which, by section 1183, a lien is authorized upon the property upon which the labor has been performed or for which the materials were furnished. It does not confer upon them a right to collect from the owner any claim they may have against the contractor for labor and materials other than is conferred elsewhere in the chapter, but provides that, instead of filing with the county recorder a notice of their claim of lien, and enforcing the same against the property, they may intercept the moneys in the hands of the owner, to the extent of their claim, by giving him this notice. The remedy thus provided is limited to the cases in which, by section 1183, the property may be made subject to a lien, and the owner is not required upon receiving such notice to withhold from the contractor any moneys in his hands, except for materials furnished for, or labor performed upon, the property.

The controversy at the trial in the present case was chiefly upon the claim of the plaintiff that all the materials furnished by him were used in the construction of the building. A portion of these articles consisted of marble tops for counters, which were to be used by the tenant of the basement, and it was claimed by the plaintiff that these counters were so constructed as to become fixtures in the building and a part thereof; whereas, on the other hand, it was contended that they were in the nature of furniture for the use of the tenant, and were no part of the building. The court found that all of the base and "a portion of the other marble" furnished by the plaintiff was so affixed and adjusted to said building as to become a part thereof, and that the value of the part of said materials so affixed to the building was \$634.53, and for this amount gave judgment in his favor against the owner. The court also found that there was due to the plaintiff, under the terms of his contracts with the furniture company, the sum of \$966.78. The appellant claims that he was entitled to judgment against the owner for this larger amount,

Whether the materials furnished by the appellant were so affixed to the building as to become a part thereof was a question of fact, to be determined by the court upon the evidence before it. It was shown that the floor of the basement was of cement, and that the counters were built upon platforms which were made by laying down strips of wood and nailing the floor to them; that the platforms rested by gravity on the cement floor, and could be taken up and carried away, and that the counters stood upon these platforms; that the floor or platforms to which the counters were nailed was loose, and was not in any way attached to the cement floor of the building. The architect testified that he had examined the work of the plaintiff, and that less than one-half was attached to the building. Other testimony was given upon the subject, the effect of which was to create a decided conflict of evidence upon the question before the court, and we cannot hold that the court erred in its conclusion. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

124 Cal. 61

BUCK v. CITY OF EUREKA. (S. F. 764.) <sup>1</sup>  
(Supreme Court of California. March 18, 1899.)

APPEAL—LAW OF THE CASE—JUDGMENT—CITIES—LIMITATION OF INDEBTEDNESS—IMPLIED CONTRACTS—ATTORNEY'S SERVICES—ACTIONS—EVIDENCE.

1. Where, on appeal in an action by a city attorney for compensation for services rendered under an express contract, the court declares the contract void, but states that the attorney, if the facts would warrant, should recover on an implied contract for services rendered after his term expired, and directs the lower court to permit the attorney to amend his complaint, the court's statement becomes the law of the case.

2. Where a city council is authorized to employ an attorney to perform special services, the city may be bound under an implied contract therefor.

3. Where a city attorney, after his term expired, continued to perform special services with the knowledge of the council, the members of which at various times expressed satisfaction therewith, and, when the attorney presented his bill, made no objection thereto, there was raised an implied promise to pay for the services.

4. Where, in an action by an attorney for services rendered in a suit, it appeared that a payment therefor had been made, but the attorney testified that the client understood that the case was not concluded, and that the former agreed to continue it without further fee if a bill for other services was paid, and, if not, that he would expect further compensation, and the other bill was not paid, the case was for the jury.

5. In an action against a city for services rendered during a period of several years, the judgment should be in form a general one, and not make the services rendered each year payable out of the funds in the treasury for that year, though the constitution limits the liability for one year to the revenue provided for such year.

6. Const. art. 11, § 18, prohibiting a city from incurring any liability exceeding in any one year the revenue provided for it for such year, includes an implied liability

<sup>1</sup> Rehearing denied April 17, 1899.



7. Where an attorney rendered services for a city under an implied contract, the liability was incurred when, from time to time, the services were fully rendered and accepted, so that, in an action therefor, evidence as to whether there were sufficient unappropriated revenues at such times to meet the liability was admissible, the constitution limiting the city's liability for one year to the revenue provided for that year.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county.

Action by S. M. Buck against the city of Eureka. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

A. J. Monroe, for appellant. F. A. Cutler and F. M. Buck, for respondent.

CHIPMAN, C. Action on an implied contract for the value of services as attorney at law. The cause was tried by a jury, and plaintiff had the verdict and judgment thereon for \$4,700, from which, and from an order overruling defendant's motion for a new trial, defendant appeals.

Plaintiff sues on quantum meruit, setting forth in his complaint a claim for services rendered defendant between July 12, 1886, and March 30, 1889, of the alleged value of \$10,000, in defending a suit which was then pending against defendant in the circuit court of the United States, at San Francisco, where in one Wing Hing was plaintiff. In a second count plaintiff claims for services rendered on and after August 5, 1889, of the value of \$500, in prosecuting an appeal in this court, in a cause entitled "The People vs. Barney Croghan." Plaintiff's prayer is for \$7,000, with interest from December 13, 1889. Defendant made a general denial by answer, and to the first cause of action further answered that, if defendant incurred any liability, it was in excess of the income and revenue provided for defendant for any of the years during which the alleged services were performed, and was, therefore, invalid. The same answer is made as to plaintiff's second cause of action. A further defense is made to the first cause of action that on February 8, 1886, plaintiff was the duly appointed and authorized attorney of defendant; that on said day defendant entered into a contract with plaintiff, by an ordinance that day passed, whereby plaintiff was employed to act for defendant in said case of Wing Hing against the city of Eureka; that said contract was illegal and void; and that plaintiff's said services were rendered under said contract, and not otherwise, and said contract has not been rescinded, but is still subsisting.

1. The case, so far as it involves the first cause of action, was here once before. In the complaint at that time plaintiff claimed under an express contract embodied in the ordinance now pleaded by defendant, and which will be found set out in the former opinion. Plaintiff was the city attorney when that ordinance was passed and went out of office July 13, 1886, but continued to manage the Wing Hing

case to its conclusion. He sued, however, for services during the entire period of his employment, under this contract. It was held, on the first appeal, that he could not recover, because the contract was void. But the court said "that, if the facts would warrant it, plaintiff should recover, not upon the original or void contract, but upon an implied one, for services rendered after the expiration of his term of office"; and the judgment was reversed, with directions to the trial court to permit plaintiff to amend his complaint. 109 Cal. 504, 42 Pac. 243. The law of the case is thus settled to be that plaintiff may recover upon an implied contract for services rendered after the expiration of his term of office; i. e. after July 12, 1886. The Wing Hing suit was for \$132,000 damages alleged to have accrued to 50 or 60 different Chinamen who had been driven out of the city of Eureka by a mob. Plaintiff testified that he continued to manage the defense after July 12, 1886, and to the close of the litigation, March 2, 1889, in which the city prevailed. No notice was given to him by the council, or by his successor in office, that his services were dispensed with. It was known to the members of the council that he was performing the services. The labor performed was in the examination of the facts applicable to each of the 56 counts in the Wing Hing suit, preparation of a brief of the law governing the case, and in making many trips to San Francisco in connection with the suit at his own expense. Three-fourths of the actual labor was performed after July 12th, and was of the value of \$7,500. Plaintiff further testified that after he ceased to be the city attorney he had conversations with different members of the council relating to the Wing Hing case, two of whom he named. They desired to know how he was getting along with the case, and, when told, seemed pleased with the progress made. He had conversations with other members of the council, but could not name particularly any but Councilmen Mercer and Monroe. He also explained the situation of the case to his successor in office. He testified, as to one of the councilmen: "He came to know how the matter was getting along, and the council would like to know,—gave me to understand that the council had discussed the matter, and expressed a desire to know something about it, and he wanted to interrogate me for that purpose, and I told him how the matter was getting along." Again, he testified: "I was always given to understand by members of the council that my services were satisfactory. They never made any objection." He further testified: "I never made any report to the council in regard to this suit, and was never asked to, until I finally reported that I had recovered judgment in favor of the city. \* \* \* That was the first written report." He was asked by counsel for defendant if he had any official communication with the council about the matter during the period from July 12,

1886, to March, 1889, and answered: "Only in the way I have mentioned, by speaking to the different councilmen, and giving them information in regard to it." Plaintiff's deposition was taken before the trial commenced. In it defendant's counsel asked the witness to state how the council expressed its satisfaction with his services. He replied: "Members of the council at different times expressed themselves satisfied, and, finally, when the case was terminated, and I presented my bill, there was no expression of dissatisfaction in regard to my services; on the contrary, the services were considered by all the councilmen with whom I conversed at that time very satisfactorily [sic] indeed, and they all expressed themselves willing to pay me; but they never did." Upon cross-examination defendant showed the original employment of plaintiff by the ordinance. A portion of the unverified complaint of plaintiff was introduced, claiming on contract under that ordinance. Some of the testimony of plaintiff at the first trial was also introduced, tending to show that he claimed under contract, and he was searchingly cross-examined as to whether he was not still claiming under that contract, or was ever employed otherwise than through this ordinance—contract—which was held to be void. Witness could not and did not deny that the first trial was based upon his employment by that ordinance. He replied: "I wish simply to add to that, as I said then, that I didn't know whether it was a contract or not, but I considered it an employment under that ordinance; that I was to have full charge of the case \* \* \* until judgment was finally obtained in favor of the city. Of course, after the 13th of July I was discharged as city attorney, and continued in the case with the knowledge and consent of my successor and the city council." There was evidence adduced by defendant tending to contradict plaintiff's testimony, creating a clear conflict upon some points. Indeed, upon some facts the preponderance seems to be with defendant; but we are not at liberty to attempt a reconciliation of this conflict. Plaintiff is not claiming under the original contract at this time, nor does he seek to make it the basis of his implied contract. He now claims under a contract which the law has made for him, and which this court in the former appeal said he may do, although he first claimed under a void contract. The cases cited by appellant arose either where no authority existed to enter into an express contract, or do any acts from which a contract might be implied, or they were cases where the mode was the measure of the power. But where, as here, the authority existed in the council to employ plaintiff after he ceased to be city attorney, he may recover upon an implied contract for the value of his services. Nor is it necessary, as is contended by appellant, that the knowledge or assent of the council be evidenced by some formal corporate act,—as by ordinance. Implied contracts, within the

scope of the powers of the council, may be deduced by inference from authorized corporate acts, without either a vote, or deed, or writing. Dill. Mun. Corp. § 463, and cases cited in note 1; 15 Am. & Eng. Enc. Law, 1102. It was recently held by this court in a case where the facts as to the knowledge of the board and its assent to the employment of the attorney were not unlike the facts here, that no resolution of the board authorizing the services was necessary. *Power v. May* (opinion filed Dec. 23, 1898) 55 Pac. 796. It is not disputed that plaintiff performed services of much value, in good faith believing he was under legal employment. The evidence tends to show that these services were performed with full knowledge of the council, and with their assent as given when plaintiff presented his bill. "Where work done for a corporation purpose without complete legal authorization is for a corporate purpose, and is beneficial to it, and the price reasonable, strong evidence of the assent of the corporation is not required." 1 Dill. Mun. Corp. § 464. We think the evidence is sufficient to raise an implied promise to pay the reasonable value of the services.

2. It is claimed that the motion for nonsuit as to plaintiff's second cause of action should have been granted because of insufficiency of evidence to make a prima facie case for recovery. It appears from the evidence that plaintiff was paid \$500 for services in *People against Croghan*, but he testified that, when this payment was made, it was understood by the council that the case was not concluded, and plaintiff agreed to continue his services to the end in that case without further fee if his bill for other services, rendered at the same time, was paid; but, if not paid (as it appears it was not), he would expect further compensation in the *Croghan* case. We think there was sufficient evidence for the jury as against a motion for nonsuit.

3. Defendant assumes that plaintiff's services extended over a period of three years from July 12, 1886, and upon that assumption makes an arbitrary division of the judgment into three parts, and asks that it be modified so as to make each of these several parts payable out of the funds in the city treasury for the three years severally. Error is also claimed because the court excluded defendant's evidence that the liability incurred was in excess of the revenues for these years. At the trial an effort was made to agree upon the amount of funds in the treasury from time to time during these years, but it failed, and finally the court refused all testimony on the question, holding that the term "liability," used in section 18 of article 11 of the constitution, does not refer to an implied liability, such as is the basis of this action. When this case was here on the second appeal (see 119 Cal. 44, 50 Pac. 1065), the question related to the form of the judgment, and upon the authority of Hig-



gins v. Water Co., 118 Cal. 524, 45 Pac. 824, and 50 Pac. 670, it was held that it should be in form a general judgment. This disposes of a part of defendant's objection above stated. In speaking of the question as to whether the liability is within the inhibition of the constitution, Mr. Justice Temple, for the court, said: "If the constitutional restriction is plain, it is not for the court to refuse to obey it because it is unwise or impolitic. If the liability was contracted by the city, it is within the inhibition." It was suggested, however, that the point might not necessarily arise in that appeal, as it was from the form of the judgment only. The question is clearly presented in this appeal. Without entering upon the argument, we think that the term "liability" includes implied contracts, such as the one here involved. The learned trial judge was, therefore, in error in the reason he gave for excluding the evidence.

It remains to consider the materiality of the evidence. In *Higgins v. Water Co.*, supra, the court said: "Our former opinion is also modified as follows: We cannot direct the superior court to enter a judgment upon the findings for the reasonable value to the city of the water company's plant and of water supplied, because it does not appear that the claims of the water company all accrued at a time when there were unappropriated revenues to meet them; and it will be necessary for the court to ascertain, as the basis of its judgment against the city, just when the claims of the water company for reasonable value of use, etc., equaled the amount of unappropriated revenues for the respective fiscal years during which the city had the use of the water company's plant. Claims for use of plant and value of water supplied after such time are like other claims upon exhausted revenues,—they are void, and will not warrant a judgment of any character." In a concurring opinion Mr. Chief Justice Beatty said: "In determining the validity of the obligation it will, of course, always be necessary to inquire whether, at the date of its assumption, there were appropriated revenues to meet it, because, if there were not, there will be no liability resting upon the city, and the claimant will have no right to a judgment in any form." It would thus appear that the validity of the liability depends upon the fact as to whether there were unappropriated revenues when the liability was incurred, and no judgment should be entered until that fact is established. The liability was incurred when, from time to time, the services were fully rendered, and the city, with knowledge, accepted the benefit of them (*State v. McCauley*, 15 Cal. 429; *McBean v. City of Fresno*, 112 Cal. 159, 44 Pac. 358); and evidence should be received as to the condition of the revenues at that time. The defendant offered such evidence. We think it was material, and that it was error to exclude it.

To hold otherwise would be inconsistent with holding, as we do, that the liability is within the constitutional inhibition.

Appellant assigns certain errors in the admission or exclusion of testimony, but they do not seem to call for special notice.

It is also claimed that the court erred in its instructions to the jury, and in refusing certain instructions asked by defendant, and in striking out portions of others. We have carefully examined these assignments. They are numerous, and would occupy much space in any intelligent statement of them. Some of the objections arise out of questions already disposed of in this opinion; others upon points as to which the court had in other parts of its instructions fully advised the jury; others where slight, but immaterial, modifications of defendant's instructions were made. Taken as a whole, we think the instructions fairly gave the law of the case to the jury without prejudicial error. For the error above stated, we think the judgment and order should be reversed, and so advise.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

124 Cal. 29

OWENS v. McNALLY et al. (S. F. 1,416.)  
(Supreme Court of California. March 15,  
1899.)

RES JUDICATA — IDENTITY OF CAUSE OF ACTION.

A judgment for defendant, in an action to enforce an executory agreement of a decedent to will all his property to plaintiff, based on a certain consideration, is not a bar to an action to establish an executed gift of particular property to plaintiff by decedent, founded on the same consideration.

Department 2. Appeal from superior court, Humboldt county.

Action by Maria B. Owens against Alice McNally and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Chamberlain & Wheeler, for appellants. Buck & Cutler, for respondent.

McFARLAND, J. This is an action to have it declared that plaintiff is the owner of a certain lot of land, with a dwelling house thereon, situated in the city of Eureka, county of Humboldt, state of California, and known as lot 13 in block 8. The defendants are the widow, Alice McNally (who is also sued as administratrix), and the other heirs at law of Lawrence McNally, deceased. Judgment in the court below went for the plaintiff, and the defendants appeal from the judgment.

Some of the facts in the case are stated in the opinion of this court in *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, although there are other facts in the case at bar which do not

appear in the former case. In the case at bar, we are concerned only with the first count of the complaint, which states, in substance, the following facts: In the year 1881, plaintiff, who was then 18 years of age, lived with her parents in the state of Michigan. The said Lawrence McNally, deceased, was the brother of plaintiff's mother, and lived at that time in the city of Eureka, in Humboldt county, Cal., where he continued to reside until his death, in 1893. In 1881 the deceased was a bachelor, about 54 years old, and was the owner of considerable property in said Humboldt county; and in that year he visited his sister, Catherine Owens, the mother of plaintiff, and sought to have plaintiff come to California, and live with him and take care of him. In order to accomplish this purpose, he executed and gave to the mother, for the benefit of the daughter, the following written instrument: "I, Lawrence McNally, promise my sister, Catherine Owens, in case of her consenting to allow her daughter, Maria Owens, to return with me to my home in Eureka, California, to remain with me during my life, I promise to provide for her as my own child; and, in case of her remaining single, at my death I promise to bequeath her (\$20,000) twenty thousand dollars, and real estate the value of which I am unable to state at present. Lawrence McNally. Detroit, August 25, 1881. Signed witness: Mrs. Henry Owens." Thereupon, in said year 1881, the plaintiff came with the deceased to Eureka, Cal., and lived with and cared for him as a daughter until January, 1893, when he married the defendant Alice McNally. In the same year, on September 16, 1893, he died. He did not devise or bequeath to the plaintiff any property whatever, but died intestate. However, in part performance of his promise "to provide for her as my own child," in 1887 he purchased the lot and house involved in this action, and gave them to plaintiff, although the legal title stood in his own name. The court found the facts to be as averred in the complaint. It found: That in 1887, "in partial performance of the terms" of the written promise, "he purchased the lot in controversy, and gave the same to plaintiff; and during the following year he furnished the dwelling house thereon, and gave the furniture therein to plaintiff, and placed her in actual possession of said premises; and from thence to the present time plaintiff has been, and still is, in the actual possession thereof, claiming the same as her own, under and in pursuance of said gift. That from 1888 until the marriage of said Lawrence McNally, in 1893, he lived with the said plaintiff upon the lot in controversy, and during said time the said plaintiff, in reliance solely upon the said gift as aforesaid, cared for him as a daughter, and attended to his daily wants, cared for him in times of sickness, prepared extra meals for him, was in all things kind, considerate, and affectionate, and generally devoted her time, labor, and energy in caring for his

health and comfort. \* \* \* That by reason thereof plaintiff was induced to, and did, so change her situation in life that it would be a fraud upon her if the gift so as aforesaid made by said Lawrence McNally to plaintiff herein should not be enforced." There was sufficient evidence to support these findings.

Appellants contend that respondent is estopped from maintaining this action by the judgment in the former case of *Owens v. McNally*, which was affirmed by this court, as reported in 113 Cal. 444, 45 Pac. 710, hereinbefore referred to; but we do not think that this contention can be maintained. The court below, having set forth the complaint in the former case, found correctly as follows: "That the cause of action set forth in the complaint therein was not, nor is not, the same cause, nor the identical cause, of action set forth in the complaint herein, and is not a bar to the maintenance of the cause of action herein." In the former case the plaintiff sought to enforce an executory agreement of the decedent, Lawrence McNally, to will to her all his property; and, for various reasons stated in the opinion of this court in that case, it was held that that executory agreement could not be enforced. In the former case the written agreement set forth in the case at bar had been lost, and averments were made as to the contents of the written agreement therein referred to, and there was a failure to prove any written agreement. But the present action is founded upon an executed gift of the house and lot involved in the case. The two cases therefore present different causes of action.

There are no other points calling for special notice. The judgment appealed from is affirmed.

We concur: HENSHAW, J.; TEMPLE, J.

123 Cal. 610

OSBORNE v. HOME LIFE INS. CO. (S. F. 811.)

(Supreme Court of California. March 3, 1899.)

INSURANCE—FORFEITURE—NOTICE—FOREIGN STATUTES.

1. Under Laws N. Y. 1877, c. 321, providing that, before forfeiture of a life policy, notice shall be addressed to the person whose life "is insured," the notice must be given, not to the beneficiary, but to the person whose life is insured.

2. In construing the statute of another state, the decisions of the highest courts will be followed, and not dissenting opinions of the lower courts.

3. As, under the nonforfeiture law of New York, a failure to tender a premium, without the notice specified in the state law to be given by the company, did not work a forfeiture, it is not necessary, in an action on the policy, to allege a tender.

4. Under the nonforfeiture law of New York, as a forfeiture could only occur after notice by the company, and nonpayment within the time specified, a waiver of such notice cannot be shown in order to sustain a forfeiture.



Department 1. Appeal from superior court, city and county of San Francisco.

Action by Annie R. Osborne against the Home Life Insurance Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Elliott McAllister, for appellant. Van Ness & Redman, for respondent.

VAN DYKE, J. This action is upon a life insurance policy for \$5,000, issued by the defendant, a New York company, in New York, October 4, 1888, insuring the life of the husband of the plaintiff, Elihu C. Osborne, for \$5,000, made payable to the plaintiff. The policy called for the payment of an annual premium of \$174.70. On issuing the policy, this sum was paid, and the first and second annual payments of the same amount were made. The complaint sets out the policy, and also incorporates the nonforfeiture law of the state of New York, and alleges that the defendant never served upon the said Elihu C. Osborne, the insured, the notice required by said law, and also alleges the death of the insured on January 21, 1895, and that subsequent thereto the defendant company expressly disclaimed and denied any and all liability, under and by virtue of said policy, arising from the death of said Elihu C. Osborne, on the ground that the third annual premium called for by said policy had not been paid. The answer does not deny that notice was not given, in pursuance of said law, to the insured; nor does it allege that notice was given to the plaintiff, the beneficiary, or at all. Findings and judgment went for the plaintiff in the court below for the sum specified in the policy, less the unpaid premiums and interest thereon.

It is contended on the part of the appellant that the plaintiff, and not the deceased, was the person whose life was assured, and that the notice required by the New York law should have been served upon her; she being the party for whose benefit the insurance was made. The language of the law in reference to the notice is "shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company." The language of the policy in this case is, "does assure the life of Elihu C. Osborne"; and therefore he was the "person whose life is assured." The law might have been enacted, as claimed by the appellant, so as to require notice to the beneficiary; but it clearly does not, but to the person whose life is assured. The law in question has been construed and applied repeatedly by the highest court in the state of New York adversely to the contention of the appellant. Appellant, however, is not satisfied with these decisions, but seems to rely upon the dissenting opinions of the supreme court in an earlier case than those hereafter referred to, claiming that such dissenting opinions are based on better reasons and sounder law. This court, however,

will prefer to follow the decisions of the highest court, particularly in the construction of the statutes of its own state, and not the dissenting opinions of the lower court. In *Baxter v. Insurance Co.*, 119 N. Y. 450, 23 N. E. 1048, the court, in construing the statute in question (Laws 1876, as amended in 1877), say: "The statute above referred to (Laws 1877, c. 321) declares that no life insurance company doing business in this state shall have power to declare forfeited or lapsed any policy thereafter issued, by reason of nonpayment of premium, unless, after it becomes due, a notice, stating the amount of such premium, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured at his last known post-office address, postage paid, by the company, and further stating that, unless the premium then due shall be paid to the company or its agent within thirty days after the mailing of such notice, the policy and all payments thereon will become forfeited, and void. It is also provided by the same section that, in case such payment is made within the thirty days limited therefor, it shall be deemed a full compliance with the requirements of the policy in respect to the payment of premium; and it declares that no such policy shall in any case be forfeited until the expiration of thirty days after the mailing of such notice. These provisions are to have full effect, any condition to the contrary notwithstanding. There was no proof given at the trial by either party to show whether this notice was served or not. It is obvious that this statute, when imported into the contract, modified its conditions in very material respects. The duration and validity of the policy is not, then, dependent upon payment of the premium on the day named therein, but upon payment within thirty days after the notice had been given."

It is objected, also, on the part of the appellant, that the complaint does not contain any allegation of a tender of the premium. Under the nonforfeiture law of New York, a failure to tender the premium, without the notice specified in said law to be given by the company, did not work a forfeiture. It not being necessary on the part of the plaintiff to prove a tender, it was not necessary that it should be alleged in the complaint. In *De Frece v. Insurance Co.*, 136 N. Y. 144, 32 N. E. 556, the court say: "The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause, unless the defendant alleged and proved nonpayment, after the due service of the notice required by law."

It is also claimed, on the part of appellant, that there was a waiver of the notice by the plaintiff. There is nothing in the case to show a waiver. Besides, it has been held by

the court in the case of *Griffith v. Insurance Co.*, 101 Cal. 627, 36 Pac. 113, that under the law in question in the state of New York a forfeiture could only occur in the mode pointed out by such law, to wit, after notice by the company as therein provided, and nonpayment within the time specified after such notice given. In this last case a policy of insurance for \$10,000 was issued upon the life of E. J. Griffith; loss, if any, payable to his wife, Mary E. Griffith. The action was brought by his widow, Mary E. Griffith, and an attempt was made in that case to show a waiver on her part of the notice of nonpayment of the premium; and in the opinion it is said: "The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for nonpayment of premiums, except in the prescribed mode, and that, being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power, in the face of the law which has taken it away. The reasons for such a policy are so numerous and obvious that it is not deemed necessary to occupy time and space in specifying them. The conclusion is reached that, as no notice was given by defendant, the policy was not forfeited by failure to pay the annual premium which fell due June 1, 1890."

We see no error in the case. The judgment and order denying defendant's motion for a new trial are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(123 Cal. 674)

**MERRILL v. BACHELDER.** (S. F. 1,472.)<sup>1</sup>  
(Supreme Court of California. March 4,  
1899.)

JUDGMENT—COLLATERAL ATTACK—POWERS OF ADMINISTRATRIX.

1. In an action to restrain defendant administratrix from selling certain land, on the ground that the title belonged to plaintiff, plaintiff offered a judgment roll, in an action against defendant and the heirs of the intestate, quieting title against defendants in favor of plaintiff; the judgment showing entry under a stipulation in open court. *Held*, that whether the stipulation was sufficient to authorize judgment, or not, was within the jurisdiction of the court to determine, and the judgment thereunder, though erroneous, was not void.

2. Under Code Civ. Proc. § 1588, authorizing a compromise when for the best interests of an estate, it will be assumed, when judgment is entered against an administratrix by stipulation, that it was shown to the court that the administratrix had been authorized to consent to the entry of the judgment.

Department 1. Appeal from superior court, Sonoma county.

Action by one Merrill against Mrs. Bachelder, administratrix of Joseph E. Bachelder, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

<sup>1</sup> Rehearing denied April 5, 1899.

Thos. J. Batchelder, for appellant. T. J. Butts and J. M. Thompson, for respondent.

HARRISON, J. The defendant is the administratrix of the estate of Joseph E. Bachelder, deceased, and, as such administratrix, advertised for sale certain parcels of real estate, as a portion of the estate of her intestate. The plaintiff alleges in her complaint herein that she is the owner in fee of the said real estate, and seeks to restrain the defendant from selling, or from offering the same for sale, upon the ground that her title thereto will be clouded. Judgment was rendered in favor of the plaintiff, and the defendant has appealed therefrom, and from an order denying a new trial. The allegations of the complaint are sufficient to support the judgment; and, as findings of fact were waived by the parties, only the order denying a new trial can be considered.

For the purpose of establishing her claim of ownership, the plaintiff offered in evidence a judgment roll in an action brought by her grantor against the defendant herein and the heirs of her intestate, in which the superior court had adjudged that her grantor was the owner in fee of said parcels of land, and quieting her title as against the defendants therein, and declaring that they be debarred from asserting any title thereto. The defendant objected to the introduction of this evidence, on the ground of incompetency, and urges upon this appeal that, by reason of its recitals, the judgment itself cannot be made the foundation of any rights in the plaintiff. The judgment is in the following form: "This cause coming on regularly for trial on the 22d day of September, A. D. 1896, a trial of said cause was had before the court without a jury; whereupon witnesses on the part of the plaintiff and the defendants were sworn and examined, and documentary evidence introduced by respective parties; and, the evidence being closed, the said parties, in open court, stipulated and agreed that the plaintiff should have judgment as prayed for in her complaint; that a judgment and decree might be entered herein adjudging said plaintiff to be the owner of, and entitled to the possession of, the property described in the complaint; and findings were waived. Wherefore, by reason of the law and the facts herein, findings of which have been duly waived by the defendants, it is ordered, adjudged, and decreed that the plaintiff is the owner in fee of the property described in the complaint [describing the same, and quieting her title thereto]."

It is contended by the appellant that the administratrix could not enter into a stipulation that a judgment be rendered against her for a portion of the estate of her intestate, without authority from the court in which the administration of said estate was pending, and that, until such authority was shown, the judgment was inadmissible as evidence; and that, as the judgment recites that it was rendered upon a stipulation by the administratrix,



its invalidity appears upon its face, and may be availed of at any time. The stipulation was, however, only evidence before the court to be considered in rendering its judgment; and whether it was sufficient to authorize the judgment or not was within the jurisdiction of the court to determine. If it was insufficient therefor, the court committed an error, which might have been corrected upon an appeal, but its judgment was not thereby rendered void. All intendments are in favor of the correctness of the judgment; and, if the administratrix could, under any circumstances, have made the stipulation recited in the judgment, it will be assumed, for the purpose of sustaining the judgment, that these circumstances were shown to the satisfaction of the court. Section 1588, Code Civ. Proc., provides, "A compromise may also be authorized when it appears to be just, and for the best interest of the estate;" and, as against the objections of the appellant herein, it will be assumed that it was shown to the superior court that the administratrix had been authorized to consent to the entry of the judgment. It appears from the complaint in that action that the plaintiff therein claimed to be the equitable owner of the land, by reason of having furnished the consideration for its purchase, and that the conveyance was taken in the name of the deceased; and it may well be that, upon these facts having been presented, the court, sitting in probate, granted the administratrix authority to enter into the stipulation. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

124 Cal. 7

PEOPLE ex rel. LEE v. PREWETT et al.  
(Sac. 371.)

(Supreme Court of California. March 9, 1899.)

ELECTIONS—SCHOOL TRUSTEES—VACANCIES—NOTICE  
—DISFRANCHISEMENT—REGISTRATION—OFFICERS—FAILURE TO BE SWORN—PLEADING.

1. Where a notice of election stated that it was to elect school "trustees," failure to state that there were vacancies to be filled did not invalidate the election; no voters being misled.

2. Under a statute requiring polls to be open at an election not less than four hours, a notice is sufficient which states that they will be open "between" 1 and 5 p. m.

3. One not offering to vote cannot complain that he was deprived of the privilege of voting.

4. The great register remains for all purposes required by law until the new registration is completed.

5. Re-registration is not required for the annual school election.

6. Under Pol. Code, § 1597, permitting trustees in a school-election notice to designate any four consecutive hours for the polls to be kept open, a failure to open the polls for 30 minutes after the time set does not invalidate the election; no one being prevented by the delay from voting.

7. Failure of an election officer to be sworn, though a felony, does not invalidate the election.

8. The fact that a threat was made that no one would be allowed to vote, unless he was re-registered, does not invalidate the election; no one in fact being challenged for that reason.

9. Under Code Civ. Proc. § 808, providing that, when several persons claim the same office, one action may be brought against all to try their respective rights to the office, an action by three trustees, constituting a board charged with the same public duty, to try their right to the three offices, is not an improper uniting of three causes of action in one.

10. A complaint in quo warranto, to try the right to an office, which alleges a valid election, is sufficient on demurrer, as against the claim that vacancies should be filled by appointment; the demurrer admitting the validity of the election, and hence that there was no vacancy.

Commissioners' decision. Department 2. Appeal from superior court, Madera county.

Quo warranto by the people, on the relation of Charles A. Lee, against S. M. Prewett and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

W. H. Larew, for appellants. Francis A. Fee, for respondent.

HAYNES, C. This proceeding, in the nature of quo warranto, is brought for the purpose of ousting the defendants as trustees of Green school district, in the county of Madera, and of admitting to said office Charles A. Lee, Nelson Luke, and George Hudson. The plaintiff had judgment of ouster against the defendants, and that Lee, Luke, and Hudson be admitted to said office; and from this judgment, and an order denying a new trial, the defendants appeal.

For more than three years prior to June 5, 1896, there had been no election of school trustees held in said district; and during all that time the county superintendent of schools had, from year to year, appointed trustees for said district. On the first Friday in June, 1896, an election was held in said district, at which said Lee, Luke, and Hudson were declared elected, and within 10 days thereafter they all qualified as trustees of said district. On July 9, 1896, the county superintendent, acting upon the supposition that said election was illegal and void, appointed the defendants trustees of said school district; and hence this proceeding. The merits of the case, therefore, turn upon the validity or invalidity of said election, though there are some minor questions requiring notice.

The alleged invalidity of said election is based upon several grounds; the first being that the notice of election was insufficient, in that it gave notice "that the annual school meeting for the election of school trustees will be held," etc., and did not state that vacancies in the office existed, which were to be filled. The law provides that, when a new district is organized, an election shall be held, at which three trustees shall be elected, one to serve one year, one for the term of two years, and the third for three years, and thereafter, on the first Friday in June of each year, that one trustee shall be elected, to serve three years.

Appellant contends that there were vacancies in the office of trustee to be filled, and that the notice of election should have specified that fact, and cites *People v. Porter*, 6 Cal. 27. In that case it was held that elections to fill vacancies occasioned by the death or resignation of an officer are special elections, and that the proclamation of the governor, required by statute, is necessary to the validity of a special election. In that case the county judge of Calaveras county tendered his resignation, to take effect September 1st, which resignation was received by the governor on August 24th, though dated August 13th. The board of supervisors, learning that the resignation had been made, gave 10 days' notice that a special election to fill the vacancy would be held on the day of the general election, which was held on September 5th; but this special election was not included in the governor's proclamation, because it was not known in time. Here the question is different. The notice of election was given by the proper authority, the trustees of the district, and for the proper time, and the notice specified that it was "for the purpose of electing trustees for said district," which implied that a full board was to be elected; and, if so, the statute determined the respective terms for which they should be elected. I think there was no such defect or uncertainty in the notice as would make the election void, unless it were also shown that the voters were in fact misled by the notice, and because thereof had failed to elect three trustees, one to serve one year, one to serve two years, and one to serve three years. The record, however, shows that in this respect the law was complied with. "Elections should never be held void, unless clearly illegal. It is the duty of the court to give effect to them, if possible." *State v. Hudson Co. Freeholders*, 35 N. J. Law, 277.

Appellants cite, and quote largely from, *People v. Weller*, 11 Cal. 49. It will be noticed, however, that in that case, as in others, a distinction is taken between vacancies caused by death or resignation, and vacancies occasioned by operation of law, as by the expiration of the term, in which case the statute, it said, fixes the time when a successor shall be elected; and in such case it seems to have been held in *People v. Brenham*, 3 Cal. 491, that the requirement that proclamation shall be made is directory, not mandatory. This construction was put upon *People v. Brenham* in *People v. Weller*, supra, in which it was said, speaking of the former case: "The court properly held that the failure of the incumbent—the mayor—to give the required notice could not deprive the people of their right under the law to elect their officers. But it has nowhere been decided that such notice is not essential to the validity of all special elections. An election to fill a vacancy occasioned by the death or resignation of an officer is a special election, and the provision of our laws which requires such election to be held at the same time and place with general elections does not change

their character." And, as to vacancies of the latter class, notice of the election was held to be mandatory, the reason being that it is essential in order to prevent frauds; that, if it were otherwise, an officer might resign on the eve of an election, and, concealing it from the public at large, advise a few friends of the fact, who might thus, with a few votes, elect a successor, while, as to vacancies by the expiration of the term of office, the people have knowledge of the fact long in advance, and can nominate their candidates, and have a fair expression of the people's choice. In the case at bar it may be conceded that the notice is defective, since ordinarily after the first election in a new district but one trustee is to be elected each year; but here the notice called for the election of "trustees," and, in so small an organized territory as a school district, we may reasonably suppose that, as there had been no election for three years, a full board was to be elected, and this was indicated by the notice. If it had been shown by the evidence that voters were misled by the defective notice, so that for that reason a fair election was not had, we should be inclined to reach a different conclusion; but the evidence does show that every vote cast specified the term for which each candidate should serve, if elected.

It is also contended that the notice does not state the time of opening and closing the polls. The notice stated, "The polls will be open between the hours of 1 p. m. and 5 p. m." This, I think, was sufficient. The law requires the polls to be kept open not less than four hours. The notice obviously meant that the polls would be open from 1 to 5 p. m. There is no claim that any one was prevented from voting, either because of the notice, or because the polls were kept open a little less than four hours. The record shows that but five votes were cast,—all for Lee, Luke, and Hudson. There were several persons present who did not vote, or offer to vote, though, before the polls were closed, it was asked if any one who had not voted desired to vote. Six of these persons were called by defendants, and all testified, in substance, that they went for the purpose of voting, but did not offer to vote, because they understood their votes would be challenged upon the ground that in March, preceding, the board of supervisors had canceled the old register of voters, and no one could vote unless he had been re-registered. This was talked around the polls, but it will hardly be contended that one who did not offer to vote can complain that he was deprived of his privilege of voting. That the great register remains, for all purposes required by law, until the new registration is completed, and that re-registration was not required for the annual school election, see *Falltrick v. Sullivan*, 119 Cal. 613, 51 Pac. 947.

The last clause of section 1597, Pol. Code, permits the trustees, in the notice of election in those districts in which the number of



children between the ages of 5 and 17 years does not exceed 500, to designate any consecutive four hours after 9 o'clock a. m., and ending not later than sundown, as the time during which the polls are to be kept open. A substantial compliance with the notice as to the time of opening the polls, where no one was deprived of the privilege of voting thereby, does not affect the validity of the election. Appellants contend that the polls were not opened until half past 1 p. m., and that the finding that the polls were opened at 1 o'clock is not justified. But, if the finding had been as appellants contend it should be, it would not affect the judgment, as no one was prevented from voting by the delay, which seems to have been caused by the failure of the inspector and judges to attend, the selection of others, and procuring a box to serve as a ballot box.

The court found that the persons who served as officers of the election were not sworn as required by law, and appellants cite those provisions of the Political and Penal Codes making it a felony to act as an election officer without having been appointed and qualified as such. But these provisions, while imposing penalties upon the person who so acts, do not declare the election void for that cause. But the point has been directly decided in *Whipley v. McKune*, 12 Cal. 352. See, also, *Rounds v. Smart*, 71 Me. 380; *Taylor v. Taylor*, 10 Minn. 107 (Gil. 81); *People v. Cook*, 14 Barb. 259; *Atkinson v. Lorbeer*, 111 Cal. 419, 44 Pac. 162; *Code Civ. Proc.* § 1112. The principle underlying these decisions is that the rights of the voters should not be prejudiced by the errors or wrongful acts of the officers of the election, unless it shall appear that a fair election and an honest count were thereby prevented.

H. J. Prewett, a witness called by defendants, was asked: "Did you hear the plaintiff, Charles A. Lee, say, prior to the election in Green district, that he would not let a d—d man vote at that election, if he were not re-registered?" An objection to this question was rightly sustained. It does not appear that Mr. Lee did not believe that no one had a right to vote unless he had been re-registered, and, if so, it would be his duty to challenge voters upon that ground; but, however that may be, this was prior to the election, and no one was in fact challenged on that ground. That several, perhaps all, who did not vote, refrained from offering to vote because they believed they had no right to vote, cannot be a ground for setting aside the election. That the voters generally were mistaken upon a question of law relating to or affecting their right to vote is of itself no evidence of conspiracy or fraud.

Appellants' objection to the complaint on the ground that three causes of action are improperly united is not well taken. Section 808, *Code Civ. Proc.*, provides, "When several persons claim to be entitled to the same office or franchise, one action may be brought

against all such persons in order to try their respective rights to such office or franchise." The office or franchise here was the same. The three trustees constitute a board, or entity, charged with the performance of the same public duty; and where the right of each member of the board depends upon the same facts, as is the case here, the question is whether the board, composed of the three persons, has a legal existence, and the right to exercise the powers conferred upon it as such.

Nor was the general demurrer to the complaint well taken. It is true, the school superintendent has power to fill all vacancies on the board; but the complaint alleged an election on June 5th of an entire board, and hence there was no vacancy on July 9th, when the superintendent appointed the defendants. For the purposes of the demurrer, the defendants must have assumed, contrary to the allegations of the complaint, that the election was illegal and void. I find no error in the record, and advise that the judgment and order appealed from be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

124 Cal. 1

LAHMAN et al. v. HATCH. (L. A. 556.)

(Supreme Court of California. March 9, 1899.)

TAXATION—ASSESSOR—BOARD OF EQUALIZATION—  
ASSESSMENT BOOK—CUSTODY—ALTERATION  
—LEVY OF TAX—NOTICE.

1. That, while the assessment book was in the office of the secretary of the board of equalization, the assessor added descriptions of improvements in the columns provided therefor, does not invalidate the assessment, the columns theretofore having in them figures corresponding in quality and value to the figures in the columns headed "Value of the Improvements"; no description of the improvements being necessary, and the book being clear and intelligible without them.

2. The fact that the assessor removed the assessment book from the office of the secretary of the board of equalization, where it was lying open for public inspection, as required by law, from 5 p. m. Saturday until Monday morning, does not invalidate the assessment; the law not requiring the book to be open for inspection on Sunday, and Act March 31, 1897 (St. 1897, p. 254) § 71, requiring irregularities not affecting substantial rights to be disregarded.

3. A complaint alleging that, after the board of equalization lost control of the assessment book, it made changes therein, without showing that complainant was injured, is bad on demurrer; since, whether such action was valid or invalid, the complaint does not show complainant entitled to any relief.

4. Where a taxpayer has notice of the meeting of the board of equalization, and all the steps preliminary to the levy of an assessment, he is not entitled to notice of the levy.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county.

Suit by W. E. Lahman and others against Ed. J. Hatch, as collector of the Escondido irrigation district. There was a decree for defendant, and complainants appeal. Affirmed.

R. P. Willard, for appellants. Wadham & Stevens, for respondent.

PRINGLE, C. Appeal from judgment entered after demurrer to complaint sustained. Action brought to restrain the respondent, as tax collector of the Escondido irrigation district, from selling lands of the appellants for taxes imposed by the directors of the district under the act entitled "An act to provide for the organization and government of irrigation districts and to provide for the acquisition or construction thereby of works for the irrigation of lands embraced within such districts, and also to provide for the distribution of water for irrigation purposes," approved March 31, 1897 (St. 1897, p. 254).

The grounds of demurrer to the complaint are: First, that complaint does not state facts sufficient to constitute a cause of action; second, that the action is barred by the limitation established by the act in question. In answer to the point that the complaint does not state facts sufficient to constitute a cause of action, the appellants claim that the taxes, the collection of which they seek to restrain, are illegal for two reasons,—for conduct of the assessor, and for conduct of the board of equalization.

For conduct of the assessor: Section 37 provides that, on or before the first Monday in August of each year, the assessor must complete his assessment book and deliver it to the secretary of the board, who must immediately give notice thereof, and of the time the board of directors, acting as a board of equalization, will meet to equalize assessments. The time fixed for the meeting shall not be less than 20 nor more than 30 days from the first publication of the notice, "and in the meantime the assessment book must remain in the office of the secretary for the inspection of all persons interested." The complaint charges that the assessor prepared his assessment book, and "on the 4th day of August, 1897, said assessor delivered said assessment book to the secretary of the said irrigation district; that said assessor did not, prior to said 4th day of August, 1897, list any improvements on said book, or in the columns of said book headed 'Improvements on land in the Rancho Rincon del Diablo' (that being the land in said district other than city or town lots), as being or situated on any of the land assessed; that there was at said time improvements on said lands in said district, and on the lands listed on said book, and on the lands of these plaintiffs; that the value of all of said improvements ex-

ceeded the sum of one hundred thousand dollars; that, on or about the 11th day of September, 1897, at about the hour of five o'clock p. m., said assessor, without having first been authorized so to do by any action of the board of directors of said district, sitting as a board of equalization, or as said board of directors, took and removed said assessment book from the custody of the secretary of said board and of said district, and retained the same until Monday morning of September 13, 1897, when said book was returned to the custody of said secretary; that said book, when so returned, had entered and listed thereon, and in the column headed 'Improvements on the Land in the Rancho Rincon del Diablo,' and in the column headed 'Improvements on City or Town Lots,' the improvements that were situated and located on said lands and on said city and town lots; that prior to said 11th day of September, and at the time said book was taken from the custody of said secretary, as aforesaid, there was nothing written on said assessment book or in said columns to represent improvements, except figures, which corresponded in quantity and number to the figures entered on said book in the column headed 'Value of Improvements on Lands in the Rancho del Diablo' (which column was properly marked '\$' and 'c.'), and in the column headed 'Improvements on City or Town Lots,' said figures having nothing annexed to them for the purpose of explaining their meaning; \* \* \* that said assessor did not \* \* \* assess or list in an assessment book, or in any other manner, any of the improvements situated upon the lands in said irrigation district; that, at all of said times, there were a great many buildings, consisting of dwelling houses, barns, outbuildings, store and business houses, in said district and situated upon the lands of said district." As far as we can gather from this imperfect statement, it appears that, when the book was first delivered to the assessor, it contained columns "headed 'Improvements on Land,'" in which there were figures "which corresponded in quantity and value to the figures entered in said book in the columns headed 'Value of Improvements on Land.'" The vice charged is that "the figures had nothing annexed to them for the purpose of explaining their meaning." But these figures corresponded in quantity and number with the figures in the column headed "Value of Improvements"; and, as this latter column had proper dollar and cent marks, the book was made clear and intelligible. No description of the improvements is necessary in the assessment book. All that is necessary is a general designation of improvements, with the value at which they are assessed. *People v. Rains*, 23 Cal. 127. In the form prescribed for an assessment book by section 3651 of the Political Code, there is no description of improvements. It would be a highly inconvenient provision if the validity of an assess-



ment of improvements were made to depend upon a correct description of every dwelling house, barn, or outhouse. The description of the real property sufficiently identifies the improvements. Thus, it appears in this book, with sufficient clearness, that the assessor has assessed the improvements. He had done his duty in that respect. That was the essential thing. The figures were correct. All that he is said to have done afterwards was to have "listed and entered in the columns headed 'Improvements on Land in the Rancho Rincon del Diablo,' and in the column headed 'Improvements on City and Town Lots,' the improvements that were situated and located on said lands, and on said city or town lots." If this means that he added descriptions of the improvements, that was unnecessary and immaterial. Certainly, nothing new that was material was added; for the correct valuations were there, and nothing was added to alter them. If this is a correct interpretation of the complaint, it does not show anything which injuriously affects the substantial rights of the appellants. The assessor made his corrections two days before the board of equalization lost control of the book, and the parties interested might have seen and examined it. Section 71 of the act provides: "The court hearing any of the contests herein provided for, in inquiring into the regularity, legality or correctness of such proceedings, must disregard any error, irregularity or omission which does not affect the substantial rights of the parties to said action or proceeding." If the above is not a correct interpretation of the complaint, it does not state with sufficient clearness any cause of action to entitle the appellants to relief. Of the same character is the irregularity in taking away and detaining the assessment book from 5 o'clock on Saturday afternoon until Monday morning. Sunday is, by another provision of the act, recognized as a dies non in proceedings of the board of equalization. The book may be presumed to have been returned before office hours of Monday morning; or the undescribed fragment of Monday morning during which it was unreturned comes within the rule of de minimis, not substantially affecting the rights of the parties.

The conduct of the board of equalization: Section 37 of the act requires the assessor to deliver his assessment book to the secretary on or before the first Monday in August, and the secretary immediately to give notice thereof, and of the time the board will meet to equalize the assessments. The time fixed for the meeting shall not be less than 20 nor more than 30 days from the first publication of the notice. Section 38 provides that the board "shall meet and continue in session from time to time as long as may be necessary, not to exceed ten days, exclusive of Sundays, to hear and determine such objections," etc. The complaint shows that the meeting of the board was fixed for

the 4th day of September, 1897; that the board met on the 4th of September, and continued in session from day to day, Sundays and legal holidays excepted, up to and including the 16th day of September, and on the 16th day of September "altered and changed, by either raising or reducing the same, a great many of the assessments on assessment book." The respondent contends that the 9th of September, being a legal holiday, was, like the two Sundays, properly excluded from the counts. But, conceding to the appellants that the board lost jurisdiction after the 15th, and that its action on the 16th was void, there is a fatal objection to the complaint. It does not show how the appellants were injuriously affected by the action or by the omission of the board; for, whether the action of the board be valid or invalid, the result is the same with the averments of the complaint. Assuming that the action of the board was regular and valid, the complaint is defective. The averment is simply that the board "altered and changed, by either raising or reducing the same, a great many of the assessments." It does not appear that the assessments of appellants' lands were altered. Nor does not appear that, by the "raising or reducing," the general assessed value was lowered, thereby causing an increased tax levy to operate, to the injury of the appellants. If the valuation of the lands or improvements of appellants were not raised, but the total valuation raised,—which is quite consistent with the allegations of the complaint,—the result would be a lesser tax upon the appellants. If, on the other hand, the action of the board was void for want of jurisdiction, the original assessment remained; and there is no error shown in that assessment. The appellant cites the case of *State v. Central Pac. R. Co.*, 21 Nev. 270, 30 Pac. 693, to the effect that the reduction of the assessment of the lands of the road from \$14,000 per mile to \$12,000 per mile was void, because made by the board of equalization after the expiration of the allotted time. The result was that the original assessment remained, and the state recovered the tax. The failure of the board to act did not defeat the assessment. Under this decision, the result to the appellants is that the assessment stands, and is unattacked. It does not appear that the appellants attempted to call into action the seasonable action of the board upon their assessments,—a proper course suggested by the Nevada court to the taxpayer before he complains of the board. In no aspect of the complaint does it state a cause of action. Another objection made by the appellants is that there is nothing in the act providing for notice to be given of the time when the assessment will be levied. But proper notice is given of the meeting of the board of equalization (section 37), and within 10 days after the close of the session, whose duration is fixed by the law, the secretary is required

to have the whole work of the session extended into columns, and added (section 38). "The board of directors shall then levy an assessment," etc. (section 39). As the taxpayer has had notice of all the preliminary steps which he could examine and make objection to, there is no controlling reason why he should have notice of the levy, the final act which is the outcome of the rest, and in reference to which he can have nothing to say. He has, besides, complete notice of the time before which the levy cannot be made, and it would need but small diligence in him to know the rest. It becomes unnecessary to pass upon the defense of the limitation prescribed by section 72 of the act. I advise that the judgment be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

124 Cal. 14

ASHTON et al. v. HEYDENFELDT et al.  
(S. F. 1,266.)<sup>1</sup>

(Supreme Court of California. March 10,  
1899.)

REPLEVIN—PROPERTY SUBJECT—SHARES OF STOCK  
—CONVERSION—REVERSAL ON APPEAL—RIGHT TO  
RESTITUTION—SUPREME COURT—JURISDICTION.

1. Replevin does not lie to recover shares in a corporation, as they are incorporeal and intangible property, incapable of seizure.

2. In an action for the recovery of property, an allegation of a demand therefor, and its refusal, does not show a conversion.

3. Under Code Civ. Proc. § 957, requiring property and rights lost by a judgment which is thereafter reversed on appeal to be restored, and giving appellant a right of action therefor against the respondent, executors who, pursuant to a decree of distribution, delivered property to a distributee, may, on the reversal of such decree on appeal, and the remanding of the matter of distribution of the estate to the court below for further proceedings, recover the property from the distributee, or its value, if restitution cannot be had, since the delivery by them was not voluntary.

4. Code Civ. Proc. § 456, requiring a judgment or determination of a court to be pleaded by stating it to have been duly given, does not apply to a judgment of the supreme court, it being a court of superior jurisdiction, whose jurisdiction is presumed.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Charles Ashton and another, as executors of the will of Solomon Heydenfeldt, deceased, against Sunshine O. Heydenfeldt and another. There was a judgment for defendants, and plaintiffs appeal. Reversed.

Craig & Meredith, J. H. Meredith, and L. H. Jacobs, for appellants. Knight & Heggerly and Geo. D. Collins, for respondents.

HAYNES, C. Action to recover possession of "shares of stock." Defendants' demurrer to the complaint was sustained, and, plain-

tiffs having declined to amend, judgment of dismissal was entered, and plaintiffs appeal.

The property sought to be recovered is described thus, "Four thousand six hundred and seventy-four shares of the capital stock of the Zeila Mining Company, a California corporation," which stock, it is alleged, was the property of said Solomon Heydenfeldt at the time of his death, and ever since has been the property of his estate; that on October 23, 1893, the superior court made a final decree of distribution of said estate; "that pursuant to said decree said stock was distributed to the defendant Elizabeth A. Heydenfeldt, and was thereafter by her transferred, as plaintiffs are informed and believe, and therefore allege, without any valuable consideration, to the defendant Sunshine O. Heydenfeldt, and said stock has ever since been detained by them from the possession of plaintiffs." It is further alleged "that said decree of distribution was reversed by the supreme court of the state of California, and the matter of said distribution remanded to this honorable court for further hearing"; that no further hearing has taken place; that both the defendants were parties to the proceedings, and had notice thereof; that charges and expenses to a large amount have accrued against said estate, which are unpaid; "that since the reversal of said decree plaintiffs have demanded of defendants the return of said stock, but they did then refuse, and have ever since then refused, and do now refuse, to return said stock, or any part thereof." The value of the stock is alleged to be \$30,000, and damages for its detention \$4,000. The prayer is for judgment for the return of the stock, or, if that cannot be had, then for its value, and for damages.

If the complaint is to be regarded as though the action were in claim and delivery, it does not state a cause of action, inasmuch as "stock" in a corporation is an incorporeal, intangible thing, and therefore incapable of identification, or seizure under the writ. The proceeding is not aimed at the certificate representing these shares, nor is it mentioned or described. Nor is it sufficient as a complaint for the conversion of the stock, since a conversion is not alleged. The allegation of a demand and refusal is not sufficient as an allegation of conversion, since "the demand and refusal is only evidence of a prior conversion, not in itself conclusive, but liable to be explained and rebutted by evidence to the contrary." 2 Greenl. Ev. § 644. And in *Mires v. Solebay*, 2 Mod. 244, it was said: "It is not found that the servant did convert the sheep to his own use, for the special verdict only finds the demand and the refusal, which is no conversion; and, though it is evidence of it to the jury, yet it is not matter upon which the court can give judgment of conversion." But this point need not be further pursued, since I think the complaint sufficient to require the restitution of the stock distributed under the decree, or the payment of its value, of Supreme Court, see 56 Pac. 1031.

<sup>1</sup> For opinion on motion to amend judgment



said decree having been afterwards reversed on appeal to this court. 39 Pac. 788. The defendants were parties to the settlement of the accounts of the plaintiffs as executors, and to the decree of distribution mentioned in the complaint; and the right of the plaintiffs, as such executors, to the possession of said stock as assets of said estate prior to the decree of distribution cannot be questioned. The decree operated as a judgment against the executors requiring them to deliver said stock to the defendant Elizabeth, and it was so delivered under and pursuant to said judgment, and not as the voluntary or gratuitous act of the plaintiffs, but in discharge of their liability to account for all the assets of the estate which came to their hands. But, that decree having been reversed (vacated) on appeal, the matter stood as though no decree had ever been made, and upon another hearing it might appear that the said stock was required for the payment of some debt or liability of the estate, or that some other distributee was entitled to it; and in such case, the liability of the plaintiffs remaining as though the erroneous decree had never been made, it is obvious that the stock was lost to them by reason of said erroneous decree, and that they are entitled to restitution; and in such case it is provided that relief may be had by action. Code Civ. Proc. § 957. The right to such relief, however, existed before the statute. In *Bank of U. S. v. Bank of Washington*, 6 Pet. 17, it was said: "On the reversal of the judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost. And the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a scire facias, when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases a scire facias may be necessary to ascertain what is to be restored. 2 Salk. 587, 588; Tidd, Prac. 936, 1137, 1138. And, no doubt, circumstances may exist where an action may be sustained to recover back the money. *Clark v. Pinney*, 6 Cow. 297." In *Raun v. Reynolds*, 18 Cal. 276, 290, this court said: "It does not follow, because a party has a right, under a certain state of facts, to a judgment, and the fruits of it, that he must necessarily be entitled to those fruits forever afterwards. A judgment, so long as it continues unreversed and unsuspended, may be enforced; but when it is reversed it is as if never rendered, and money collected by authority of it may, as a general rule, be recovered back. \* \* \* Here the equity of *Reynolds* arose after the reversal, to be restored to whatever he lost by the judgment." See, also, *Applegarth v. Dean*, 68 Cal. 491, 13 Pac. 587, and numerous other cases approving *Raun v. Reynolds*, cited in 2 Notes on California Reports, p. 64. In such cases the plaintiff is entitled to a restitution

of everything still in the possession of the defendant in specie. *Freem. Judgm.* § 482. The suit being in equity, the court has power to compel the delivery of the property received by the defendant, even though it be of a character such as to make its seizure under a writ of replevin impossible; or, if it is no longer in the possession or control of the defendant, the court may compel compensation in money.

It is contended by respondents that there is nothing in the complaint to show that the supreme court had jurisdiction to reverse the decree of distribution; that, as no attempt was made to comply with section 456, Code Civ. Proc., it was necessary to show jurisdiction in the supreme court to reverse the decree; and that the supreme court, though a court of record, is not a court of general jurisdiction. The supreme court, however, is a court of superior jurisdiction, and is within the rule laid down in *Weller v. Dickinson*, 93 Cal. 108, 28 Pac. 854, where it is held that said section refers to that class of judgments which, prior to the enactment of the provision, were required to be pleaded by setting out the jurisdictional facts, and not to "courts of superior or general jurisdiction that are presumed to act by right and within the authority conferred upon them by law"; and *Freeman*, in his work on Judgments (section 452), after referring to certain cases, further says: "But, in so far as these cases indicate that it is essential to aver anything whatever to show the jurisdiction of courts of record, they are not sustained by the authorities." *Weller v. Dickinson*, supra, is cited and approved in *Clark v. Nordholt*, 121 Cal. 26, 53 Pac. 400. Viewed as an action to recover property, or its value, from a party who received it under a judgment afterwards reversed, the complaint is not obnoxious to either of the grounds of special demurrer interposed by respondents. I advise that the judgment appealed from be reversed, with directions that the demurrer to the complaint be overruled.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with directions that the demurrer to the complaint be overruled.

124 Cal. 19

PEOPLE v. GRINER. (Cr. 513.)

(Supreme Court of California. March 14, 1899.)

HOMICIDE—INFORMATION—SIGNATURE—NEW TRIAL—EVIDENCE—CHARACTER OF DECEASED.

1. An information signed in the name of the district attorney, by an assistant district attorney, is valid.

2. The mere fact that the deceased had an ax in his hand, and shook it around, defendant being behind him, does not show an excuse

for defendant's act in then shooting the deceased.

3. It is not an abuse of discretion for the trial court to refuse a new trial, in a criminal case, on the ground of newly-discovered evidence, where the person who was to give such evidence was present as a witness at the first trial, under a subpoena from defendant.

4. Defendant cannot object to the court's refusal to permit evidence that the "character" of the deceased for peace and quietness was bad, where the court offered to allow evidence of his "general reputation" therefor.

5. In a prosecution for murder, the record evidence that the deceased had been previously convicted of an assault on a third person is inadmissible.

In bank. Appeal from superior court, Sonoma county.

Frederick Griner was convicted of murder in the second degree, and he appeals. Affirmed.

J. F. Campbell and R. M. Swain, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. Defendant has been convicted of murder of the second degree, and appeals from the judgment, and from the order denying his motion for a new trial.

The information charging the commission of the crime is signed with the name of the district attorney of the county, "by T. J. Butts, Assistant District Attorney." It is now claimed that there is no authority in law for an assistant district attorney to sign an information in the name of his principal, and that, therefore, the motion to set aside the information should have been granted. The district attorney of Sonoma county is allowed an assistant district attorney by authority of the state legislature. It has been held that an information is properly signed when the district attorney's name is attached thereto by a deputy district attorney. *People v. Darr*, 61 Cal. 554; *People v. Etting*, 99 Cal. 577, 34 Pac. 237. Again, it is held that an information signed by an assistant district attorney is valid. *People v. Turner*, 85 Cal. 432, 24 Pac. 857. If an information signed by a deputy district attorney, in the name of his principal, satisfies the law, and if an information signed by an assistant district attorney also satisfies the law, then there can be no question but that an information signed in the name of the district attorney, by the assistant district attorney, is sufficient.

It is next insisted that the verdict is contrary to the evidence. To this point we quote the following excerpt from the testimony of the defendant himself: "I saw he won't go to bed, and so I got up and lit the lamp, and told him to go out to his room, and he would not do it; and I urged him along, and put the lamp on the table in the sitting room, and urged him along to his room; and he got out of the sitting room into the empty room, and there was an ax in the corner between the two doors, and I saw him raise that, and I went back to my bedroom; and under the pillow I had my pistol, and got it, and I

walked out and urged him along to go to his bed, and he shook the ax around one way and the other way; and I fired three shots, the first one hitting the breast, and the others I don't know where they went. I went back to the sitting room. The room was full of smoke, and I heard the ax drop, and he walked out on the porch, and from there I don't know where he went; and I took the lamp, and went out, and found him dead on the ground." Upon this evidence, alone, the jury was authorized in law to find the verdict rendered.

It is claimed that a new trial should have been granted upon the ground of newly-discovered evidence. In view of the fact that Brown, the party who was ready to give the newly-discovered evidence upon a second trial, was present as a witness at the first trial, subpoenaed by the defendant, we are not strongly impressed with the showing made. It can be only in an exceptional case that the character of showing here disclosed should be deemed sufficient to demand a new trial. Especially in a case like this, much should be left to the discretion of the trial court. New trials upon the ground now urged would be a most common occurrence, if the precedent here sought should be declared. *Harralson v. Barrett*, 99 Cal. 610, 34 Pac. 342, is a case in point. It was there held that a lack of diligence in securing the evidence was fatal to the application. In this case there was no abuse of discretion upon the part of the trial court in so holding.

Defendant claimed to have done the shooting in self-defense, and upon that theory offered to prove, by various witnesses, that the character of the deceased for peace and quietness was bad. It is only in certain peculiar cases that this kind of evidence is admissible at all; and, conceding, for present purposes, that such a case is disclosed by this record, still we find no error committed by the court in the action taken. Under objection, the evidence was not admitted, the judge stating at the time that he would allow evidence as to the "general reputation" of the deceased for peace and quietness. Counsel for defendant declined to accept the offer made, and now claim reversible error in the ruling of the court in the rejection of the evidence offered. We will enter into no discussion as to the existence of any substantial difference between evidence as to the "character" of the deceased for peace and quietness, and evidence as to his "general reputation" for peace and quietness. It is sufficient now to say that the judge offered to allow counsel for defendant to examine witnesses as to the general reputation of the deceased for peace and quietness, and counsel should have been satisfied with such offer.

It was next attempted to show, by the record of conviction, that deceased had been previously convicted of a misdemeanor, namely, an assault upon one Whallen. This evidence was erroneous from any standpoint. Neither



do we find any well-founded objection to the remarks of the prosecuting attorney in his address to the jury.

The court has carefully examined the instructions asked by the defendant which were refused by the judge. There is no substantial error to be found in such refusal. The charge to the jury was full, explicit, and legally sound. It appears to have fully covered the entire law of the case. For the foregoing reasons, the judgment and order are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.; McFARLAND, J.; HARRISON, J.; VAN DYKE, J.

124 Cal. 117

GRAHAM PAPER CO. v. PEMBROKE et al.  
(S. F. 558.)

(Supreme Court of California. March 25, 1899.)

ASSIGNMENTS OF CHOSSES IN ACTION—PRIORITIES—NOTICE TO DEBTOR—ACCOUNTING.

1. A subsequent assignee of book accounts and bills receivable, who gives notice of the assignment to the debtors, has a title superior to that of the first assignee, who has failed to give such notice, especially where the first assignee left the accounts and chosses in action in the hands of the assignor as its agent for collection, and the second assignee took actual possession thereof without notice of the first assignment.

2. In the absence of evidence that defendant had made any collections on the accounts assigned to plaintiff after the assignment, no right to an accounting exists.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by the Graham Paper Company against S. J. Pembroke and others. From a judgment entered on sustaining a motion for a nonsuit, and from an order denying a new trial, plaintiff appeals. Affirmed.

Gordon & Young, for appellant. J. H. Dickinson and H. E. Monroe, for respondents.

HAYNES, C. The plaintiff and the defendant the Pacific Roll-Paper Company are corporations. On December 23, 1893, the Pacific Roll-Paper Company was indebted to the plaintiff in the sum of about \$15,000, due on merchandise accounts, and on that day T. J. Corwin, the president of said Pacific Roll-Paper Company, in the name of the corporation, by himself as president, executed to the plaintiff a written assignment of "all its book accounts and bills receivable, including all debts of every kind now due to said Pacific Roll-Paper Company from any person or persons, and the said Pacific Roll-Paper Company hereby agrees and covenants with the said Graham Paper Company to represent it as its agent henceforth in the collection of said bills and book accounts and debts, and reduce the same into cash as speedily as possible." This assignment was to be in satisfaction of the plaintiff's demand only to the extent that collections

should be made. No statement of the accounts, bills receivable, or other debts embraced in said assignment accompanied it, nor was any statement thereof afterwards furnished the plaintiff, though demand was made for such statement about January 1, 1894, and afterwards a partial pencil memorandum was shown the plaintiff, but was retained by the assignor to be completed. On January 19, 1894, said Pacific Roll-Paper Company sold its property, assets, and good will, including the accounts and other demands so assigned to the plaintiff, to defendant S. J. Pembroke, for the sum of \$23,500, part of which was paid in cash (\$6,853), and the remainder in notes; and the answer alleged that no part of the purchase price consisted of debts due or owing from or by the vendor, that the purchaser immediately gave notice to all persons whose names appeared upon the books of the vendor as owing said Pacific Roll-Paper Company of the assignment and transfer of said accounts, and that said defendant had no knowledge or notice of said assignment to the plaintiff. The relief demanded by the plaintiff is, in substance, that it be adjudged to be the owner of said accounts and demands, that a receiver be appointed, for an accounting, that plaintiff have access to the books, and that defendants be enjoined from collecting any of the accounts that were in existence and unpaid on December 23, 1893, and for other relief. At the conclusion of plaintiff's evidence in chief the defendants moved for a nonsuit upon the grounds: (1) That it was not shown that the assignment to plaintiff was executed by the corporation, or that the directors ever authorized the president to make it; and (2) that no steps were taken by the plaintiff to perfect the assignment, or to act under it, and that no attempt was made to reduce the accounts to possession. Said motion was granted, and from the judgment entered thereon and an order denying plaintiff's motion for a new trial this appeal is taken.

The only questions made or discussed by counsel in their briefs are: First, whether Mr. Corwin, the president of the Pacific Roll-Paper Company, had authority to execute the assignment to plaintiff; and, second, if its execution was authorized by the corporation, was it valid as against S. J. Pembroke, the subsequent assignee, who was a purchaser of the same accounts and demands without notice of the prior assignment, and who immediately gave notice to the debtors of the assignment to her, and obtained possession of the books and accounts? If the second of these questions should be resolved against appellant, the first need not be considered. To complete the assignment of an account as against the debtor, it is universally conceded that the debtor must have notice, as otherwise his debt will be discharged by payment to the assignor; but whether the prior assignee must give notice to the debtor in order to protect himself against a subsequent assignee is a question upon which there is a conflict in the authorities. "It is a

well-established rule in England that, as between successive assignees of a chose in action, he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided at the time of taking it he had no notice of the prior assignment." 2 Am. & Eng. Enc. Law (2d Ed.) p. 1077. The reason of this rule is stated by Sir Thomas Plumer, M. R., in *Dearle v. Hall*, 3 Russ. 1, thus: "In *Ryall v. Rolles*, 1 Ves. Sr. 348, the judges held that in the case of a chose in action you must do everything towards having possession which the subject admits. You must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund. In the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired title, in the actual possession and under the absolute control of another person." The English rule has been followed by the federal courts in this country. See *Judson v. Corcoran*, 17 How. 612; *Spain v. Hamilton's Adm'r*, 1 Wall. 604, 624; *Bank v. Schuler*, 120 U. S. 511, 7 Sup. Ct. 644. In *Methven v. Power Co.*, 13 C. C. A. 362, 66 Fed. 113, it was held that, where two assignments of a chose in action, for valuable consideration, are made to different persons, the assignee who first gives notice of his claim to the debtor has the prior right, though the assignment to him is later in date than that to the other assignee, if taken without notice. This proposition is also sustained in 2 Story, Eq. Jur. § 1035a; and in note 4, p. 339, *Foster v. Cockerell*, 9 Bligh, 332, 375, 376, is quoted at considerable length, stating what appears to us satisfactory reasons in its support. In 2 Pom. Eq. Jur. § 695, the same doctrine is stated, and at section 698 the learned author added: "Even where the rule concerning notice to the debtor or trustee has not been adopted, an assignee who had otherwise the priority may lose it through his laches, as against a subsequent purchaser in good faith and for value who has been injured by the negligence. \* \* \* The questions as to priority of right may arise between the assignee and a judgment creditor of the assignor or a subsequent purchaser from the assignor. There is a clear distinction between these two claimants, since a judgment creditor only succeeds to the rights of his debtor, while a purchaser may acquire higher rights." See, also, *Id.* § 707. In 2 Am. & Eng. Enc. Law, p. 1077, notes 3, 4, Iowa, Missouri, Vermont, and Virginia are mentioned as supporting the English rule, and New Jersey, New York, and Texas as rejecting it. To the former list may be added Connecticut. See *Bishop v. Holcomb*, 10 Conn. 444, and *Foster v. Mix*, 20 Conn. 395.

Appellant cites a large number of the New

York cases in support of its contention, and it must be conceded that they sustain the general proposition that the prior assignee has the better right, though he has not notified the debtor. We think, however, that the doctrine announced by the English courts, and followed by our federal courts and the state courts above mentioned, is based upon the better reason, and sustained by the weight of authority. Notice to the debtor not only protects the assignee against payment to the assignor, but against payment to the subsequent assignee; since the debtor, with notice of the prior assignment, would be no more protected by a payment to a subsequent assignee than he would by payment to the assignor; and, besides, an intending purchaser of the accounts from the assignor would have it in his power to ascertain from the debtors, by inquiry, whether any prior assignment existed, and would thus be furnished with the only reasonable protection possible against fraud on the part of the assignor. There are, however, some special features which strengthen the case of defendant *Pembroke*, the second assignee. The plaintiff was a creditor of the assignor, endeavoring to obtain some security for its claim against the Pacific Roll-Paper Company. It left the accounts and choses in action in the hands and under the control of the assignor, as its agent, for collection. The defendant, *Pembroke*, is a purchaser, who not only took an assignment of the accounts and other choses in action, but obtained actual possession of them and immediately notified the debtors, and therefore obtained a perfect legal title, without notice of the prior assignment, and with no means of obtaining information of it otherwise than from the fraudulent assignor, who, by the sale and assignment, represented that it had good right to make the sale and assignment. The case of *Kirk v. Roberts* (Cal.) 31 Pac. 20, is not in point. There the defendant was the assignee in insolvency, and therefore stood in the shoes of the insolvent; while here the defendant is a purchaser in good faith and for value, without notice, and therefore stands in a better position than her assignor.

In the closing paragraph of appellant's brief it is said that plaintiff had a right of action for an accounting against the Pacific Roll-Paper Company as to what it had collected on the assigned accounts, and against defendant *Pembroke* for whatever she may have collected since the assignment to her, and that it was, therefore, error to grant the motion upon the grounds stated. As to defendant *Pembroke* there was, as we have seen, no right to an accounting; and as to the Pacific Roll-Paper Company there was no evidence that it had made any collections. The court would certainly not make an order requiring it to account in the absence of some evidence that it had made collections. Plaintiff called and examined Mr. Corwin



as a witness, but did not ask for disclosures as to whether collections had been made; and, having rested its case, the court below could not assume that collections had been made, nor can we. Under these circumstances it does not appear that appellant has been prejudiced.

Numerous exceptions were taken to rulings on the admission and rejection of evidence. None of them are discussed in the briefs. Most of them relate to the authority of the president of the defendant corporation to make the assignment to the plaintiff, which assignment, we have assumed for the purposes of the case, was the act of the corporation. None of the other rulings would have changed the result had they conformed to plaintiff's views. I advise that the judgment and order appealed from be affirmed.

We concur: GRAY, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

124 Cal. 57

KUHLMAN v. KUHLMAN. (S. F. 1,075.)

(Supreme Court of California. March 18, 1899.)

DIVORCE—EVIDENCE—CRUELTY.

1. Where plaintiff alone testifies as to personal abuse by his wife, and she explicitly denies the language alleged to have been used, no divorce can be granted under Civ. Code, § 130, prohibiting the same on the uncorroborated statement of either party.

2. Evidence that after a husband, without cause, had deserted his wife, who was at the time sick, she missed her diamonds and her sealskin saccue, and reported to friends of his that she thought he had taken them, is insufficient to entitle him to divorce on the ground of extreme cruelty.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Hans G. Kuhl against Helen Kuhl for a divorce on the ground of extreme cruelty. Judgment of dismissal was entered. From an order granting a new trial, defendant appeals. Reversed.

Naphtaly, Friedenrich, & Ackerman, for appellant. J. H. Henderson, for respondent.

HAYNES, C. The action was tried before Hon. D. J. Murphy, late judge of the superior court, who found from the evidence that the defendant was not guilty of extreme cruelty towards the plaintiff, and did not inflict upon him grievous mental suffering; and, as no affirmative relief was sought by defendant, judgment of dismissal was entered. Plaintiff moved for a new trial upon the ground that the evidence was not sufficient to justify the findings, and that the decision was against law. A bill of exceptions was settled by Judge Murphy, and the motion was afterwards heard before Judge Bahrs,

who made an order granting a new trial, and from that order the defendant appeals.

The complaint alleged that the parties intermarried July 23, 1895; that on divers occasions the defendant was guilty of extreme cruelty towards the plaintiff, and particularly as follows: "In the month of April, 1896, she had angrily upbraided the plaintiff, and said to him, 'God curse your soul;' and on many occasions in or about said month of April, 1896, she called him a 'damned Dutchman' and a 'loafer.' In the month of May, 1896, the defendant falsely and maliciously accused plaintiff to sundry of his business acquaintances and friends of having stolen diamonds and a sealskin saccue." That said acts and conduct inflicted upon plaintiff grievous mental suffering. The answer put in issue all these allegations. The plaintiff testified that defendant used towards him the epithets alleged in the complaint, and the defendant testified as explicitly that she did not, and that she did not use towards the colored servant girl any such language as plaintiff testified to. As to these matters the plaintiff was not corroborated in the slightest degree, and hence, as to them, there was no evidence upon which the court could base a finding for the plaintiff. "No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties. \* \* \*" Civ. Code, § 130. As to the allegation in the complaint that "in the month of May, 1896, the defendant falsely and maliciously accused plaintiff to sundry of his business acquaintances and friends of having stolen diamonds and a sealskin saccue," a somewhat fuller statement is required. These parties were married in July, 1895. The epithets of which the plaintiff complained he testified were used in the following March, and on May 13, 1896, he left the defendant, and did not afterwards return, and informed two of defendant's friends, whom she had sent to ascertain the cause of his absence, that he would never return or live with her again. While living together, they occupied defendant's house. At the time plaintiff left her, defendant was sick in bed, and had been for about 10 days. She missed her diamonds and saccue soon after the plaintiff left, and about the last of May she called on Mr. Hadley, a personal and intimate friend of the plaintiff, and, in the language testified to by him, told him "that her husband had left the house where they were living, and had taken her diamonds, and also her sealskin saccue. She asked me if he had pledged them to me, or whether he had tried to get a loan upon them from me. I told her no; that I did not believe he had taken them; that I did not believe Kuhl capable of doing such a thing." Mr. McKenzie, the other friend of plaintiff, on whom defendant called, put the matter in a somewhat different light. He testified: "She told me that her husband had left her home, and had stolen her diamonds, and also

her sealskin sacque." In relation to this matter the defendant testified that at the time plaintiff left her she was sick in bed, and had been for 10 days; that he did not tell her he was going to quit; that they had no quarrel; that she observed him going to a drawer, where she kept her diamonds, and that her diamonds and sacque disappeared when he left; that about the 5th of May he said there was a good market for stocks, and that "if he had some money he could make a barrel of money"; that he wanted her to mortgage the furniture to go into the speculation, but she declined to do so. Taking these facts, in connection with her inquiry addressed to the witness Hadley whether the plaintiff had pledged her property to secure a loan, or whether he had applied to him for a loan, they tend strongly to show that she believed he had taken them for the purpose of raising money with which to speculate in stocks, and that her statement and inquiry were not malicious, nor, from her standpoint, without excuse or palliation. It should be remembered that these statements to plaintiff's friends Hadley and McKenzie were made after plaintiff had deserted defendant, and therefore formed no justification or excuse for the desertion; nor did he give to either Mrs. Salmon or Mr. Ward, who were sent to him by the defendant to learn the cause of his absence, any hint that he left her because of any cruel treatment, but assigned as the reason for leaving her that he was disappointed in money matters; that he supposed she was wealthy, and would let him have money. The plaintiff was recalled in rebuttal, and testified that he did not ask the defendant for money to speculate in stocks, that he did not say that he had married her for her money, or that he would return upon payment of \$10,000; but this was the full extent of his denial of the testimony of those witnesses.

The rule determining what conduct constitutes extreme cruelty as a cause of divorce is matter of law; but whether the evidence shows such conduct is a question of fact to be decided upon the trial. *Janvrin v. Janvrin*, 58 N. H. 144. Ordinarily, what constitutes extreme cruelty is a mixed question of law and fact, and where the evidence, assuming it to be true, is not legally sufficient, the court may so decide as a question of law. As to the language alleged to have been used by the defendant to the plaintiff prior to the separation, the burden was upon the plaintiff to prove it. He testified that it was used; she, that it was not. No corroboration was attempted by the plaintiff, while the testimony of Mr. Ward, a boarder in the house during all the time these parties lived together, tended strongly to corroborate the defendant. Those acts of alleged cruelty, and the other relating to the taking of the diamonds and sacque, were wholly distinct in character, and were separate in point of

time by about two months. If, therefore, there was any extreme cruelty inflicted by the defendant upon the plaintiff, it must be predicated wholly upon the last of these alleged acts. Under the facts in this case, was that "extreme cruelty"? That it hurt the plaintiff's feelings may be conceded. That it inflicted upon the plaintiff "grievous mental suffering"—that which the statute makes a ground of divorce—is a conclusion the law will not draw from the evidence. The marital relation is one of great public concern. The law does not tolerate contracts in restraint of marriage, nor permit the marriage relation to be dissolved at the whim or caprice of the parties, or for causes which, in view of public policy, it is better the parties should bear, even though it be with discomfort. Whether the plaintiff, who had deserted defendant, and not only announced his determination never to return, but affirmed that determination by bringing an action for divorce, could maintain it for an act of extreme cruelty occurring after the desertion, which was less than a year before suit was brought, need not be decided. Certainly it was a material fact in the case, to be considered by the court in determining whether the words spoken would not have been more likely to cause anger than mental anguish.

Appellant also contends that the court erred in not entering a final judgment that the plaintiff take nothing by his action, instead of a simple judgment of dismissal, which he seems to think is not a bar to a relitigation of the issues. If that be true, the judgment is more favorable to the plaintiff than it should have been, and he is not injured. But the judgment is upon the merits, and in the usual form in equitable actions, in which, if it is intended to permit the plaintiff to relitigate the issues, or any of them, the right is preserved by adding, "without prejudice to a new action." I advise that the order appealed from be reversed.

We concur: GRAY, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

124 Cal. 48

ANDERSON v. ANDERSON. (L. A. 583.)  
(Supreme Court of California. March 18,  
1899.)

#### DIVORCE—DECREE FOR MAINTENANCE.

1. In an action for divorce, where the wife charges that the husband has left her without cause, and charges conduct which the court finds renders it impossible for her to live with him, and alleges want of means, and prays that a portion of the common property be awarded to her, on proper showing she is entitled to a decree for maintenance, under Civ. Code, § 136.
2. In an action for divorce, where decree is



rendered for the wife for separate maintenance, she is entitled to an allowance for the support of a daughter who is of age, under Civ. Code, § 136, providing that the court may provide for the maintenance of the wife "and her children," and section 206, providing that the father and mother of any poor person, who is unable to maintain himself, must maintain such person to the extent of their ability, on a finding that the daughter is dependent on her parents for support.

3. An allowance of \$150 a month to a wife, for the support of herself and children, out of an income of \$230 a month of the husband in the state,—he having an income of about \$450 outside of the state,—is not excessive.

4. It is not error to appoint a receiver of the husband's property in the state, where a decree for separate maintenance has been rendered in favor of the wife, and the husband is a nonresident, and allegations in the bill that he is about to dispose of the property are not denied.

Commissioners' decision. Department 1. Appeal from superior court, Riverside county.

Action by Henrietta Anderson against William H. Anderson. From a judgment for plaintiff, and an order denying a new trial, and from an order appointing a receiver, defendant appeals. Affirmed.

Chas. R. Gray and E. R. Annable, for appellant. E. B. Stanton, for respondent.

PRINGLE, C. Action for divorce. The complaint alleges that plaintiff was married to defendant in New York; has resided for more than 8 years in California; there are six children living, the two youngest being a daughter of 19 and a son of 11 years. Charges extreme cruelty in many forms, growing out of a morose and cruel disposition. Alleges that defendant deserted plaintiff in 1893, and went to live in New York; that defendant is the owner of a block of land in the town of Riverside containing  $2\frac{1}{2}$  acres, upon which are situated 9 dwelling houses, value about \$18,000, rent \$170 per month; also, the N. W.  $\frac{1}{4}$  of another block, with 4 dwelling houses, value about \$7,500, rent \$60 per month; also, 55 acres of Rancho San Bernardino, planted in deciduous trees, no income; also, personal property, consisting of household furniture of the value of \$2,000, a mortgage given by R. J. Mills for \$1,525, and mortgage of \$600 by Archie Brook; that all of the above is community property; that defendant is the owner of real properties in the city of Brooklyn, state of New York, of the value of \$50,700, rents \$440 per month; that plaintiff is in indigent circumstances, and has no means or income except what may be derived from the rents of these houses in Riverside. Alleges, upon information and belief, that "the defendant has endeavored to sell, convey, transfer, and incumber portions of the premises above described, thereby to deprive her of a livelihood and support, and is now endeavoring to make such transfers or incumbrances." Prays for divorce and the custody of the minor child; that a portion of the common property be set apart to plaintiff, and that defendant be enjoined from disposing of, or in any manner

incumbering, the property, and that a receiver be appointed to take charge of the property, receive the rents, etc.; with prayer for general relief. The answer denies cruel treatment and morose and ungovernable temper. Admits that he has not lived with her as her husband since August 1893, but denies that his living apart from her was without provocation. Alleges that, "by reason of the unfortunate condition of things surrounding defendant, he became addicted to the use of intoxicants, and was more or less under their influence from day to day," but denies that plaintiff was in great fear of him in that condition. Alleges that the property in the state of California is all his separate property, having been purchased with funds acquired by him in the state of New York, as his separate property, under the laws of that state; that the mortgage given by Archie Brook for \$600 has been paid up, and the money properly expended for medical services and payment of debts; that defendant is indebted in the sum of \$10,007 in the state of New York. Denies the values put upon the properties in Brooklyn, and the rents stated, and alleges that after paying taxes, water rates, repairs, and insurance, and interest on the debt, the income is nearly exhausted, and furnishes very little towards the support of either himself or family. The answer does not deny the values or rents of the California properties, or the charge made in the complaint that defendant has endeavored to sell, convey, transfer, or incumber portions of the property, to deprive plaintiff of a support, and is now endeavoring to make such transfers or incumbrances; does not deny that plaintiff is without means.

The court finds: That the defendant was morose and suspicious, and unjustly accused plaintiff of want of chastity; was unreasonable and abusive. That such conduct was wholly due to jealousy and a morose disposition. That defendant was not otherwise intentionally cruel in his conduct towards plaintiff. That this action was commenced by plaintiff under the belief that defendant was endeavoring to sell and dispose of his property. That she did not wish to obtain a divorce, except for the purpose of preserving the property. That plaintiff has always conducted herself in a proper and blameless manner, and used her best efforts to conciliate the defendant. "That since the month of August, 1893, without any reason, cause, or excuse, defendant has refused to live with plaintiff. That since said date, and before said date, defendant has given but very little or no attention to the care of the property mentioned and described in plaintiff's complaint. He has allowed the property to be controlled by agents, and has given it no personal attention. Defendant has not been engaged in any business. He has been reckless and extravagant in his expenditures, and has squandered large sums of money, and his estate has become seriously impaired by his extravagance and reckless expenditure. He has shown no rea-

sonable disposition to support or maintain plaintiff or his children, but has shown a disregard of the rights of plaintiff and his children to support. His conduct towards plaintiff and his children has been willful and intentional. \* \* \* He has shown no disposition or desire to resume marital relations with plaintiff, or to live with her; and the conduct of defendant towards plaintiff has been and is unjustifiable, and renders it impossible, at present, for them to live together. His conduct shows that he is unwilling to support his wife and children, and that he has tried to avoid supporting them, and to squander, dispose of, and incur the property upon which they are dependent for support. That the property in California is sufficient, if properly administered, to provide for the support and maintenance of plaintiff and the children, and to yield a surplus, after paying the expenses of maintenance of said property and the support of plaintiff and her children, towards the support of defendant, and that in addition the defendant has the entire management and control of all the property situated in the state of New York, described in paragraph 15 of the plaintiff's complaint. That it is apparent that the defendant, if allowed the control of the property in California, will not provide for the maintenance and support of the plaintiff and his children, but will recklessly squander said property, and ignore their rights." The court finds that all the property in the state of California is the separate property of the defendant, and finds that two of the children (Harry and Etta, the daughter) are dependent upon plaintiff and defendant for support, and have heretofore been, and now are, supported by plaintiff, and are residing with her. From the above facts the court holds that the conduct of the defendant did not amount to extreme cruelty, and that plaintiff is not entitled to a divorce; that plaintiff is entitled to a reasonable support and maintenance out of the property of defendant for herself and the two children, the daughter and son; that a receiver be appointed to take charge of and manage the property; that plaintiff be paid by the receiver \$150 per month for the support of herself and children, and be allowed the use of the house at Riverside occupied by her, and the household furniture. Judgment is entered in accordance with the conclusions of law, and charges all the real properties with a lien in favor of the plaintiff to secure the payment of the maintenance awarded to her. The judgment recites that the mortgages of Mills and Brook had been paid.

The appellant contends that under these pleadings the plaintiff is not entitled to a decree for maintenance, and that the court has gone outside of the issues to make a case for maintenance. But the case comes within section 136 of the Civil Code, as settled in *Hagle v. Hagle*, 68 Cal. 588, 9 Pac. 842. The wife charges that the husband has left her

without cause, and charges conduct on the part of the husband which the court finds makes it impossible for her to live with him, alleges her own want of means, and prays that a portion of what she claims to be the common property be awarded to her, and prays for general relief. Under the case made in the complaint, it was not necessary to charge a failure to provide the plaintiff with the necessities of life; and, if it were, the necessity of a separate maintenance is shown by the undenied averment that defendant was threatening to dispose of the property in order to deprive her of the means of support.

The point is made that the custody of the minor child is not awarded to the plaintiff, and for that reason nothing should be allowed for his support, and also that the daughter is of age, and nothing should be awarded for her support. So far as the minor child is concerned, it is found that he is in the custody of the mother, and is supported by her. As long as this state of facts continues, the father has no reason to complain; for by the provision thus made for the support of the son he is relieved from liability himself. The case is different with the daughter. In her case it appears from the findings that she is residing with her mother, and that, although of age, she is dependent upon her parents for support. Section 136 provides that, though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance of the wife "and her children or any of them." It has been held, under a statute of Oregon somewhat analogous, that the word "children" must be construed to mean "minor children." *Fitch v. Cornell*, 1 Sawy. 156, Fed. Cas. No. 4,834. But the court adds: "The reason is, they are no longer in the custody or under the control of their parents; nor are the latter bound to maintain them, except under peculiar circumstances, arising from poverty or sickness." The same intimation appears in *Snover v. Snover*, 13 N. J. Eq. 261, where the chancellor says: "From the evidence now before the court, I incline to the opinion that, if the daughter continues in health, the allowance for her support should cease when she attains the age of eighteen. I will hear an application on this ground from the father at the proper time." And so, in the present case, under any change of circumstances with reference either to son or daughter, the court may at any time make a modification of the judgment, if it hold that under the circumstances of the case the presence of the children influences the amount of the allowance. In this connection section 206 of the Civil Code is important, in the line of the intimations of the Oregon and New Jersey courts. That section provides that it is the duty of the father and mother of any poor person, who is unable to maintain himself by work, to maintain such person, to the extent of their ability. In view of the finding that the daughter is



dependent upon her parents for support, we must presume that, from ill health or other cause, she is "unable to maintain herself by work." It does in fact appear in the testimony, without objection, that the daughter is an invalid. From the above reasons, which are sufficient to support the judgment on this point, it becomes unnecessary to determine whether, under section 136, the court may not, in granting a maintenance, properly take into consideration the size of the family, adult or minor, which the husband has left with his wife in his home, as an element entering into "her condition in life," which may always be considered in fixing the amount of maintenance.

It is insisted that the allowance of \$150 to the wife out of an income of \$230 derived from the California property of the husband is excessive, the privilege of dwelling house and furniture being also allowed to her. There is no settled rule which can be invoked in such a case to control the discretion of a trial court, and there is nothing here to show abuse of discretion. It is claimed that there is a fatal omission to find whether the income of the New York property, as established by the findings, is gross or net, or to find the amount of expenses to which it is subject, or the amount of indebtedness of the husband. The income is found to be about \$440 per month, and the value of the property about \$50,700. The answer does not state definitely the amount of expenses to which the income is subject, but only that, after paying interest and other expenses, the income will "furnish very little towards either the support of himself or his family." It states an indebtedness of \$10,007, but admits a valuation of property in New York to the amount of \$45,000, with gross income to the amount of \$287 per month. Under these circumstances, it cannot be said that the omission to find as a fact the existence of the indebtedness stated in the answer is material. The trial court evidently did not so regard it. The statements in the answer as to the expenses of the property are too vague to be the subject of a finding.

A more serious question is the necessity of the appointment of a receiver in the case. Section 140 of the Civil Code provides that the court may require the husband to give reasonable security for making any payments required, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case. It is charged in the complaint, and not denied in the answer, that the husband has endeavored, and is endeavoring, to sell and transfer or encumber his property, and thereby to deprive the wife of a support. The defendant is a resident of the state of New York. Where so much is necessarily committed to the discretion of the trial court, depending in each case upon its estimate of the character of the parties, as exhibited in matters too numerous or too trivial to go into the record, we cannot

say that there was an abuse of discretion in this case in the appointment of a receiver. That the defendant was a nonresident of this state, attached to his residence in New York by large holdings of property, is a strong circumstance tending to make a receivership the most natural as well as the most effective method of enforcing compliance with the order for maintenance. And the severity of the method devised is mitigated by the fact that he did not, as from his nonresidence he could not, give personal attention to his properties in this state, and left them to the management of agents. Under the management of a receiver, judiciously appointed, and subject to the control of the court, the properties may be well managed, and the rights of both parties protected. These considerations probably tended to influence the judgment of the court below. I advise that the judgment and the order denying motion for new trial, and the order appointing a receiver, be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and the order denying motion for new trial, and the order appointing a receiver, are affirmed.

123 Cal. 657

BRIGGS et al. v. BREEN et al. (S. F. 1,076.) 1  
(Supreme Court of California. March 6,  
1899.)

EXECUTORS—LIABILITY—ATTORNEY'S FEES—ALLOWANCE—CONCLUSIVENESS—PARTIES TO ACTIONS—JOINDER.

1. In the absence of an agreement that attorneys for an executor shall look for their fees to the estate or an allowance therefrom by the court, the executor is personally liable for their reasonable compensation.

2. Code Civ. Proc. § 1616, provides that an executor shall be allowed reasonable fees paid to attorneys, etc. Section 1635 provides that "any person interested in the estate" may contest an executor's account. Section 1637 provides that the settlement of the account is conclusive against "all persons in any way interested in the estate." *Held*, that an executor's attorney is not "interested in the estate," so as to be estopped to claim a greater fee than is allowed the executor.

3. The fact that the attorney files exceptions to the executor's account does not render the court's allowance binding on him.

4. Under Code Civ. Proc. § 379, providing that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein," an administrator of a deceased promisor may be joined with survivors who were jointly liable with decedent to plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county.

Action by N. C. Briggs and another against James F. Breen and another. From a judgment for plaintiffs for a less sum than that demanded, they appeal. Reversed.

Scott & Dooling, for appellants. S. F. Lieb and B. D. Sargent, for respondents.

<sup>1</sup> Affirmed in bank. See 56 Pac. 886.

BRITT, C. Action for the alleged value of professional services rendered by plaintiffs as attorneys at law (they being partners in practice) to the defendant James F. Breen, and one John R. Breen, who were executors of the last will of a certain decedent. It appears that the executors employed plaintiffs to conduct the ordinary legal proceedings for the administration of the testator's estate and in the defense of certain actions brought against the executors in their official character. Such employment terminated upon the death of said John R. Breen, which occurred August 31, 1894. On July 12, 1895, the surviving executor, James F. Breen, filed in court his final account of the administration. Therein he prayed a credit of \$1,250 for the payment of plaintiffs, and alleged that sum to be the reasonable value of their services. Before the account was filed, plaintiffs notified the executor that they were dissatisfied with this sum; and after the filing thereof they filed written exception to the same, stating that said sum "is not reasonable compensation for the services of said attorneys, and they ask leave to submit evidence to the court of the value of said services, to the end that said attorneys have from said estate reasonable compensation." Upon the hearing of said account the plaintiffs were, it seems, present in court, but declined to introduce any evidence touching the item aforesaid, and the account was settled and allowed as rendered. Afterwards plaintiffs brought this action. The administrator of the estate of John R. Breen, the deceased executor, is joined as a defendant with James F. Breen, plaintiffs having first presented their claim to him for allowance as a debt of said John R. Breen, and the claim having been rejected.

The matters above stated appear from the findings of the court or the admissions of the pleadings. The court further found that no agreement or understanding was ever had between plaintiffs and the executors as to the amount of compensation for the services of plaintiffs, nor the source from which payment was to be made, nor that they should receive such sum as the court should fix on settlement of the accounts of the executors; also that the reasonable value of said services was the sum of \$1,800; but the court held that, "by reason of the conclusiveness on plaintiffs of the allowance in the probate court,"—meaning the superior court sitting in probate in the matter of said final account,—they were entitled to judgment for the sum of \$1,250 only, which was entered accordingly.

1. Since there was no agreement that the attorneys should look for their fees to the estate or an allowance therefrom by the court, it follows that the executors were liable personally to them for their reasonable compensation. It was so decided in *Dwinelle v. Henriquez*, 1 Cal. 387, and has been more or less distinctly asserted in several cases since.

*Gurnee v. Maloney*, 38 Cal. 85; *In re Page's Estate*, 57 Cal. 241; *In re Ogier's Estate*, 101 Cal. 385, 35 Pac. 900; *In re Kasson's Estate*, 119 Cal. 489, 51 Pac. 706. The law of this state is not peculiar in this regard. "It is a well-recognized principle," says Judge Woerner, "that for liabilities contracted by the personal representative, although for the benefit and in the interest and behalf of the estate, it is not liable to creditors. \* \* \* It follows that the estate is not liable to an attorney for his services at the instance of an executor or administrator, but that the latter is himself liable in a suit by the attorney." 2 Woerner, *Adm'n*, § 356. And to the same effect, among other cases, are *Mygatt v. Wilcox*, 45 N. Y. 306; *Bowman v. Tallman*, 2 Rob. (N. Y.) 385; *Parker v. Day*, 155 N. Y. 383. 49 N. E. 1046; *Thomas v. Moore*, 52 Ohio St. 200, 39 N. E. 803; *Barker v. Kunkel*, 10 Ill. App. 407.

2. Section 1635, Code Civ. Proc., relating to the accounting of executors and administrators, provides that "any person interested in the estate" may contest the account on the hearing thereof; and section 1637, following, provides that "the settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate," with a saving in favor of persons under legal disability. Defendants urge that plaintiffs were persons "interested in the estate," within the meaning of these sections, and are, in virtue of the same, estopped to claim more than was allowed to the executor for their compensation on settlement of his final account. We cannot agree with defendants. The law being that the estate is not liable to the attorney, it must be also that the attorney is not interested in the estate. This court has often decided that the allowance from the estate for attorney's fees, under section 1616, Code Civ. Proc., must be made to the executor or administrator, and not to the attorney (*In re Levinson's Estate*, 108 Cal. 458, 41 Pac. 483, and 42 Pac. 479, and cases cited); which construction of the statute is reasonable, in view of the rule that the representative, and not the estate, is liable to the attorney; but that could scarcely be said if the attorney is really a person interested in the estate to the amount of his fees. It is hard to see how the court could compel the representative to take more from the estate for payment of his attorneys than he has himself claimed for that purpose in his account. Unless the attorney has agreed to accept for his fees the allowance made by the court to indemnify the executor or administrator in that behalf, there seems as little reason for saying that he is concluded by the order making such allowance as that persons having claims against the representative founded on the latter's tort or breach of contract, committed while acting for the estate, can be affected by the settlement of his accounts. In the absence of statute, the court in probate cannot adjudicate between such



persons and the executor or administrator. 2 Woerner, Adm'n, §§ 152, 356. See *Eustace v. Jahns*, 38 Cal. 3; *In re Burdick's Estate*, 112 Cal. 387, 44 Pac. 734; *Sterrett v. Barker*, 119 Cal. 492, 51 Pac. 695; *Worrall v. Harford*, 8 Ves. 4; *Johnson v. Leman*, 131 Ill. 609, 23 N. E. 435.

The circumstance that plaintiffs filed exceptions to the executor's account is unimportant. If they were interested in the estate, the order of the court (made on due notice) concludes them, whether they contested the account or not. If they were not interested, they had no right to contest it, and the filing of exceptions could not give them an interest. The fact of such appearance may have been evidence bearing on the question whether they expected to look to the estate for their fees, —a question settled, however, by the findings in the negative.

We are not insensible to the force of defendants' argument ab inconvenienti. It is said that, if the representative pays the attorney in advance of settlement, he may find that the court will consider the charge too great, and refuse him credit for the payment, as happened in *Re Gasq's Estate*, 42 Cal. 288; while, if he first obtains settlement of his account on his own estimate of what is a proper charge, the attorney may refuse to accept it, and sue him for a larger sum, as in the case here. The supposed perils of the representative are more apparent than real. He will, we apprehend, commonly be able to procure competent counsel, who will agree to render their services for such compensation as the court may allow to him for that purpose from the estate. It is seldom that the superior courts have been found niggardly in that particular. See the remarks of this court in *Re Byrne's Estate* (Cal.) 54 Pac. 957, 1015. Again, the attorney is entitled, in any event, to only reasonable compensation. It will probably not often occur that the estimate of a jury in an action by the attorney against the representative will be higher than that of the court to which the account is rendered.

Defendants rely on *In re Courts' Estate*, 87 Cal. 480, 25 Pac. 685. In that case an order, made on settlement of an account, determining that certain claims for services rendered to the executrix were legal charges against the estate, was held conclusive on the executrix and those interested in the estate. If there is anything in the opinion there which would justify the inference that persons not so interested might be compelled to litigate their claims against the executrix upon hearing of her account, it is dictum merely.

3. It is claimed by respondents that the administrator of J. R. Breen is improperly joined as a defendant with James F. Breen. There were, at common law, valid formal reasons against such joinder, and they were allowed effect in two early cases in this state. *May v. Hanson*, 6 Cal. 642; *Humphreys v. Crane*, 5 Cal. 173. But section

379, Code Civ. Proc., provides that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." The language is certainly broad enough to allow the joinder of the administrator of a deceased debtor or promisor with survivors who were jointly liable with him to the plaintiff; and such is the later doctrine of this court, to which we adhere. *Lawrence v. Doolan*, 68 Cal. 309, 5 Pac. 484, and 9 Pac. 159; compare *Bank v. Howland*, 42 Cal. 129; *Fisher v. Hopkins*, 4 Wyo. 379, 34 Pac. 899; *Bliss*, Code Pl. § 107; *Pom. Rem.* §§ 302-304. The objection of misjoinder must be overruled.

Defendants were liable for the whole value of the services of plaintiffs, as found by the court; but it appears from the record, and from the admissions in the briefs of plaintiffs, that they have received on account of their demand the sum of \$1,250, paid from the funds of the estate subsequently to the commencement of the action. The judgment should therefore be reversed, with directions to the court below to render judgment for plaintiffs for the sum of \$550, the excess of the value of their services as found by the court above the payment aforesaid, with interest from date of the original judgment, and for costs, judgment to be against James F. Breen personally; and that the administrator of J. R. Breen pay in due course of administration.

We concur: GRAY, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to the court below to render judgment for plaintiffs as in said opinion recommended.

124 Cal. 36

SHAFFER v. WILLIS et al. (S. F. 817.)

(Supreme Court of California. March 16, 1899.)

NOTES—OWNERSHIP—FINDINGS—TENDER—REASON FOR REFUSAL—NEW TRIAL—APPEAL.

1. An allegation in the complaint, not denied in the answer, that defendants made the note sued on, and delivered it to plaintiff as payee,—the note being produced at the trial and offered in evidence by plaintiff without objection,—supports a finding that plaintiff was the owner of the note at the time of the trial.

2. In an action on a note, defendants alleged a tender of the amount claimed by them to be due. The court found that the allegations of the answer were untrue, "save and except as to the second allegation, \* \* \* wherein a tender of \$60 is pleaded, \* \* \* but \* \* \* that \$60 was and is wholly insufficient in amount" to pay the note sued on. Held equivalent to a finding that a tender was made which was insufficient in amount.

3. A note, on its face, amounted to \$318. The maker deducted the amount of certain warrants which he claimed should be credited on the note, and made a tender of the balance,

which was \$60. The payee's agent stated that he could not "receive the offer, and would refuse the tender of \$60." Held to show a refusal of the tender because of its insufficiency.

4. Where a motion for a new trial is based on the ground of newly-discovered evidence, and every material fact is contradicted by counter affidavits, the trial court's discretion in refusing a new trial will not be interfered with.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county.

Action by W. H. Shafer against V. I. Willis and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Horace Hawes, for appellants. W. B. Good and Meux & Johnston, for respondent.

CHIPMAN, C. Action on promissory note. Plaintiff had judgment, from which, and from an order denying a motion for a new trial, defendants appeal.

The complaint asks judgment for \$318.22, balance due of the principal and interest of the note in suit, and \$50 as attorney's fees. The answer denied that no payments had been made except as admitted in the complaint, and alleged in addition thereto a payment, not credited, of \$244.90, in the form of certain Selma irrigation district warrants. The answer also alleged the tender of \$60 before suit was commenced, in payment of the balance due on said note, and that, on the day of the said tender, defendants deposited said sum, in the name of plaintiff, in the Bank of Selma,—a bank of deposit and good repute,—and so notified plaintiff. The pleadings are verified. The cause was tried by the court without a jury, and as facts the court found that plaintiff was the owner of the note; that all the allegations of the complaint are true, and that there was an unpaid balance of \$318.22 due on said note; that the allegations of the answer are untrue, "except as to the second allegation in said answer contained, wherein a tender of the sum of sixty dollars is pleaded and properly set forth as having been made by defendants to plaintiff, on or about August 12, 1896, but from the undisputed evidence the court further finds that the said sum of sixty dollars was and is wholly insufficient in amount to operate as a payment of the promissory note mentioned in plaintiff's complaint."

1. Appellants contend that the findings are not supported by the evidence: (1) That plaintiff was the owner of the note at the date of the trial; and (2) that no payments on the note had been made, except as admitted in the complaint. It was alleged in the complaint, and not denied in the answer, that defendants made the note, and delivered the same to plaintiff as payee. This note was produced at the trial and offered in evidence by plaintiff without objection. This was sufficient evidence to support the finding of ownership. The more seriously disputed finding of fact relates to the agreement of the parties when the Selma irrigation warrants were delivered to plaintiff. Appellants claim that

they were delivered as payment, and should have been credited on the note, which would have left a balance due of \$60, and that they tendered payment of this balance before suit was brought. As to the purpose in delivering these warrants, the evidence is conflicting. Plaintiff testified that he received them "as collateral on the note, to be collected and applied on the note." There were two warrants,—one for \$10, and one for \$234.90. Plaintiff, in his testimony, explains the circumstances under which he received these warrants, and he testifies that he did not receive them as payment on the note. Defendants testified that they understood the delivery of the warrants to be a payment as money, at their face value. Without quoting from the evidence, I think it may be said that defendants clearly contradict the plaintiff as to the understanding in this matter. As there is a direct conflict in the evidence, it is beyond the province of this court to reconcile it.

2. On August 12, 1896, plaintiff, by his attorney, Mr. Good, presented the note for payment, amounting then to \$318. Defendant Mr. Willis deducted the amount of the warrants, leaving a balance, as defendant figured it, of about \$60, and offered to pay that in cash. This money was placed on deposit in a bank of good repute for the use of plaintiff. Appellants assign error because they alleged a tender of \$60, and the court failed to make a finding upon the issue thus presented. The court did not find distinctly whether a tender in fact was or was not made, but it did so find inferentially; for it found that the allegations of the answer were untrue, "save and except as to the second allegation in said answer contained, wherein a tender of a sum of sixty dollars is pleaded and properly set forth as having been made by defendants to plaintiff on or about August 12, 1896, but from the undisputed evidence the court finds that the said sum of sixty dollars was and is wholly insufficient in amount to operate as a payment of the promissory note mentioned in plaintiff's complaint." This we think was tantamount to a finding that a tender was made which was insufficient in amount. What took place at the time the tender was made was testified to by Mr. Good as follows: "On or about August 12th I presented this matter to Mr. Willis for payment. It amounted then to some three hundred and eighteen dollars, and he deducted the face of the warrant from the amount, and it amounted to something like sixty dollars, as the difference. He said he would tender me the amount of the difference, which was sixty dollars,—he made it,—but which was a few cents more than the difference, and offered to pay me that in cash then and there. I told him we were unable to receive the offer, and would refuse the tender of sixty dollars." We think it fairly inferable from this testimony that the tender was refused because insufficient. The purpose of the statute (Code Civ. Proc. § 2076) which requires the objection to be stat-



ed, if it is to the amount, is to inform the debtor of the amount claimed by the creditor, so that the former may have the opportunity of meeting the demand, if he should wish to do so. Here the amount of the demand was made known by the agent of the creditor, and the debtor clearly understood it, because he made his tender of that amount, less what he claimed should be deducted on account of the warrants. The refusal to accept the amount was a refusal of the tender as made, and, as the evidence shows that it was much less than the amount found to be due, we think the findings sufficient.

3. The motion for new trial was based in part upon the ground of newly-discovered evidence. This evidence is set forth in three separate affidavits. One Elliott deposed that he was secretary of the Selma irrigation district in February, 1896. At a meeting of the directors held early in the month, plaintiff came to him at that meeting, and asked about a warrant which the board had allowed and delivered to defendant Willis, and stated to affiant that Willis had promised him the warrant, or a part of it, as payment on a note of Willis held by him (plaintiff). One Gower, who was president of the board, made a similar affidavit. One Walton deposed that in March, 1896, "plaintiff stated that he was interested in the Willis warrant; that Mr. Willis owed him, and that, if he had not received this warrant as a payment, he would have sued him; \* \* \* that he thought he would get the money sooner that way than from Mr. Willis." Defendants deposed that they did not know these facts until after the trial, and that they could not have discovered or produced this evidence by any reasonable means. Plaintiff, by counter affidavit, contradicted the facts set forth in the affidavits used by defendants at the hearing of the motion. Elliott and Gower deposed as to a conversation which occurred before plaintiff received the warrants, and when the defendants were not present. The terms of the transfer depended on what took place at the time the warrants were delivered, and not upon anything the transferee may have said at some time previous, and to third persons. It is claimed that the statements of Gower and Elliott would have been admissible to contradict plaintiff's evidence as to what afterwards took place between plaintiff and defendants; but, whether admissible or not, the evidence, as admissions, the court below might well have regarded as overcome by the denial of plaintiff that he made them. Walton's statement was contradicted by plaintiff's affidavit, and, besides, in its essential feature, does not present such unequivocal facts as would justify this court in reversing the order denying the motion. The affidavit does not clearly charge that plaintiff admitted that he held the warrants as payment, and plaintiff denies that he made any statement of the kind affirmed by

Walton. Where the motion for new trial is based on the ground of newly-discovered evidence, and every material fact is contradicted by counter affidavits, the discretion of the court in refusing a new trial will not be interfered with on appeal. *People v. Mesa*, 93 Cal. 580, 29 Pac. 116; *Doyle v. Sturla*, 38 Cal. 457; *Merk v. Gelzhauser*, 50 Cal. 631. Furthermore, the newly-discovered evidence was cumulative, and was not so conclusive in its character as to raise a reasonable presumption that it would change the result. The judgment and order should be affirmed.

We concur: HAYNES, C.; BRITT, C.

McFARLAND, J. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

TEMPLE, J. I concur in the judgment and in the opinion, except that I do not agree that when a motion for a new trial is based on the ground of newly-discovered evidence, and every material fact in the affidavits is controverted by counter affidavits, the discretion of the trial court may not be interfered with. The authorities cited do not sustain the proposition, and I think the proposition cannot be sustained on principle, or upon a proper construction of the statute. Section 657, Code Civ. Proc., provides that a new trial may (must) be granted "for any of the following causes materially affecting the substantial rights of such party: \* \* \*

(4) Newly-discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." Now, if a showing is made which satisfies the statute, the party is entitled to a new trial in court according to the law regulating such trials. The court cannot, in lieu of such new trial, determine the issue of fact on affidavits, and find that, though such evidence, material under the rigid rules especially applied to these motions, and which, if true, would probably require a different judgment, can be produced, nevertheless the opposing party can refute the new testimony by other evidence, also new. This would be to retry the issue on affidavits, and to deny the trial according to established procedure, such as the statutes provide the moving party who makes such a case shall have. The newly-discovered evidence here should, I think, have been held not to be material in the sense required in these motions; but, if it was material, it consisted of proof of certain statements alleged to have been made by plaintiff. Affidavits by three witnesses were submitted as to statements made by plaintiff. The counter affidavit is simply and only that of plaintiff himself. I do not think it can be held to be a counter showing at all; but, waiving that, the issue of fact could not be properly determined by the court upon these affidavits. The authorities

ited do not sustain the proposition. They are all of a piece, and in each, after giving sufficient reason for denying the motion, it is added, "Besides, every material fact was contradicted by counter affidavits." The decision is not based upon that fact, nor is there an intimation that any importance is attached to the counter showing. On many points, no doubt, the affidavits of the moving party may properly be overcome by counter affidavits. As to the use of due diligence, or that the evidence is newly discovered, or can be had, no doubt affidavits of the proposed witnesses might be read to show that they would not testify as represented. In short, any pertinent matter may then be tried, except the issue of fact to which the newly-discovered evidence is addressed. That issue cannot be then tried, although the court may examine the proposed testimony, and compare it with the case already made upon the trial, to determine its relevancy and importance; and if it determines that the evidence, if true, would most probably not change the result, the motion should be denied. In this case I think the court must have so determined, and upon that ground I concur in the conclusion.

I concur: HENSHAW, J.

6 Cal. Unrep. 254

**BAYLEY v. EMPLOYERS' LIABILITY ASSUR. CORP.** (S. F. 857.)

(Supreme Court of California. March 18, 1899.)

**APPEAL—ACCIDENT INSURANCE—FALSE STATEMENTS—WAIVER—WARRANTIES.**

1. A finding by the jury on conflicting evidence will not be disturbed.

2. The fact that an accident insurer had waived a false statement that the insured had never before received compensation for any accident, in so far as it had paid him therefor in 1892, and knew of certain other like payments by third persons in 1892, does not waive the falsity of the statement in that prior compensations for accidents had been paid the insured in 1886, of which the insurer had no knowledge.

3. The objection of immateriality cannot be urged against a warranty in a policy so as to avoid the effect of a breach thereof.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by G. B. Bayley against the Employers' Liability Assurance Corporation. From a judgment for plaintiff, defendant appeals. Reversed.

Van Ness & Redman, for appellant. Stanley, Hayes, McEnerney & Bradley, for respondent.

**PER CURIAM.** This is an action upon a policy of accident insurance. The verdict and judgment were for plaintiff, and defendant appeals from the judgment and order denying a new trial.

The assured, George H. Bayley, was killed

by an accident, and this action is brought by his widow, Gertrude B. Bayley, who was the person in whose favor the policy ran. At the trial all of the defenses set up in the answer were waived, except two: (1) That the insured represented in his written application for the policy that he had never proposed and been declined insurance by an accident insurance company, and that this was not true; and (2) that he represented in said application that he had never received compensation for any accident, whereas he had, in November, 1892, and also in the year 1886, received compensation from other accident insurance companies on account of injuries he had sustained by previous accidents.

As to the first defense, it is sufficient to say that the evidence as to that defense was materially conflicting, and that, therefore, the finding of the jury upon the issue cannot be here disturbed.

2. The application upon which the policy was issued contained the following: "Said policy to be based upon the following statement of facts, which are to be considered as warranties." The fourteenth statement in the application is as follows: "I have no other accident insurance covering weekly indemnity except as herein stated: Aetna, ten thousand dollars." The fifteenth statement is as follows: "I have never received compensation for any accident except as herein stated;" and there was no statement as to any compensation having been received; and the statement, as thus expressed, was clearly that he never had received any prior compensation for an accident. But it was proven beyond doubt that he had received compensation for an accident in 1892, and also in 1886, and therefore the statement was false. This false statement, being a warranty, relieved the appellant from any liability on the policy, unless certain other principles of law intervene to prevent that result. Respondent contends that at the time the statement was made the appellant knew that respondent had before that received certain compensations for an accident, and that the appellant, having received the premium and issued the policy with a knowledge that the statement was false, thereby waived it. There is no doubt that the principle contended for by respondent as to the waiver is well established. In *Menk v. Insurance Co.*, 76 Cal. 53, 14 Pac. 839, and 18 Pac. 117, Mr. Justice Temple, delivering the opinion of the court in bank, said: "Nor would misstatements be fatal to the claim of plaintiff which the agent well knew to be false when he made out the application, received the money of the applicant, and issued the policy. The tendency of the decisions is, plainly, to hold all those conditions waived which, to the knowledge of the agent, would make the policy void as soon as delivered; otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud. *Kruger v. Insurance Co.*, 72 Cal. 91, 13 Pac. 156."



In *Bacon on Benefit Societies and Life Insurance* (volume 2, par. 427) it is said: "And if, when the insurance company issues the policy, it knows that certain answers in the application are falsely answered, it waives the right to object by such issue;" and the text is amply sustained by the authorities. See *Van Schoick v. Insurance Co.*, 68 N. Y. 434; *Gray v. Association*, 111 Ind. 531, 11 N. E. 477; *Schwarzbach v. Protective Union*, 25 W. Va. 622. This principle might be successfully invoked by respondent so far as the compensations for a former accident in 1892 are concerned, for it appeared that the appellant itself had paid some of those compensations, and that it also knew that other compensations were paid in that year by one or two other companies. And it might well be held to have waived the fact that respondent had received compensations for the accident which occurred in 1892. But respondent had also received compensations for an accident which occurred in 1886, of which appellant had no knowledge whatever; and there is no principle upon which it can be held that a waiver of compensation for one particular accident, of which the appellant had knowledge, was also a waiver of the fact of prior compensations for accidents of which appellant had no knowledge. Appellant might well have overlooked the circumstance that respondent had been once before injured, and had received compensation for an accident, while the fact that on other occasions, or even upon one other occasion, he had received compensations for accidents upon one or more other policies might have been considered by the appellant as a very material objection to him as an applicant for insurance. Moreover, the statement was a warranty, and the objection of immateriality cannot be urged against a warranty, unless in very exceptional instances; and, although a warranty may be waived, there was no waiver in the case at bar except as to the compensations received in 1892. The judgment and order denying a new trial are reversed, and the cause remanded for a new trial.

124 Cal. 32

## PEOPLE v. BIRD. (Cr. 480.)

(Supreme Court of California. March 15, 1899.)

FORGERY—EVIDENCE—OPINIONS—OTHER CRIMES—WITNESSES—EXAMINATION—HOSTILITY.

1. On a trial for forging a check, evidence that other checks are forgeries is not admissible to prove the *corpus delicti*, but only—after that has been established—to show guilty intent.

2. On a trial for forging a check, the burden of showing guilty knowledge of defendant as to other forged checks in evidence is on the state, and is not sustained by proof that the other checks were forged, and that prosecutor believes that defendant forged them.

3. On a trial for forging G.'s name to a check, evidence that, long after defendant's arrest, G. was handed a blank check, to which his name

appeared to have been signed, and which was found in a desk "said" to be the one occupied by defendant, was incompetent, in the absence of other evidence connecting defendant with the blank check or the desk.

4. On a trial for forgery, whether a witness shall point out, on enlarged photographs, differences between genuine signatures and alleged forgeries thereof, is within the discretion of the court.

5. A witness may state the grounds of an opinion to which he has testified.

6. Though it already appears that a prosecuting witness is hostile to defendant, the latter may prove that such witness has tried to persuade a surety on the bail bond to withdraw.

Department 2. Appeal from superior court, Los Angeles county.

R. A. Bird was convicted of the forgery of a check, and from a judgment on the verdict, and from a refusal of a new trial, he appeals. Reversed.

C. W. Pendleton, E. A. Meserve, and J. L. Copeland, for appellant. Atty. Gen. Fitzgerald, for the People.

TEMPLE, J. Defendant appeals from a judgment upon a verdict convicting him of forgery, and from a refusal of a new trial. Defendant was employed as clerk by G. J. Griffith, and is prosecuted for forging his employer's name to a check on the First National Bank of Los Angeles for \$200, with intent to defraud Griffith and the bank. It was proved that defendant presented the check to the bank, and obtained the money thereon; and Griffith testified that he (the witness) did not draw the check, and had not authorized defendant to do so, and, further, that the money drawn was not used by him (Griffith), or for his benefit. On the other hand, Grove, the bank teller who paid the check, and Mr. Hammond, the assistant cashier of the bank, both testified that in their opinion the check was genuine. There being, then, a conflict as to whether the check was genuine or not, the prosecution introduced a number of checks, drawn in the name of Griffith on the same bank, which he swore were forgeries, and had been paid, to his damage in the sum of about \$1,250. There was no evidence whatever tending to connect Bird with these forgeries, if they were such. A suspicion may have been suggested that, as Bird had drawn the money upon one check alleged to have been forged, he probably was guilty of the other forgeries, and had been systematically committing such forgeries. As he was the confidential clerk of the prosecuting witness, suspicion would more naturally attach to him. If proof had been forthcoming to show the connection of defendant with these other checks which were said to have been forged, still such coincidence is not admissible to prove the *corpus delicti*, but only after that has been established to show guilty intent. And the prosecution assumed the same burden of proof as to each of the checks introduced to show guilty knowledge as in regard to the check for which he is being tried. *People v. Whiteman*,

114 Cal. 338, 46 Pac. 99. As to some of these checks, Griffith testified that he believed the signature to be Bird's signature; meaning, perhaps, that he believed that Bird signed his (the witness') name. He does not say that he knew Bird's handwriting, or why he believed that Bird wrote it. Indeed, there is much to show that his opinion resulted simply from the fact that he did not recollect drawing the check, and thought the money had not been used in his business. There can be no doubt that the evidence was improperly admitted.

Griffith was allowed to testify that he had been handed a blank check, to which his name appeared to have been signed, which blank he immediately tore up and threw into the waste basket. Upon objection being made, the district attorney stated that he would follow it by testimony showing where it was found. This occurrence was long after defendant had been arrested, and it was not proposed to show that Griffith's name had been signed to the blank by Bird, or that Bird had ever seen it, otherwise than by showing where it was found. Afterwards one Hoyle was sworn, and testified, under objection, that he examined the contents of a square-top desk "said" to be the desk occupied by Bird, and found among them the blank check in question. When he found it, or in whose custody the desk had been, or whether others occupied it as well as Bird, if it can be assumed that Bird did occupy it, was not shown. There was no other testimony connecting Bird with the blank or with the desk. The evidence was clearly incompetent.

There are some other alleged errors, but of less consequence than those already alluded to, and which do not call for extended notice. I think it was a matter within the discretion of the court whether Griffith should have been required to point out upon the enlarged photographs the difference between the signatures alleged to have been forged and those admitted to be genuine. The court also properly excluded evidence as to what Hammond said to Griffith as to one of the checks, but I think that Gibson should have been permitted to state the grounds of an opinion to which he had testified, and am unable to appreciate the objection that it was argumentative; also, that the defense should have been permitted to prove that Griffith, the prosecuting witness, had endeavored to persuade one of the sureties on defendant's bail bond to withdraw. The fact that it already appeared that Griffith was hostile did not supply the place of the proffered testimony. If true, such evidence would tend to establish a persecuting spirit, and a degree of hostility which, in the opinion of the jury, might affect the value of his evidence. The judgment and order are reversed, and a new trial ordered.

We concur: HENSHAW, J.; McFARLAND, J.

124 Cal. 43

**SUPREME COUNCIL AMERICAN LEGION  
OF HONOR v. GEHRENBECK  
et al. (S. F. 1,484.)<sup>1</sup>**

(Supreme Court of California. March 18, 1899.)

**BENEFICIAL ASSOCIATIONS—INTEREST OF BENEFICIARY—DESCENT.**

Under a by-law of a beneficial society, providing that if all the beneficiaries selected by a member die before him, and he leaves no widow, the benefit shall go to his heirs, where a member's wife, who is named in the certificate as beneficiary, dies before her husband, his heirs are entitled to the benefit, the wife's interest not being such as could descend to her heirs.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by the Supreme Council American Legion of Honor against Albrecht Gehrenbeck and others. From the judgment rendered, Jacob Kornahrens, administrator of the estate of Margaretha Gehrenbeck, deceased, appeals. Affirmed.

B. McFadden, for appellant. Loewy & Gutsch, for respondents.

GRAY, C. The plaintiff, a mutual benefit association, issued a beneficiary certificate to one of its members or companions named Gehrenbeck, and his wife, Margaretha, was named therein as the beneficiary. The wife died some months prior to the death of Gehrenbeck, but no other beneficiary had been named by Gehrenbeck at the time of his death. The administrator of the deceased wife's estate claims that the \$3,000 due on the certificate became a part of her estate on the death of her husband; and the children of the deceased husband by a former wife claim that it should go to them under a by-law of the plaintiff. The contest is between the defendants, they having interpleaded, and the plaintiff having paid the money into court. The children of the deceased husband had judgment, and the administrator of the deceased wife's estate appeals.

The beneficiary named in the certificate had no interest or property therein that her heirs could succeed to. Her interest was "a mere expectancy of an incomplete gift." It was revocable at the will of the insured, and could not ripen into a right until his death. *Hoelt v. Supreme Lodge*, 113 Cal. 91, 45 Pac. 185; *Jory v. Supreme Council*, 105 Cal. 20, 38 Pac. 524; *Hellenberg v. District No. 1, I. O. B. B.*, 94 N. Y. 580. Her right under the certificate was not unlike that of an heir apparent, and that "is not to be deemed an interest of any kind." Civ. Code, § 700. The beneficiary having died before any right had become vested in her, this mere expectancy died with her, so there was nothing left for her heirs to succeed to. The by-laws of plaintiff provide as follows: "(128) In the event of the death of all the beneficiaries selected by the member before

<sup>1</sup> Rehearing denied April 17, 1899.



the decease of such member, if no other or further disposition thereof be made in accordance with the provisions of these by-laws, the benefit shall be paid to the widow. If none, then to the heirs of the deceased member; and, if no person or persons shall be entitled to receive such benefit, it shall revert to the benefit fund." Under this by-law the children and heirs of the deceased, Gehrenbeck, are the beneficiaries of the certificate, and entitled to the money paid into court. These views of the case dispose of the other objections urged by appellant. For these reasons, I advise that the judgment be affirmed.

We concur: BRITT, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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124 Cal. 164

**BREEDLOVE v. NORWICH UNION FIRE  
INS. SOC. (L. A. 360.)**

(Supreme Court of California. March 29, 1899.)

INSURANCE—SOLE OWNERSHIP—WAIVER OF CON-  
DITIONS—APPEAL—REVIEW—PLEADING.

1. A mortgagor conveyed land, but the deed was not recorded until foreclosure suit was begun. The mortgage was foreclosed, and the property sold. *Held*, that the grantee of the deed was not the sole and unconditional owner of the property within the terms of the policy issued to her pending such foreclosure.



2. A mortgagor conveyed mortgaged property to his mother, which deed she did not record. Another son was the agent of defendant insurance company, and, with knowledge of the condition of his mother's title, issued a policy to her on an application in which she stated that she was the sole and unconditional owner of the property. The mortgage was foreclosed, and at the time the policy was obtained the redemption had but 18 days to run. Ten days thereafter the building was burned. Held that, though there was enough evidence to warrant a trial court in finding against a waiver of the condition as to conditional ownership, his finding of waiver was sufficiently supported by the evidence, so that a verdict for plaintiff will not be set aside.

3. Where, in an action on a policy, plaintiff alleges that she has fulfilled all the conditions on her part to be kept and fulfilled, it was not necessary for her, where the application alleged a sole and unconditional ownership, to allege waiver of such condition, where the evidence showed that the allegation was not true in fact.

4. The act of an agent of an insurance company in issuing a policy on an application alleging unconditional ownership is a waiver of such condition where he knows at the time that the property is mortgaged, and that a foreclosure suit is pending.

In bank. Affirmed.

For opinion in division, see 54 Pac. 93.

HENSHAW, J. This is an action to recover upon an insurance policy. George L. Bush had been the owner of the property. He executed a mortgage upon it to one Cowgill. Thereafter he conveyed the property to the plaintiff, who is his mother. An action to foreclose the mortgage was commenced against the mortgagor on October 3, 1894, and judgment therein was rendered upon December 22, 1894. Under this judgment the property was sold to Cowgill upon January 31, 1895. The plaintiff did not record conveyance from her son until October 13, 1894, and, consequently, was not made a party to the foreclosure suit. After the sale under the judgment, and 18 days before the expiration of the time within which she could redeem, she applied for and obtained insurance in the sum of \$2,500 upon a warehouse located upon the property. Ten days after the insurance of the property, and eight days before the time for redemption had expired, the warehouse was destroyed by fire. Plaintiff never redeemed. The policy contained the following clause: "This entire policy shall be void if the interest of the insured in the property be not truly stated herein.

\* \* \* This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void \* \* \* if the interest of the insured be other than unconditional and sole ownership." The character of plaintiff's interest, as stated in the policy, was, "Mary Breedlove, two thousand five hundred dollars on her two-story frame, metal-roof building." In her complaint plaintiff averred that she was the unconditional and sole owner of the building insured. She further alleged that all the conditions of the policy upon her

part to be kept and performed were duly kept and performed. In answer, defendant denied the allegation of the complaint as to plaintiff's sole and unconditional ownership, and by way of separate defense averred that it was stipulated in the policy that it should be void if the interest of the insured was not truly stated therein; that the interest of the insured was stated to be the sole and unconditional ownership of the property; that the statement was not true, and that the falsity of the warranty vitiated the policy. Under these pleadings the trial was had. The court distinctly declined to find whether or not plaintiff was the sole and unconditional owner, but set forth the facts of her title as hereinabove stated, and further found that defendant waived the warranty expressed in the contract by issuing the policy to plaintiff with full knowledge of the condition of her title.

That plaintiff was not the sole and unconditional owner of the property does not admit of debate. It may be conceded that when she took the deed from her son she was such an owner, but she failed to record her deed. The judgment in the foreclosure suit, and all the proceedings therein had, were as conclusive against her as if she had been made a party to the action. Code Civ. Proc. § 726; Daniels v. Henderson, 49 Cal. 245. "Upon a sale of real property the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto." Id. § 700. "If the debtor redeems, the effect of the sale is terminated, and he is restored to his estate." Id. § 703. It is by the foreclosure sale that the title passes. Robinson v. Thornton, 102 Cal. 680, 34 Pac. 120. The sheriff's deed gives no new title. It is merely evidence that the title has become absolute. Duff v. Randall, 116 Cal. 226, 48 Pac. 66. One who fails to record his conveyance from the mortgagor puts himself in position to be deprived of his title by the foreclosure proceedings. If he stands idly by, and permits the action to be prosecuted without intervention upon his part, he is consenting to be represented by his grantor, and the legal effect of the foreclosure sale is to dispose of his title as completely as though he himself were present and litigating. By failing or refusing to record his title, he holds it subject to divestiture under the foreclosure proceeding. It is not that he retains his title, but is estopped from asserting it against the purchaser at the foreclosure sale, or those in privity with him; it is that he has been stripped of title, and left with but a brief right of possession, and an equally brief equity of redemption. But in this case it matters not whether it be said that the plaintiff retained her title, but was estopped from asserting it, or whether it be said, as we have held it to be, that she has been deprived of her title; for in either case the interest which she possessed in the property at the time of her insurance of it was not that of sole and unconditional ownership. If, upon the one hand, she

was divested of title by the foreclosure sale, assuredly she was not the sole and unconditional owner. But if, upon the other hand, she retained her title, but was estopped from asserting it, none the less the result of the foreclosure sale was to create by operation of law a superior and paramount title in the purchaser at that sale. That purchaser became the owner of the property, and from any point of view plaintiff could not have been the unconditional and sole owner. See *Insurance Co. v. Brennan*, 58 Ill. 158. If there was a warranty at all from the insured to the insurer upon this question of unconditional and sole ownership, it is fully established by the use of the possessive pronoun "her" in the sentence above quoted, "Mary Breedlove, two thousand five hundred dollars on her two-story, metal-roof building." *McCormick v. Insurance Co.*, 66 Cal. 363, 5 Pac. 617.

But against this claim of warranty plaintiff contended (and the court so found) that the policy was issued by defendant's authorized agents with full knowledge of the condition of her title, and that thereby the warranty was never given, but its giving was expressly waived. It is with the utmost reluctance that we are compelled to the conclusion that this finding is sufficiently supported by the evidence, for the circumstances are such as gravely discredit the good faith of the transaction, and leave a taint of fraud affecting the whole. The facts in this regard are the following: A son—George Bush—made a deed to the mother which she did not record. Another son,—B. B. Bush,—with John T. Jarvis, together composing the firm of Jarvis & Bush, were the agents of the defendant insurance company. By these agents a policy had been issued to the mortgagee of the property some few months before the date of the issuance of the policy in suit, and had been canceled by this same insurance company as an undesirable risk because of the foreclosure proceedings, and perhaps because of other matters. George Bush, upon behalf of his mother, obtained from B. B. Bush the insurance policy in question when the mother's time for redemption had but 18 days to run, and 10 days thereafter the building was consumed by fire. The mother never redeemed. George Bush testified that he informed his brother, B. B. Bush, of the condition of the mother's title to the property, and that the brother was fully advised upon the matter. B. B. Bush, the agent, shufflingly and evasively testified to the same facts. He was impeached by proof of contradictory statements made by him touching these questions, and it is shown that his associate and partner, Jarvis, knew nothing whatever of the issuance of the policy. There was clearly enough in all this to have warranted the trial judge in discrediting this testimony, and finding against a waiver. He, however, accepted the testimony and found in accordance with it. It

cannot be said, therefore, that the finding is unsupported, and under our rule we are reluctantly compelled to permit it to stand.

But appellant insists that the question of waiver was not in issue, and that, therefore, the court erred in admitting evidence and in finding upon it. Herein it is argued that plaintiff relied for her recovery upon performance of her contract of insurance; that, as appears by that contract, she warranted her title; that, in accordance with this, she affirmatively pleaded that she was the sole and unconditional owner, and that this was the only issue which the court was called upon to decide. It is urged that this pleading comes under the general and well-settled rule that one who pleads performance cannot recover upon proof of waiver or proof of excuse for nonperformance. *Daley v. Russ*, 86 Cal. 114, 24 Pac. 867. This position, however, cannot be maintained. It was incumbent upon the plaintiff to aver a performance of all conditions upon her part to be kept and performed. It was necessary for her, then, to plead performance of all promissory warranties, but it was not necessary for her to plead the truth of an affirmative warranty of title. *Cowan v. Insurance Co.*, 78 Cal. 181, 20 Pac. 408. Still it was obligatory for plaintiff to show by her pleading that she had an insurable interest, and this she undertook to do by the averment touching her title. Defendant, however, by a separate defense, pleaded the warranty as to title, and the falsity of it, in avoidance of its liability. Since this new matter is taken as controverted under our laws of pleading, any defense to it by way of replication was open to plaintiff without pleading, and it was, therefore, permissible for her to show that there never had been such a warranty, and that it had been waived at the time of the delivery of the policy. That the warranty could be waived in the manner indicated, is settled in this state. *Farnum v. Insurance Co.*, 83 Cal. 260, 23 Pac. 869; *Kruger v. Insurance Co.*, 72 Cal. 95, 13 Pac. 156; *West Coast Lumber Co. v. State Inv. & Ins. Co.*, 98 Cal. 502, 33 Pac. 258. And upon the precise question of the waiver of a warranty as to sole and unconditional ownership, see *Long Island Ins. Co. v. Great Western Mfg. Co.* (Kan. App.) 42 Pac. 740. Notwithstanding the fact, then, that plaintiff's interest in the property was not that of a sole and unconditional owner, nevertheless she did have an insurable interest which will support her action. The court found that she was damaged by the fire in the amount of the policy, and gave her judgment accordingly. No exception is taken to this finding, and it is conclusive upon the question in this appeal. For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: McFARLAND, J.; TEMPLE, J.; HARRISON, J.; GAROUTTE, J.



(124 Cal. 74)

**KNARSTON v. MANHATTAN LIFE INS. CO. (S. F. 1,114.)<sup>1</sup>**

(Supreme Court of California. March 20, 1899.)

**LIFE INSURANCE — NONPAYMENT OF PREMIUMS — WAIVER OF FORFEITURE—POWERS OF GENERAL AGENT — SUFFICIENCY OF EVIDENCE.**

1. A general agent may waive a forfeiture for nonpayment of premiums by extending the time of their payment, in the absence of knowledge by insured that the agent has no such authority.

2. Notice to pay a premium due on the 15th of the month was given to insured, but the general agent, on the 16th, extended the time to the 24th. Insured, who did not pay on the 24th, promised to pay in a day or two, but did not pay a collector who called on him on the 27th, and no other efforts were made to collect the premium. The general agent testified that he would have received the premium at any time prior to the death of insured, which occurred on the 2d of the following month. Held sufficient to show a waiver of forfeiture for nonpayment of premium.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Alice L. Knarston against the Manhattan Life Insurance Company. There was a judgment for defendant, and plaintiff appeals. Reversed.

John H. Durst, for appellant. James M. Allen, for respondent.

**GAROUTTE, J.** This is an action brought to recover upon a policy of life insurance. The defense is that the policy had become forfeited prior to the death of the insured by reason of the nonpayment of the fourth semiannual premium. The policy contained the usual forfeiture clause upon failure occurring in the payment of premiums when due. The defendant company, being a New York corporation, was required by the laws of that state to give a written notice to the insured, at a stated time before the premium became due and payable, notifying him of the fact that such premium would become due and payable upon a certain date. The giving of this notice was made by the law of New York a condition precedent to the forfeiture of the policy. It is conceded that in this case the notice was given.

The facts giving rise to this litigation are as follows: The fourth semiannual payment became due upon November 15, 1895. Upon that day the general manager of the company sent his collector to Knarston, the insured, to collect the premium, but Knarston was absent from his place of business. This fact was reported to the general manager, whereupon the collector was again sent, upon November 16th, to collect the premium. One Gilmor, representing Knarston, thereupon went to see Landers, the general manager and agent of the company, in reference to the matter, stating to Landers that Knarston desired an extension until November 24th in which to pay the premium. Landers then stated, in substance, that such extension

would be given. Upon November 25th the collector was again sent to collect the premium, and Knarston thereupon promised to pay it that day or make some arrangement in reference to the matter. Upon November 27th the collector was again sent upon the same errand, but failed to get the money. Nothing further was done, and upon December 2d the insured was killed in a railroad accident.

There are but two important questions involved upon this appeal, the first one being: May a general agent of an insurance company waive the conditions of a policy and extend the time of payment of a premium? This question presents but little difficulty in solution, and must be answered in the affirmative. Bacon on Benefit Societies and Life Insurance (section 426) states the true rule when he says: "A general agent has power, unless specially restricted by limitations and instructions communicated to parties dealing with him, to waive or dispense with any of the conditions of the policy; and the company is liable for all acts done by him in the course of his employment. He may waive conditions either in writing or verbally." It will thus be observed that, whatever the restrictions placed upon the powers of a general agent by the company may be, unless those restrictions are brought home to the insured the company is bound by the acts of the general agent. The waiver of conditions in a policy of life insurance by the general agent is within his apparent scope and authority, and, in the absence of notice to the contrary, parties dealing with such agent have the right to assume that all general powers rest with him. In this country, where these companies carry on business in almost every state in the Union through the instruments of general agents, such of necessity should be the law. We find ample authority to support the text of the author from which we have quoted. *Silverberg v. Insurance Co.*, 67 Cal. 36, 7 Pac. 38; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Insurance Co. v. Hayden's Adm'r*, 90 Ky. 39, 13 S. W. 585; *Murphy v. Insurance Co.*, 3 Baxt. 440; *Palmer v. Insurance Co.*, 84 N. Y. 63. It is said in *Joyce on Insurance* (section 536): "In general it may be stated that it is conceded that a general agent may, in the absence of known limitations on his authority, waive a forfeiture as well as the company." It is apparent from the foregoing authorities that it is not sufficient upon the part of the defendant to show that Landers had no authority to waive conditions in the policy, but to such a showing must be joined the all-important fact that the insured, Knarston, knew of the limitations placed upon Landers' authority. There is an entire absence of any such showing in this record. Indeed, it appears affirmatively that the insured had no such notice.

It is next contended upon the part of the appellant that defendant waived the payment

<sup>1</sup> Rehearing denied April 19, 1899.

of the premium at the time it became due under the policy, and hence there was no forfeiture of the policy at the date of Knarston's death. After careful consideration, we have concluded this contention has full support in the law. The law does not like forfeitures, and evidence tending to show the waiver of a forfeiture will be looked upon with kindly eyes. While the time for payment of premiums is a pure matter of contract between the parties, and such time may not be extended by the courts, still forfeitures will be avoided upon any reasonable showing. The amount of evidence demanded to establish a forfeiture is much greater than is needed to establish a waiver. Again, there need be no direct and specific agreement to waive the forfeiture. A waiver may be implied by the acts and conduct of the parties. Speaking directly to this question, it is said in *Titus v. Insurance Co.*, 81 N. Y. 419: "But it may be asserted broadly that if in any negotiations or transactions with the assured, after knowledge of the forfeiture, it recognized the continued validity of the policy, or does acts based thereon, or required the insured, by virtue thereof, to do some act or incur some trouble or expense, the forfeiture, as matter of law, is waived; and it is now settled in this court, after some differences of opinion, that such a waiver need not be based upon any new agreement or an estoppel." Again, it is said in *Hanley v. Association*, 4 Mo. App. 253: "Regard must be had to the element of reciprocity. If a company keeps things open so that it can at any time claim its rights to premiums, why should not the policy be regarded as existing in respect to its liabilities?"

\* \* \* If the forfeiture, whether full or partial, occurs eo instante, the insurer should act accordingly. If his own acts show that he does not regard it as having so occurred, he cannot complain that those acts are made evidence against him. It is no hardship that he should be made to take one ground or the other." Joyce says: "As a general rule, if the company has treated the policy as valid, and has sought to enforce payment of the premium, or has otherwise, with knowledge, recognized by its own acts or declarations, or those of its agents, the policy as still subsisting, it waives thereby prior forfeitures." Joyce, Ins. § 1370. A waiver was held in *Robinson v. Insurance Co.*, 18 Hun, 395, the court saying: "Down almost to the time of the destruction of the property by fire the defendant was making vigorous attempts to collect the premium on the last renewal, and showed no sign of an intention to take advantage of the conditions in the policy which made it void, but one quite to the contrary, of continuing the policy and collecting the consideration for so doing." The identical principle here discussed was under consideration in *Murray v. Association*, 90 Cal. 406, 27 Pac. 309, and it is there said: "And the rule is firmly established in this class of cases that when an insurance company, after

knowledge of any default for which it might terminate the contract, enters into negotiations or transactions with the assured which recognize the continued validity of the policy and treat it as still in force, the right to claim a forfeiture for such previous default is waived,"—citing cases.

Tested by the foregoing authorities, there can be but one conclusion arrived at in this case, and that is a waiver of the forfeiture is disclosed by the evidence. The express promise of the general agent to extend the time of payment of the premium to November 24th left the policy in full force and effect to that time. If the insured had died during that extension, there could be no question but that the company would have been liable. Indeed, respondent's counsel admitted such liability at the oral argument. The notice served upon the insured under the provisions of the New York law was to the effect that the policy would be forfeited upon November 15th if the premium was not paid, yet it is conceded that the forfeiture at that time was waived by the 10-day extension. Was the right of forfeiture exercised by the company upon the 24th of November or thereafter? There surely was no exercise of the right of forfeiture at that time; for upon the 25th the defendant attempted to collect the premium, and likewise attempted to collect it upon the 27th. By these acts of defendant it is plain that it considered the policy in full force and effect upon both the 25th and the 27th. The insured was killed upon December 2d. Between the 24th of November and the 2d of December, by no word, deed, act, or sign did the defendant indicate that the policy was forfeited. Upon the contrary, everything that was said or done by defendant during that time indicates that it deemed the policy to be in full force and effect. The general agent himself testifies that he would have accepted the premium at the hands of the insured if paid at any time before Knarston's death. This statement is strong evidence against defendant's present position. It casts a strong light upon the mind of the defendant, and shows almost conclusively that it did not exercise the right to claim a forfeiture prior to Knarston's death, but, upon the contrary, considered the policy as alive and in full force and effect. The cases all hold that under such circumstances as presented here the insurance company may not blow both hot and cold at the same time. In other words, it cannot be allowed to say that the policy was canceled prior to Knarston's death, and at the same time declare that it was ready and willing to accept the premium at any moment before his death. If the policy was canceled, it had no right to reanimate it by the mere acceptance of a premium. The defendant has no right to say, "Knarston having met with sudden death, the policy is canceled because the premium was not paid;" and in the same breath also say, "If Knarston had not met such death, we would not have



considered the policy canceled, but would have accepted the premium if offered."

Much stress is laid by respondent upon the written notice served upon the insured prior to November 15th, as required by the laws of the state of New York. That notice was simply a condition precedent to the forfeiture of the policy. The serving of the notice in no way or degree barred the company from thereafter waiving the forfeiture, if it felt so disposed. And that the forfeiture was waived for the space of 10 days after November 15th cannot be denied. The promise to give a 10 days' extension of time in which to pay the premium accomplished the result. The fact that this promise was made upon November 16th, the day after the premium became due, is immaterial. It is said in *Insurance Co. v. Norton*, 96 U. S. 241: "On the other hand, if the agreement be made after the note matures, such agreement is itself a recognition on the company's part of the continued existence of the policy, and consequently of its election to waive the forfeiture." Conceding, upon the expiration of the 10 days' extension, that the forfeiture would take place in the presence of nonaction upon the part of the parties to the contract, still we have no such case. Defendant thereafter treated the contract of insurance as still in force. By its conduct it affirmatively indicated that as yet it did not insist upon a forfeiture. Aside from the original notice, the effect of which has been entirely neutralized by its subsequent conduct, the defendant indicated no intention during Knarston's life of claiming a forfeiture. After Knarston's death, in view of its previous conduct, it was too late to make the claim. For the foregoing reasons the judgment is reversed, and the cause remanded for a new trial.

We concur: VAN DYKE, J; HARRISON, J.

124 Cal. 99

DAVITT et al. v. AMERICAN BAKERS' UNION, NO. 51. et al. (S. F. 1,177.)

(Supreme Court of California. March 24, 1899.)

CONSPIRACY—EQUITABLE RELIEF—PLEADING.

1. As against a special demurrer, a complaint to enjoin a boycott of a private business, and for damages, is bad, which merely alleges that defendants have conspired to injure plaintiffs' business, and by force and threats have attempted to intimidate plaintiffs' workmen and prevent them from working, and to compel plaintiffs to discharge them, and that defendants have in various ways attempted to destroy plaintiffs' business, and threatened to destroy it, and does not show the particular threats made, or force used, or the character of menace exercised.

2. An allegation in such complaint that to prevent plaintiffs from carrying on their business, and to keep persons from dealing with them, defendants maliciously distributed false circulars in front of plaintiffs' place of business, without setting out their substance, is insufficient as against a special demurrer.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Davitt & Daly against the American Bakers' Union, No. 51, and others. From a judgment for defendants, and from an order dissolving a preliminary injunction, plaintiffs appeal. Affirmed.

M. Cooney, for appellants. Geo. W. Monteith, for respondents.

GAROUTTE, J. Action for damages and perpetual injunction. A general and special demurrer was interposed to the complaint and sustained. Plaintiffs declined to amend, and judgment went against them. This appeal is from the judgment, and also from the order dissolving the temporary injunction. A verified answer was filed with the demurrer. The complaint alleged that plaintiffs were co-partners carrying on the bakery business; "that for the purpose of injuring plaintiffs' business, and to compel them to discharge their employes, defendants have for more than sixty days last past resolved upon and conspired together, \* \* \* and to that end and for that purpose defendants have attempted, by force, menace, and threats, to intimidate said workmen, and to prevent them from working for the plaintiffs." It is further alleged that defendants have likewise attempted, by force, menaces, and threats, to compel the plaintiffs to discharge said employes; that defendants in various ways have maliciously attempted to destroy the said business of plaintiffs, and still threaten the destruction of plaintiffs' business. It is further alleged "that the said defendants during said period have maliciously continued to publish, or caused to be printed and published, distributed, and circulated, false and malicious publications and circulars upon the said premises of the plaintiffs, and in front of and in the vicinity of their said place of business, for the purpose of preventing them to carry on their said business, and to prevent persons from dealing with them, as well as to intimidate both the plaintiffs and their employes in their conduct of the business and in the performance of their work, and they threaten to continue to do so."

In the face of the demurrer interposed in this case, the complaint must fall. Possibly the complaint is not sufficient to stand, even against a general demurrer; but, however that may be, it surely is too weak to stand an attack made upon it by a special demurrer. This complaint deals in generalities throughout, and the rule for drafting a pleading which asks for the interposition of equitable relief demands a statement of the specific facts upon which relief is sought. Inferences, generalities, presumptions, and conclusions have no place in such a pleading. Conceding the formation of a conspiracy is charged, having for its object a common design and purpose, still we find no statement in the bill as to any specific overt acts done by defendants in pursuance of that design and purpose. A conspiracy, however atrocious,

clous its purpose, is not the subject of a civil action, for it does not damage. *Herron v. Hughes*, 25 Cal. 560. There is no allegation whatever showing the particular threats defendants made, what amount or kind of force defendants used, what kind or character of menace was exercised, or how the business was to be boycotted.

The allegation as to the acts of defendants in printing and circulating false publications and circulars is somewhat more specific than anything else we find in the pleading; yet that allegation is not broad enough. The substance, at least, of these publications and circulars, should have been set out in the pleading. The pleading should show the nature of the publication. The defendants and the court are entitled to know the character of the publication. Perchance, upon its face it may not have been injurious, it may not have been malicious, and it may not have been false. For these reasons the bill should have been explicit in setting forth substantially the contents of these publications. For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: HARRISON, J.; VAN DYKE, J.

123 Cal. 625

**GOLDSTONE v. MERCHANTS' ICE & COLD-STORAGE CO. (S. F. 737.)**

(Supreme Court of California. March 3, 1899.)

WAREHOUSEMEN — RECEIPTS — SALES — BONA FIDE PURCHASERS.

1. Under St. 1878, p. 949, requiring warehousemen to issue receipts for goods stored with them, and to deliver the goods only on presentation of the receipt, if it be negotiable, or, if nonnegotiable, on the written order of the person to whom the receipt was issued, and Code Civ. Proc. § 1963, subd. 33, providing that compliance with the law shall be prima facie presumed, a purchaser of goods stored in a warehouse is not put on inquiry as to outstanding warehouse receipts therefor by an order on the warehouseman, given him by the seller, directing the warehouseman to deliver "the following goods: Storage receipt No. E, \* \* \*; storage receipt No. B, \* \* \*,"—and reciting that no goods are delivered without a receipt properly filled out.

2. On an issue whether the buyer of goods stored in a warehouse was an innocent purchaser, within Civ. Code, § 1142, providing that a purchaser of goods in good faith in the ordinary course of business for value from one to whom the owner has transferred possession shall acquire the title of the former owner, it appeared that the seller had taken the buyer to the warehouse, and, with the assistance of an employé of the warehouseman, had exhibited the goods, and that, on completing the sale, he gave the buyer an order for them on the warehouseman, which the buyer exhibited to the warehouseman, who told him that he had received a duplicate thereof from the seller. The warehouseman did not inform the seller that anybody else had claims against the goods, and rendered him a bill for storage due, which was paid. Part of the goods the warehouseman delivered to the buyer, and the balance he refused to deliver, because they were the property of a third person. The seller had bought the goods from such third person, giving his note therefor, which was indorsed as

secured by the goods in question; but he testified that those words were not on it when he gave the note, that he paid part of the price, that the balance was to be paid on delivery of the goods, and that the seller's vendor had a lot of goods in the warehouse, and he purchased as much thereof as he could sell, receiving from the vendor an order therefor, which he sent to the warehouseman, and when he sold the goods in question he gave the warehouseman a duplicate of the order given the buyer, whereupon the warehouseman separated the goods sold from the remaining goods of his vendor. Held, that it was error to nonsuit the purchaser in an action to recover the goods from the warehouseman.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Charles Goldstone against the Merchants' Ice & Cold-Storage Company. There was a judgment for defendant, and plaintiff appeals. Reversed.

Naphtaly, Friederich & Ackerman, for appellant. Dorn & Dorn and Fox & Gray, for respondent.

CHIPMAN, C. The action is to recover the possession of certain 18 boxes of dressed turkeys (3,800 pounds), or the value thereof, if delivery cannot be had. The answer alleges that the turkeys were deposited with defendant by one Hoerr, in his own name, for safe-keeping, and were the property of said Hoerr and one Clements, partners as Clements & Hoerr. Plaintiff was nonsuited at the close of his evidence, and judgment for defendant was entered accordingly. The appeal is from that judgment upon a bill of exceptions containing the evidence. Appellant claims that the judgment was erroneous for two reasons: (1) The evidence shows title and right of possession in plaintiff. (2) Defendant is estopped from denying plaintiff's title.

1. A nonsuit should be denied where the evidence and the presumptions reasonably arising therefrom are legally sufficient to prove the material allegations of the complaint. *De Ro v. Cordes*, 4 Cal. 117; *McKee v. Greene*, 31 Cal. 418; *Alvarado v. De Celis*, 54 Cal. 588; *Felton v. Millard*, 81 Cal. 540, 21 Pac. 533, and 22 Pac. 750; *Higgins v. Ragsdale*, 83 Cal. 219, 23 Pac. 316. The proof must be sufficient to raise more than a mere surmise or conjecture that the fact is as alleged, and must be such that a rational mind can draw from it the conclusion that the fact exists. *Janin v. Bank*, 92 Cal. 14, 27 Pac. 1100. It has also been held that, whenever the evidence introduced by plaintiff so conclusively establishes a defense as that the court might properly grant a new trial in case of a verdict in his favor upon like evidence, the court may direct a judgment by way of nonsuit. *McQuilken v. Railroad Co.*, 50 Cal. 7. On January 29, 1895, defendant had on storage at its warehouse in San Francisco a lot of dressed turkeys. One Dunbar, of the firm of J. W. Dunbar & Co., engaged in the commission business, notified dealers on that day that he had a lot of turkeys in defendant's ware-



house, and invited their examination. Plaintiff and one Miller, among others, went with Dunbar to examine the turkeys, accompanied by an employé of defendant, who opened the cases containing the turkeys for their inspection. Upon coming out of the cold-storage room of the warehouse, Dunbar sold to plaintiff and Miller, each, a lot of these turkeys at 12½ cents per pound, and on that day made entry on his books of the sale. Plaintiff said he would take about 5,000 pounds. He testified: "I asked Dunbar if that meant cash, and he said that I could have a little time on it. I told him that, when he would give me the bill, I would pay a portion the middle of the month, and the balance at the end of the month of February. About the 5th of February we met, and he handed me a bill for the turkeys. I thereupon gave him my note for the amount, payable in 30 days, and on the 8th of February I paid him upon the note \$200. When I gave him the note, he gave me an order on the cold-storage company." Plaintiff's note, dated February 5, 1895, to J. W. Dunbar & Co., for \$503.62, due 30 days after date, showing a payment of \$200 on February 8th, is in evidence. Dunbar & Co. gave plaintiff the order on the defendant February 5th, which reads:

"Please deliver to C. Goldstone the following goods: Storage receipt No. E 55, 14 boxes Gob. 3380, tare 507-2873. Storage receipt No. B, 6 Bxs. Hens, 1310-14-1156. J. W. Dunbar & Co., M.

"No goods delivered without a receipt properly filled out."

Plaintiff testified that on receipt of this order he went to defendant, and informed the bookkeeper, and was told that they were aware of it, as they had received a duplicate from Dunbar. Dunbar testified that after the sale to plaintiff defendant segregated plaintiff's turkeys, and marked them "E 55"; that this was done before he gave plaintiff the order, and it is inferable that it was done on the 29th of January, when the sale was made, for in the record is a bill for storage rendered by defendant to plaintiff bearing that date, in which the packages are referred to as marked "E 55," and the bill shows that plaintiff paid defendant storage from January 29th to March 29th, two months, \$46.90. Some question was raised as to whether plaintiff should pay storage for any part of January, for the reason that Dunbar claimed to have paid storage for that month. But it is reasonably deducible that defendant treated the sale as made January 29th, and that the packages were then segregated, and marked for plaintiff "E 55," while Miller's were marked "A 55." Plaintiff testified: "On the 1st of March I called on the storage company for some turkeys, and received two cases. I made no payment to them when I got this lot of turkeys. They delivered them on my order. The first time they informed me of the claim that there was 10 cents payable on those turkeys was on the 7th or 8th of

March. I went there at that time, and demanded my turkeys. I was refused, and they said I would have to pay 10 cents a pound if I wanted any more turkeys. I asked the reason why, and they said those turkeys are not paid for yet. I told him I had paid for them, and I asked him why he had sent me the cold-storage bill, and they said that made no difference; that if I wanted law to go ahead." Defendant at no time told plaintiff that any person other than Dunbar & Co. owned or claimed the turkeys. Plaintiff further testified that he had not been notified of any claim on the turkeys before that time. "I went in the office in front, and said, 'I want two cases of turkeys,' and they said, 'All right; send your drayman.' I said, 'I want from E 55 one case of hens and one case of gobblers.' \* \* \* I did not pay 10 cents a pound for them, and if anybody else did I did not know it. Those were the only turkeys I took out until the suit was filed."

Defendant claims that Dunbar & Co. had no title, and therefore plaintiff got none; that Dunbar had made a conditional purchase from Hoerr, who, it is claimed, was the real owner, on which Dunbar had paid but 2½ cents per pound, and there was still due 10 cents per pound, to secure which Hoerr had a lien on the turkeys. The evidence on this point is given by Dunbar, plaintiff's only other witness. He testified that he bought the Goldstone and Miller turkeys from Hoerr. On cross-examination he testified: "I bought them on the 29th of January. There was no specific amount stated at the time,—any amount that I could sell. I paid 12½ cents per pound. I paid 2½ cents, leaving 10 cents per pound unpaid. The only portion of the remaining 10 cents per pound which I paid was on account of withdrawals from the cold-storage company or parts of the goods. When the people to whom I sold them wanted some of the goods, I went to the cold-storage company, and paid the 10 cents per pound from time to time, in order to release them. On the goods that were in the cold-storage company at the commencement of this suit I have not paid any portion of the 10 cents per pound." On redirect examination he testified: "I gave to Mr. Hoerr, for the balance of what I owed him on account of those turkeys, my note." This note is for \$966, and is dated January 29, 1895, payable March 30, 1895, to order of F. J. Hoerr, at Anglo-California Bank, and is in the usual form, signed J. W. Dunbar & Co. After the signature at the bottom of the note is the following: "Secured by poultry in refrigerators." Witness testified that he didn't think this was on the note when he signed it, but was not certain. He said, however, if it was there, he didn't see it. He further testified that he paid defendant on March 1st \$40 for the release of two cases of turkeys for Goldstone, and that "at the time I gave the note to Mr. Hoerr it was understood that the 10 cents per pound was to be paid on delivery of the poultry." There is no evidence that plain-

tiff knew of this payment, and he testified that he did not. Dunbar also testified: "Some two or three days after the dealers were there to look at the turkeys, as stated, Mr. Hoerr gave me an order, and I sent it to the cold-storage company." And, as already stated, he testified that Hoerr had sold him such of his turkeys as he (Dunbar) could sell. It clearly appears, we think, that plaintiff purchased from Dunbar & Co. in good faith, in the ordinary course of business, and paid the consideration in full; for the evidence tends to show that the note given for the balance was in payment, and was so received. There is no evidence from which it can be said that plaintiff knew or was in any wise warned that there was any claim upon the turkeys by any person other than Dunbar & Co., except it may have been by defendant for storage, and this claim plaintiff paid. In the order given by Dunbar & Co. upon defendant to deliver the turkeys to plaintiff was written: "No goods delivered without a receipt properly filled out." This obviously meant only that defendant must take a receipt for turkeys as delivered to plaintiff, as evidence of delivery.

Respondent claims that this meant to give plaintiff notice, and put him upon inquiry as to the outstanding warehouse receipts issued by defendant to Hoerr; and it is claimed that a presumption arises that defendant duly issued receipts as a warehouseman, and dealt with the goods strictly pursuant to the act of 1878. St. 1878, p. 949, citing Code Civ. Proc. § 1963, subd. 33. This act contemplates two classes of receipts, (1) negotiable and (2) non-negotiable; and, in case of the latter class, the warehouseman may deliver the goods upon the written order of the person to whom the receipt has issued. In the former case, he can deliver goods only upon presentation of the receipt and indorsement thereon of the goods delivered. We cannot presume that Hoerr's receipt was of the former class. His giving Dunbar an order for the goods would imply, rather, that the receipt of defendant, if there was one, was of the latter class. In the order given to plaintiff are found the words, "Storage receipt No. E 55," and "Storage receipt No. B," and it is claimed that these clauses had reference to the defendant's outstanding warehouse receipts, which it was plaintiff's duty to look after and surrender, and, if he had done so, he would have learned of Hoerr's claim. I do not think the words imposed any such duty. They are vague, and convey no information to the holder, however intelligible they may have been to the warehouseman. The reference to "receipt No. E 55" was plainly to the segregated lot purchased by plaintiff, and it is impossible to say what "storage receipt B" referred to. We think these references were not such as to put plaintiff on notice or inquiry as insisted by defendant.

Dunbar's testimony as to his purchase from and payment to Hoerr is somewhat confused and contradictory. The motion for nonsuit

admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom (Wright v. Roseberry, 81 Cal. 87, 22 Pac. 336; Warner v. Darrow, 91 Cal. 309, 27 Pac. 737); and I think, upon such motion, the evidence should be interpreted most strongly against the defendant. I think, also, that the rules as to nonsuit are the same whether the trial is by the court or by a jury. Dunbar testified, in effect, that he bought the turkeys from Hoerr, paid 2½ cents per pound cash, and gave his note for the balance, and that two or three days after the purchase Hoerr gave him an order (presumably for the turkeys), and he sent it to defendant. On February 5th Dunbar sent defendant a duplicate of his order to plaintiff for lot E 55. Hoerr must have known of the sale to plaintiff, for Dunbar testified that he bought from Hoerr such as he had found market for. Dunbar's note to Hoerr contained a statement, after the signature: "Secured by poultry in refrigerators." But we think the inference from Dunbar's evidence is a reasonable one that this clause was not there when the note was signed, and ought not to be accepted as proving a conditional sale, or that right of control and possession had not been given to Dunbar. Besides, the clause does not necessarily refer to these turkeys. It may have referred to other poultry. If Hoerr took Dunbar's note in payment, as may be inferred from Dunbar's evidence, and put Dunbar in control of the turkeys, by giving him an order for them, I think, on a motion for nonsuit, the court should have accepted that statement which was most favorable to plaintiff, rather than the other one, by Dunbar, that it was understood between the two that Dunbar was to pay 10 cents per pound as the turkeys were removed. If there was such an understanding, why was the note given at all? Is it not probable that defendant understood the control of the property to have passed to Dunbar since defendant segregated it from the other property of Hoerr, and marked it for plaintiff, and collected storage from him?

Appellant invokes section 1142, Civ. Code. It provides: "Where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith, and in the ordinary course of business, for value, transfers to such buyer the title of the former owner." I do not understand that the possession mentioned necessarily means actual, exclusive, manual possession. Where the property is in the hands of a bailee, it is sufficient to transfer the right of possession, subject, of course, to the bailee's lien. It seems to us that a fair and reasonable view of the evidence warrants our holding that this section applies to the case in hand. Respondent contends that plaintiff was not a buyer in good faith, and in the ordinary course of business, because he must be presumed to have known that there was an outstanding receipt, issued by defend-



ant, which plaintiff ought to have gotten possession of. But we have seen that no such presumption arises from any evidence in the case. Nor is it true that the sale was not executed, for everything was done that Dunbar and plaintiff could do to complete the sale, and leave the property with the bailee, which they had the right to do. There was payment. There was the order of Dunbar, and its acceptance by defendant, and a segregation of the property from other of Hoerr's property, and a partial delivery agreeably to the transfer. And so, also, was there possession so far as necessary.

This branch of the case is elaborately and learnedly argued by counsel for defendant, occupying the most of a 90-page brief. It is altogether possible that the facts of the case, if they were all brought out, would show that in law plaintiff ought not to, and cannot, recover; but we cannot resist the conclusion that defendant should, upon the showing made by plaintiff, be put to its proof. The evidence of Hoerr and the warehousemen may clear away many doubts which now present themselves, and which, under the rules of law, we feel bound to resolve in favor of plaintiff on the motion.

2. Appellant presents numerous and plausible, and in some respects cogent, reasons for holding defendant to be estopped by its conduct from escaping liability by pleading Hoerr's ownership of the property. We avoid a consideration of this point, although much urged by plaintiff, as we do not wish to forestall its determination at the retrial. On the whole case, it seems to us that, if it had gone to a jury on plaintiff's evidence, and a verdict had been rendered for plaintiff, the evidence would have been sufficient to support a judgment upon the verdict, and hence it was error to grant the nonsuit. The judgment should be reversed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

124 Cal. 112

McDERMONT et al. v. ANAHEIM UNION WATER CO. et al. (L. A. 529.)

(Supreme Court of California. March 24, 1899.)

WATER COMPANIES—ISSUE OF ADDITIONAL SHARES—INJUNCTION—PLEADING—DEMURRER—DEFENSES ADMISSIBLE.

1. Allegations, in a complaint against a corporation, of facts peculiarly within defendant's knowledge, may be upon information and belief, although defendant's records containing such facts were open to plaintiff's inspection.

2. In a suit by stockholders of a water company to enjoin the issue of additional shares, allegations that the amendment of the articles to allow such issue has never been adopted by a vote of holders of the third of the stock, and that no notice of an intention to make such amendment had been advertised in any newspaper published in the town or county in which the

company's principal place of business is located, which follow the language of Civ. Code, § 362, are sufficient, as against a general demurrer, to show that that section has not been complied with.

3. Where the complaint, by the stockholders of a water company, to enjoin the issue of additional shares, does not show on its face that any of the respondents were bona fide purchasers of such shares, that defense cannot be made under a demurrer.

4. A defense of laches, not appearing in the complaint, cannot be made under a demurrer.

5. The defense of estoppel on grounds not appearing in the complaint cannot be made under a demurrer.

6. An unexplained delay of 40 days after the filing of amended articles of incorporation of a water company, before a suit by stockholders to enjoin the issue of additional stock in accordance therewith, is not laches per se.

7. Where a suit by stockholders of a water company to enjoin the sale of additional shares of stock, under an amendment of the articles of incorporation, is based on the theory that the amendment is absolutely void, there need be no offer to return money paid for such shares.

8. In a suit by stockholders of a water company to enjoin the issue of additional shares of stock, brought against the company and those to whom such stock had been issued, where the complaint does not show that any consideration had been paid for such stock, a defense of failure to tender back money paid therefor cannot be raised by demurrer.

9. In a suit by stockholders of a mutual water company to enjoin the issue of additional shares of stock, it is error to strike from the complaint allegations that plaintiffs' land required all the water to which they were entitled, and that at all times all of the water controlled by the company was necessary to supply the original stockholders.

Commissioners' decision. Department 2. Appeal from superior court, Orange county.

Suit by A. McDermont and others against the Anaheim Union Water Company and others. Judgment for defendants, and plaintiffs appeal. Reversed.

E. E. Keech, for appellants. Graves, O'Melveny & Shankland, Cochran & Williams, A. E. Nolt, R. Melrose, and J. D. Pope, for respondents.

GRAY, C. In this case a motion to strike out portions of the complaint was granted, and a demurrer to the complaint sustained, and, the plaintiffs refusing to amend, the defendants had judgment, and the plaintiffs appealed.

The plaintiffs in this case are stockholders in the corporation defendant, and they bring this action to enjoin the defendants from disposing of any of the water of such defendant to any one other than bona fide stockholders in said corporation. The defendant corporation is formed for the purpose of supplying water for hydraulic irrigation and domestic uses to its stockholders, and within the limits of a certain 12,000 acres of land in Los Angeles county. It is not organized for the purpose of profit or for the purpose of distributing dividends to its stockholders, but solely for the purpose of owning and controlling water in ditches and reservoirs, the sole beneficial use of said water being vested

in the stockholders. *McFadden v. Board*, 74 Cal. 571, 16 Pac. 397.

The complaint contains the usual allegations as to the incorporation of defendant, the purpose for which it was formed, etc., and then alleges, in substance, among other things, that the directors of the corporation (who are also made defendants) on the 7th of November, 1896, adopted resolutions to amend the articles or certificate of incorporation so as to increase the land to which it should supply water to 13,055 acres, by including 1,055 acres contiguous to the original 12,000 acres in the description of lands contained in the articles, to which water was to be supplied. The complaint also states that on May 17, 1897, the articles of incorporation as amended were filed in the office of the county clerk, and a certified copy thereof in the office of the secretary of state; that these amended articles had never been approved or adopted by the vote or written consent of stockholders representing two-thirds of the capital stock; that a new issue of some 370 shares of stock in the corporation had followed the amendment of the articles, and that such new issue of stock had been sold to various parties, who are also made defendants herein, and that, unless restrained from so doing, the defendants will divert a ratable portion of the waters of the corporation to these new stockholders for use upon the lands added by the amendment of the articles to the original district embraced in the original articles of incorporation, and the plaintiffs will thereby be deprived of a portion of the water which is necessary to irrigate their lands.

The first reason urged why the demurrer was properly sustained is that certain material allegations of the complaint were made on information and belief. Section 446 of the Code of Civil Procedure seems to contemplate that the averments of a pleading may be based on information and belief, and it would seem that where the allegations of a complaint relate to facts, as they do in this case, the truth of which is peculiarly within the knowledge of the defendants, there can be no valid objection to their being based on information and belief. The fact that the records of the corporation were open to the inspection of plaintiffs does not affect this rule, for the reason that such records may be contradicted if they do not speak the truth.

The allegation of the complaint, "that the amendment to the articles \* \* \* has never been adopted or approved by a vote or written consent of the stockholders of said corporation representing at least two-thirds of the subscribed capital stock thereof, nor has any notice of the intention to make said amendment been advertised in any newspaper published in the town or county in which the principal place of business of said corporation is located," follows the language of section 362 of the Civil Code, and is a sufficient allegation to show that that section

was not complied with, in the face of any objection that can be urged against it on a general demurrer.

The complaint, on its face, does not show that any of the respondents were innocent purchasers of the new issue of stock in good faith, for value, and without notice. If there exists any such defense as that, it must be pleaded in the usual way; it cannot be taken advantage of by demurrer in this case.

The defenses of laches and estoppel are affirmative defenses in their nature, and the facts showing their existence must be set out in an answer, as they do not appear from the complaint. An unexplained delay in bringing this suit for 40 days after the filing of the amended articles of incorporation cannot be held to be laches per se.

The complaint is drawn on the theory, and its allegations show, that the attempted amendment to the articles of incorporation was an absolute nullity and void for noncompliance with the law, and that the issue and sale of stock was also an absolute nullity for the same reason. An offer to restore or a tender of money back is only necessary where it is sought to rescind or annul something. Here the plaintiffs ask to have that declared void which has on their statement been void from the beginning, and not merely voidable. The plaintiffs, so far as appears from the complaint, have received nothing on account of the sale of the stock, and therefore could not, in any event, be called on to restore anything. If there is any restoring to be done, the purchasers of the stock will have to look for that in the direction their money went, and if they have any defense at all, based on the absence of a tender or the want of an offer to restore, it will have to be incorporated in a proper pleading, along with the other defenses already referred to.

On motion, the court, by its order, struck out of the complaint the following, to wit: "And upon said lands plaintiffs have valuable walnut orchards and other trees which require all the water to which plaintiffs are entitled, as hereinafter alleged, to maintain them in a healthy, productive condition." "(5) That since the organization of said corporation, under and in accordance with its articles of incorporation as aforesaid, it has acquired water and water rights in the Santa Ana river amounting to a constant flow, where the same is taken from the Santa Ana river during the irrigating season, of from one thousand to two thousand miner's inches of water, measured under a pressure of four (4) inches." "(8) That at all times since the organization of said corporation all of the water owned and controlled by it has been necessary, during the summer months, to supply the stockholders of said corporation with water for their necessary irrigation and domestic uses."

These or similar allegations are the most common and most necessary in every complaint for the purpose of enjoining the illegal



diversion of the plaintiffs' water. In striking them out, the complaint was left devoid of anything to show any water right in either the water company or the plaintiffs, as its stockholders. It must always be shown in a complaint, in an action of this character, that the water in controversy is necessary and useful to the plaintiff for some beneficial purpose. In striking out these allegations, the court erred. In the sixth paragraph of the complaint, the pleader evidently stated a conclusion of law, which he drew from the articles of incorporation and by-laws appearing elsewhere in the complaint, and this was properly stricken out. I advise that the judgment be reversed.

We concur: BRITT, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is reversed.

124 Cal. 45

In re RINGOT'S ESTATE. (S. F. 1,483.)  
(Supreme Court of California. March 18, 1899.)  
EXECUTORS — APPOINTMENT BY WILL — COMPENSATION — MANNER OF PAYMENT.

1. An olographic will stated that testator desired a certain person to settle his estate. A codicil, which testator had kept separate from the will, stated that it was part of the will, and that on and after his death he wanted a certain person, other than the one named in the will, to have full charge of his estate, to receive all moneys, and to pay all bills for the term of seven years, for which he was to be paid a liberal sum each year. *Held*, that the codicil appointed the person therein named as executor in place of the one named in the will, under Civ. Code, § 1371, providing that, where it appears by a will that it was testator's intention to commit the execution thereof to a certain person, such person shall be entitled to letters testamentary, though he be not named as executor.

2. The provision of the codicil that the services of such person should continue for seven years, and that his compensation should be paid annually, did not constitute him an agent for a specific purpose, since it did not require the administration to be kept open for that time, and a testator may provide that the compensation of his executor shall be paid at stated intervals, under Code Civ. Proc. § 1618, fixing the compensation of executors where the will does not provide for it.

Department 1. Appeal from superior court, San Benito county.

In the matter of the estate of Joseph Ringot, deceased, E. D. Sawyer petitioned for letters testamentary, and from an order denying his petition, and appointing Herbert Nelson Taylor executor, he appeals. Affirmed.

John M. Burnett, for appellant. Briggs & Hudner, for respondent.

HARRISON, J. Appeal from an order granting letters testamentary. The will of the decedent is olographic, bearing date June 11, 1896, and is as follows: "I, Joseph Ringot, of Hollister San Benito County State of California being of sound mind and understand-

ing does make and declare this to be my last will, I have deeded to my wife Mary Belle Ringot her share of my estate. The remainder after all my just debts are paid I give and bequeath to the following named persons share and share alike [naming them]—I desire that E. D. Sawyer of San Francisco shall settle my estate. Hollister June 11th 1896. Joseph Ringot." December 31, 1897, he made a codicil thereto in the following terms: "On and after my Death I want Mr. Herbert Nelson Taylor to have full charge of my Estate to receive all moneys and pay all Bills for the terms of Seven years And to be paid a liberal sum each and every year This is a part of my will. Hollister Dec. 31st 1897. Joseph Ringot." The original will and the codicil were found in the desk of the deceased, each inclosed in a separate sealed envelope, and on the back of the envelope inclosing the codicil was indorsed, in the handwriting of the deceased, "On my death to be delivered to Herbert Nelson Taylor." The envelope inclosing the original will was addressed to Stephen L. Piper, a nephew of the deceased, who testified that the testator, about a year and a half before his death, told him that he would find his will in his desk, and that he was to deliver it to the appellant. After the death of the testator the appellant presented the will and codicil for probate, with a petition for letters testamentary, and a counter petition was presented by Mr. Taylor. The petitions were heard together, and the court admitted the two instruments to probate as constituting the last will of the deceased, and granted letters testamentary thereon to Taylor, and denied the appellant's petition. From this order the present appeal is taken, the appellant contending that the testator named Taylor only as an agent for specific purposes, and that the original appointment of the appellant as executor is not affected thereby.

In neither of the instruments does the testator name any person to be the executor of his will; but, if either of them had been presented for probate without the other, the court would have been authorized under the provisions of section 1371, Civ. Code, to grant letters testamentary to the person therein named. If the testator had made no other provision than that in the codicil for the exercise of the functions of an executor, the court would properly have determined that it was his intention that the respondent should be the executor of his will. His expression, "On and after my Death I want Herbert N. Taylor to have full charge of my Estate," sufficiently indicates his intention in this respect, and is fully as cogent as his declaration in the original will that he desired the appellant to "settle" his estate; and if each is to be construed as of equal import in determining the intention of the testator, the direction in the codicil must be held to supersede that in the original will. His declaration, "This is a part of my will," indicates that he intended that the respondent should exercise

all the functions named in the codicil. He could not, however, have "full charge" of the estate, and "receive all moneys and pay all bills," if the appellant should receive letters testamentary; and the direction that he shall have such full charge "on and after my death" is inconsistent with the contention that the testator intended that the appellant should be appointed executor, with a direction to employ the respondent as his agent. This construction is not defeated by the subsequent provision, specifying a period for his services, and providing for his compensation. This clause does not require that the administration shall be kept open for seven years, and, if the estate shall be ready to be closed before the expiration of that time, the duties of the respondent will cease. Section 1618, Code Civ. Proc., implies that a testator may by his will provide compensation for his executor different from that provided by the statute, and no reason is suggested why he may not, under this provision, direct that his executor shall receive a portion of such compensation at stated intervals during the administration of the estate. No allowance therefore could be made without the approval of the court, and, as the court would at all times have the estate under its control, it could make such allowance from time to time as would be just, in view of the condition of the estate and the extent to which the administration had been completed. The order is affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

124 Cal. 80

**CALLAHAN v. BRODERICK**, City and County Auditor. (S. F. 1,373.)

(Supreme Court of California. March 20, 1899.)

**PLEADING—DEMURRER—CONCLUSIONS—CERTAINTY.**

Allegations that certain demands "are not lawful," "not allowed by law," "in excess of the amount legally due," and are claimed under unconstitutional legislation, and allegations that certain moneys were "illegally drawn from the fund," are all mere legal conclusions; and a complaint based thereon is demurrable for insufficiency of facts the objection not going merely to its certainty.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by T. H. Callahan against William Broderick, auditor of the city and county of San Francisco. From a judgment for defendant, plaintiff appeals. Affirmed.

Alfred Clarke, for appellant. H. T. Creswell, for respondent.

**CHIPMAN, C.** Injunction. A demurrer to the amended complaint was sustained, and the court gave judgment for defendant, dismissing the action, from which plaintiff appeals. The amended complaint alleges that plaintiff is a resident of the city and county of San Francisco, and a taxpayer therein, and a contribu-

tor to and beneficiary of the fund mentioned in the complaint; that on July 7, 1897, the board of police relief and pension fund commissioners of said city and county "passed and approved, to wit, forty demands on said fund, among which are four demands which are not lawful demands on said fund, and defendant threatens to audit, and is about to audit, said four demands." Referring to these four demands, the complaint proceeds: "They are No. 878, for one hundred and sixty dollars, in favor of J. F. Moran; No. 839, in favor of John Short, for twenty-two dollars; No. 856, for one hundred and fifty dollars, in favor of G. Clinton; No. 857, for one hundred and fifty dollars, in favor of S. Pomeroy. The Moran demand is for expenses not allowed by law to be paid out of said fund, and does not show on its face the 'title, date, and section of the law under which it is drawn.' The Short demand is seventy-two dollars in excess of the amount legally due thereon. The Clinton and Pomeroy demands are drawn under section 13 of the pension law of 1889 (St. 1889, p. 59), and said section is unconstitutional and void because of special legislation, and many other reasons." The complaint then sets forth that William Alvord, R. J. Tobin, and M. A. Gunst constitute said board of commissioners, and allowed and approved said demands; that these commissioners theretofore allowed certain other demands to these same persons (Moran, Short, Clinton, and Pomeroy), for doing which the complaint charges that "they [the commissioners] are liable to the said city and county"; that defendant is about to audit the demands of said commissioners for their salaries, and it is alleged "that it is not lawful to audit said demands until said persons shall restore or cause to be restored to said fund the moneys unlawfully drawn from said fund with the approval and allowance of said commissioners, and they are liable therefor, under section 86, consolidation act (St. 1856, p. 170)." Upon the foregoing allegations it is sought to restrain defendant. The demurrer was (1) for insufficiency of facts; and (2) want of jurisdiction of the person of defendant or of the subject-matter. The latter ground is not urged.

As near as we can determine from the complaint, the restraining order is asked on two grounds: (1) Because defendant is about to audit the demands of Moran, Short, Clinton, and Pomeroy; and (2) because he is about to audit the salary demands of the commissioners.

As to the first of these demands, it is alleged that "they are not lawful"; that "the Moran demand is for expenses not allowed by law to be paid out of said fund"; that "the Short demand is seventy-two dollars in excess of the amount legally due thereon"; that "the Clinton and Pomeroy demands are drawn under section 13 of the pension law of 1889, and said section is unconstitutional and void, because of special legislation, and many other reasons." These allegations are nothing more than averments of legal conclusions. There are no aver-



ments of facts from which it can be determined whether the demands are or are not illegal or unauthorized. There is no statement of the character of the demands, from which it can be determined what they were for. The necessity for a statement of the facts essential to a right claimed is not obviated by averments of legal conclusions (*Aurrecoechea v. Sinclair*, 60 Cal. 532); for allegations of conclusions of law will be disregarded in considering objections raised by demurrer (*Ohm v. City and County of San Francisco*, 92 Cal. 437, 28 Pac. 580). A conclusion of law tenders no issue, and a complaint which depends upon such allegations is insufficient and demurrable. *Branham v. Mayor, etc.*, 24 Cal. 585. The code provision requires a concise statement of the facts constituting the cause of action, not such statement of the law governing it. Code Civ. Proc. § 426. Appellant replies that respondent ought not to be permitted to escape investigation on what is by appellant claimed to be a purely technical objection to the complaint, and that the objections go to its uncertainty, if at all, and not to its sufficiency. Most rules of pleading are technical, but they are founded in wisdom and justice, and orderly procedure imperatively demands their reasonable enforcement. The objection of uncertainty goes rather to the doubt as to what the pleader means by the facts alleged, not to the failure to allege sufficient facts. When the facts alleged are insufficient, the pleading is to be tested by general demurrer. Code Civ. Proc. § 430.

As to the salary demands of the said commissioners, the complaint is not less insufficient in its allegations of facts. Substantially all that is averred to support the complaint as to the commissioners is that they permitted moneys to be illegally drawn from a fund in their control, and for that reason it is unlawful for defendant to audit their claims for salary. It was certainly essential that some facts should have been set forth showing the nature and character of the claims alleged to have been illegally allowed by the commissioners, and which would in some degree, at least, tend to show why the commissioners became "liable to the said city and county." It was but a legal conclusion to allege that they became liable "under section 86, consolidation act," even if we may assume (what is not alleged) that the consolidation act referred to related to the city and county of San Francisco. Plaintiff no doubt seeks to restrain defendant by force of section 82 of that act, which prohibits the auditor from allowing a demand against the city "in favor of any person or officer in any manner indebted thereto." Whether the commissioners became "indebted" to the city by their alleged unlawful act, in the sense the term is used in that section, may admit of some question. As to this we express no opinion, nor upon the point as to whether the remedy be not against the commissioners upon their bonds, nor upon the further point suggested by counsel for respondent, that the term "indebted" implies a liquidated amount. We

think the allegations raised no issue of fact. They were neither more nor less than averments of legal conclusions. We do not see how the court below could have done otherwise than sustain the demurrer, without violating well settled rules of pleading, and therefore advise that the judgment be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(124 Cal. 108)

McELDOWNEY v. MADDEN (PEOPLE, Interveners). (Sac. 475.)

(Supreme Court of California. March 24, 1899.)

ATTACHMENT—SUBSEQUENT ATTACHING CREDITOR—RIGHT TO INTERVENE.

Where a subsequent intervening attaching creditor alleged that plaintiff has no legal claim against defendant, that the writ issued by him was void, that the property attached by both was insufficient to pay intervenor's claim, and that defendant had not sufficient property to pay the claims of both, such facts establish his rights to intervene, and the denial of his application was error.

Commissioners' decision. Department 2. Appeal from superior court, Modoc county.

Attachment by Jennie McEldowney against John Madden, in which the people of the state of California applied to intervene. From an order denying interveners' petition, they appeal. Reversed.

Atty. Gen. Fitzgerald and John E. Raker, for the People. Jenks & Clafin, for respondent plaintiff. J. H. Stewart, for respondent defendant.

GRAY, C. This is an appeal by intervenor from a judgment in favor of plaintiff and from an order denying appellant the right to intervene. The respondents have filed no brief. The plaintiff brought suit for \$400, money had and received, and caused a writ of attachment to be issued and levied on the property of defendant. The defendant demurred, and while such demurrer was pending the appellant asked leave to file a complaint in intervention, in which it is alleged that appellant had begun an attachment suit against the defendant Madden on a bond given by him to the state of California, and, subsequent to the levy of attachment herein, had attached the same property levied on by plaintiff in this case. Facts are then stated showing that plaintiff has no cause of action against the defendant, that the writ of attachment herein is null and void, that the property attached is insufficient to pay intervenor's claim against the defendant, and that defendant has not sufficient property to pay both intervenor and plaintiff. The prayer of intervenor's complaint is that it be adjudged that defendant is not indebted to plaintiff, that the attachment herein is null and void, and that intervenor has a prior and superior

lien on the property attached, etc. The court denied the motion to intervene, the demurrer to the complaint was overruled, and, the defendant refusing to answer, the plaintiff had judgment.

"That under our Code an attachment or execution creditor has a right to intervene, and, upon a proper showing, defeat the lien of a prior attaching creditor, we regard as too well settled to need further discussion." Opinion of Searls, C., in *Kimball v. Richardson-Kimball Co.*, 111 Cal. 393, 43 Pac. 1111; *Davis v. Eppinger*, 18 Cal. 378; *Speyer v. Ihmels*, 21 Cal. 280; *Coghill v. Marks*, 29 Cal. 673; *Coffey v. Greenfield*, 55 Cal. 382. On the authorities cited it is clear that, under the facts alleged in the complaint in intervention, appellant was entitled to intervene. I advise that the judgment be reversed, and the cause remanded, with directions to the court below to permit the complaint in intervention to be filed.

We concur: PRINGLE, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the cause remanded, with directions to the court below to permit the complaint in intervention to be filed.

124 Cal. 84

HILTON v. CURRY, County Clerk. (S. F. 1,122.)

(Supreme Court of California. March 22, 1899.)

MANDAMUS—JURORS—CERTIFICATE OF ATTENDANCE  
—ISSUANCE—CLERK'S REFUSAL—NECESSITY  
—FEES—BY WHOM PAYABLE.

1. Under Code Civ. Proc. § 1085, authorizing mandamus to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, the writ does not lie to compel the county clerk, ex officio clerk of the superior court, to issue a certificate to a juror, stating his attendance, and the amount to which he is entitled therefor, since there is no statute imposing such duty.

2. The county of San Francisco was exempted from Act 1870, § 28, requiring the county clerk to issue certificates of attendance to jurors, by St. 1870, p. 680, and hence the production of such certificate is not a prerequisite to the prosecution of any remedy a juror in such county may have for the recovery of fees.

3. St. 1864, p. 365, providing that in the county of San Francisco the fees for jurors should be "for each cause two dollars, to be paid in civil cases by the successful party," was amended by St. 1866, p. 122, which declared that, if a cause occupied more than one day, jurors should receive two dollars for each day's attendance. St. 1895, p. 267, enacted to establish the fees of jurors throughout the state, declared that grand jurors or jurors in the superior court should receive two dollars for each day's attendance. *Held*, that the latter act did not repeal the former, and hence jurors' fees in the county of San Francisco in civil cases were still payable by the successful party, and not from the public treasury.

Department 1. Appeal from superior court, city and county of San Francisco.

Application by one Hilton for a writ of mandamus against one Curry, clerk of the superior court of San Francisco county, to compel the defendant to issue to him a certificate of his attendance as a juror of said court. From an order granting the writ, defendant appeals. Reversed.

H. J. Cresswell, for appellant. Barrett & O'Gara, for respondent.

HARRISON, J. The plaintiff was summoned to attend as a trial juror before the superior court of San Francisco, department No. 3 thereof, and in obedience thereto appeared and attended as such trial juror upon 20 days in the months of March and April, 1897, exclusive of days upon which he actually served as a juror in the trial of causes therein. During all this time this department of the superior court tried only civil cases. Thereafter he demanded from the defendant, who was the county clerk and ex officio clerk of said superior court, a certificate stating that he had so attended, and was entitled to be paid therefor the sum of \$40, computed at the rate of \$2 per day for each day's attendance. The defendant refused to give him this certificate, and he thereupon applied to the superior court for a writ of mandate commanding the defendant, as such clerk, to make and issue to him the said certificate. A demurrer to his petition was overruled by the court, and judgment was entered in his favor in accordance with his petition, from which the present appeal has been taken.

The writ of mandate is issued "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." Code Civ. Proc. § 1085. It is not alleged in the petition or contended by the respondent that there is any statute directing the county clerk to issue the certificate which was demanded of him,—the allegation in the petition being, "that it is necessary for the collection of said sum from the city and county that the defendant make and issue" the said certificate; and he states in his brief that this necessity arises out of the fact that the board of supervisors refuses to take action upon any claim for jurors' fees unless accompanied by such certificate. We are not cited to any provision of law making the presentation of such certificate a condition precedent to any action by the board of supervisors, and, in the absence of such provision, this requirement of the board would not defeat any right of recovery which the respondent might otherwise have. If the certificate is not authorized by statute, it could have no legal effect, and would be but the mere declaration of a fact which is capable of being shown by any other competent evidence. The cases of *Jacobs v. Elliott*, 104 Cal. 318, 37 Pac. 942, and *Mason v. Culbert*, 108 Cal. 249, 41 Pac. 464, cited by respondent, arose under section 28 of the act of 1870, as amended in 1872 (St. 1871-72, p. 188), which



expressly directed the clerk to issue such a certificate. This statute, however, both by section 52 thereof, and also by another act passed at the same session (St. 1870, p. 680), expressly excepted and exempted the city and county of San Francisco from its operation, and the above cases are consequently inapplicable here.

The right to compensation for service as a juror is purely statutory, and it is for the legislature to determine in what cases such compensation shall be made, as well as the amount and mode of payment; or it may withhold any compensation therefor. In the absence of any provision upon the subject, the juror cannot claim any compensation for his services, and he can in no case claim compensation to any greater amount, or from any other source, than is prescribed by statute. It has never been the legislative policy of this state that any portion of the jurors' fees in San Francisco should be paid out of the public treasury. The first statute upon this subject (St. 1850, p. 421) applied to the whole state, and provided, in substance, that the court which summoned a jury should, by its order, fix a certain amount to be allowed as a per diem to the jurors, and should assess a portion of this amount as a jury fee to be paid into court in each case by the prevailing party upon the rendition of the verdict, and that the clerk should distribute this amount equally among the jurors by whom the cause was tried. In the next year the legislature provided different fees for different counties in the state, and section 20 of the act (St. 1851, p. 35), which was applicable in San Francisco, fixed the fees of jurors as follows: "For the trial of each cause two dollars; which shall be paid by the party in whose favor the verdict is rendered before the same shall be entered." In 1855 both of the above statutes were repealed, and an act to regulate the fees of office was passed (St. 1855, p. 81), by which in the part thereof made applicable to San Francisco no provision was made for jurors' fees; and it was expressly declared by section 51: "No other fees shall be charged than those specially set forth herein, nor shall any fees be charged for any other services than those mentioned in this act." In 1864 an act was passed (St. 1864, p. 365) providing that in the city and county of San Francisco the fees of jurors should be "for each cause two dollars, to be paid in civil cases by the party in whose favor verdict is rendered." This act was amended in 1866 (St. 1866, p. 122) by providing that, if a cause occupy more than one day, the jurors should receive two dollars for each day's attendance. The act of 1870, as we have above seen, excepted the city of San Francisco from all of its provisions. In 1895 the legislature passed an act (St. 1895, p. 267) establishing the fees of jurors throughout the state as follows: "For attending as a grand juror or juror in the superior court, for each day's attendance two dollars." It is contend-

ed by the respondent that this act had the effect to repeal the provisions in the act of 1870 excepting the city and county of San Francisco from its operation. Repeals by implication are not favored in the law, and, whenever there are two statutes upon the same subject, courts will endeavor to harmonize them, so that, if possible, effect may be given to the provisions of each. It is only when there is a repugnancy or inconsistency between the two that the later will be held to repeal the prior one. *Bank v. Cahn*, 79 Cal. 463, 21 Pac. 863. The act of 1895 does not purport to deal with the mode in which jurors shall be paid, nor does it contain any provision authorizing their payment out of the public treasury, or fixing the source of their compensation; but it is, as stated in its title, an act merely to establish the fees of county officers and of jurors and witnesses in this state, leaving unaffected the mode in which these fees are to be paid, and other provisions in previous acts upon that subject which are disconnected from the amount of their fees. It merely declares the amount of their fees for each day's attendance, leaving the mode as well as the source of payment as it existed prior to the passage of the act. The exception of San Francisco from the operation of the act of 1870 left the act of February 27, 1866 (St. 1865, p. 122), in force; and the provision in this latter act for the mode in which fees of jurors shall be paid was a legislative declaration upon a subject distinct from that fixing the amount of the fees, and in no respect inconsistent therewith. The act of 1895 makes an express repeal of only "all acts inconsistent herewith," but does not expressly repeal the act of February 27, 1866, nor does it expressly repeal the provision in the act of 1870 exempting San Francisco from the provisions of that act. So far as the prior act of February 27, 1866, is consistent with the provisions of the act of 1895, it was continued in force and allowed to remain the law of the land. In *Miller v. Curry*, 113 Cal. 644, 45 Pac. 877, it was held that, so far as this act purports to determine the amount of fees to be charged or collected by the officers therein named, it supersedes the statute upon the same subject which was passed February 9, 1866 (St. 1866, p. 66), applicable to San Francisco, and impliedly repeals that statute. But in *Dwyer v. Parker*, 115 Cal. 544, 47 Pac. 372, it was held that the act did not supersede or repeal the county government act, so far as it purports to affect the compensation of the officers; and in *Reid v. Groezinger*, 115 Cal. 551, 47 Pac. 374, it was held that, although the amount of fees to be received is fixed by the act of 1895, the provision in previous acts that they should not be received by the justice is unaffected. In *Carpenter v. Jones*, 121 Cal. 362, 53 Pac. 842, it was held that the act of 1895 does not repeal that provision in section 28 of the act of 1870, as amended in 1872, for the mode of paying jurors in certain cases; that the later act only

purports to deal with the amount of the fees, and not with the means or source from which they are to be paid. Under the principles of this case it must be held that the provisions of the act of 1870 for the payment of jurors' fees are still in force, but, as San Francisco is specially excepted from the provisions of that act, the provisions of this section have no application to the present case. Moreover, if the contention of the respondent should be upheld, it would prove too much for his case, since the principle upon which he claims that the act of 1895 repeals the section in the act of 1870 exempting San Francisco from its provisions would have the effect to repeal also section 28 of that act, which is the only provision in the statutes authorizing the clerk to give the certificate which he seeks. We hold, therefore, that the provisions in the act of February 27, 1866, for the mode in which jurors' fees shall be paid, were not repealed by the act of 1895, and that, as there is no provision in the statutes making the payment of jurors' fees in San Francisco a charge upon the public treasury, the petitioner was not entitled to the certificate asked for. It may be added that, if the contention of the respondent should be sustained, as the act of 1895 makes no provision for the payment of jurors' fees by the parties to a civil action, the entire compensation for their attendance must be made from the public treasury, irrespective of the days in which the juror has served on the trial of causes, or whether their service was in civil or in criminal cases. The provision in the act of 1895 in reference to the fees of witnesses is in the same terms as that in reference to the fees of jurors, and there would be the same ground for holding that provisions in former statutes determining the mode in which witness fees are to be paid have been repealed, and that the fees of witnesses are also to be paid out of the public treasury. The judgment is reversed.

We concur: GAROUTTE, J.; VAN DYKE, J.

124 Cal. 150

PEOPLE v. NOP. (Cr. 439.)

(Supreme Court of California. March 28, 1899.)

CRIMINAL LAW—MISDEMEANOR—FISH LAWS.

Pen. Code, § 19, declaring every offense, in which a different punishment is not prescribed, to be a misdemeanor punishable with imprisonment not exceeding six months, or fine not exceeding \$500, or both, does not apply to section 636, making a violation of the fish laws punishable by a fine not exceeding \$100, or imprisonment not less than 50 days, or both.

Beatty, C. J., and Henshaw, J., dissenting.

In bank. Appeal from superior court, San Diego county.

Tom Nop was charged with a violation of the fish laws. From a judgment for accused, the people appeal. Reversed.

Atty. Gen. Ford, for the People. W. A. Sloan, for respondent.

GAROUTTE, J. Defendant was charged by information, under section 636 of the Penal Code, with a violation of the fish laws. The superior court decided it had not jurisdiction to try the offense charged, and the people have appealed from that decision.

The punishment provided by the Penal Code for all parties convicted of a violation of the provisions of said section 636 determines the jurisdictional question here involved. If the punishment to be inflicted for a violation of the provisions of this section may not exceed \$500 fine, or six months' imprisonment in the county jail, then the offense is an ordinary misdemeanor, of which the superior court has no jurisdiction. But if the fine may be greater than \$500, or the imprisonment may be for a longer term than six months, then the superior court has jurisdiction to try the case. The aforesaid section 636 within itself declares that a defendant guilty of violating its provisions "is punishable by a fine of not less than one hundred dollars, or by imprisonment in the county jail not less than fifty days, or by both such fine and imprisonment." By the penalty here provided it will be observed that the minimum punishment only is fixed; yet such legislation is good, and there is no possible constitutional objection to it. Many instances are to be found throughout the Penal Code where the maximum penalty only is fixed, and the penalty in the one case is no more invalid than in the other. When the maximum only is fixed, the punishment may be adjudged at any point not exceeding the maximum. When the minimum punishment only is fixed, then the punishment may be adjudged at anything not less than the minimum. Testing the penalty provided by section 636, without regard to other statutes, it cannot be gainsaid but that a fine of \$1,000, or a judgment of imprisonment for one year in the county jail, would be a valid judgment, and absolutely unassailable. Is there any law limiting the scope and effect of the penalty provided by section 636? The defendant claims the existence of such a law, and points to section 19 of the Penal Code. That section provides: "Except in cases where a different punishment is prescribed by this Code, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or both." When placed in the crucible, this section wholly fails to meet the demands made upon it. It may be read as follows: "Except in cases where some other punishment is prescribed by this Code," etc. It is perfectly apparent that some other punishment is provided by section 636. Hence that section deals with certain cases not touched upon by section 19. Surely the punishment prescribed by section 636 is different from that prescribed by section 19. It is different in two most important particu-



lars: First, under section 636 the punishment may be greater than six months' imprisonment, or \$500 fine; and, second, under section 636 the fine may not be less than \$100, or the imprisonment less than 50 days. Under section 19 the punishment may be \$1 fine, or one day's imprisonment. The difference in the punishments under the sections is apparent at a glance. The contention is that section 19 fixes the maximum punishment for convictions under section 636. By such contention we find that section 19 fixes the maximum punishment, and section 636 fixes the minimum punishment. This is a novel situation; for section 19, in all cases where it is applicable, directly fixes both maximum and minimum. In other words, it purports to deal with and fix the entire penalty, and not simply a maximum. It was enacted to deal fully and completely with all cases coming within its purview, and not to be joined to and invoked with some other section of the Penal Code providing a penalty, in order that the true penalty for the conviction of any particular offense might be ascertained from an inspection of both. It was intended to fully and completely deal with all cases coming within its scope. And, such being its intent and purpose, it has no relationship with section 636. If section 19 had never been enacted, there would be no difficulty whatever in enforcing section 636, and administering punishments thereunder greater than a \$500 fine or a six-months imprisonment. In the absence of some kind of intimation by the lawmaking power that section 19 was purposed to limit the force and effect of section 636, we cannot so hold. *Ex parte Anear*, 114 Cal. 370, 46 Pac. 172. The judgment is reversed.

We concur: McFARLAND, J.; HARRISON, J.; TEMPLE, J.; VAN DYKE, J.

HENSHAW, J. I dissent. The conclusion reached and declared by the prevailing opinion is that a person found guilty of violating section 636 of the Penal Code may be punished by a fine to any amount, and by imprisonment for the term of his natural life. It is not questioned but that the legislature may impose so grievous a penalty for so slight an offense, if it sees fit to do so; but, in this day of humane penal laws, a court should adopt such a construction only when clearly compelled to do so. It is pointed out that throughout the Penal Code many instances are to be found where the minimum penalty only is fixed, and that such legislation is good. Unquestionably, it is good. It is aided in the case of felonies by the provisions of section 671 of the same Code, wherein it is prescribed: "Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence

such offender to imprisonment during his natural life, or for any number of years not less than that prescribed." In all cases amounting to felony, therefore, where the minimum punishment alone is fixed, resort is at once had to section 671, to determine what may be the maximum punishment. I insist that in the case of misdemeanors, where the minimum penalty alone is prescribed, resort should, in like manner, be had to section 19 of the Penal Code for the same purpose, and that in the case at bar (section 636 prescribing, as it does, the minimum penalty alone) reference should be had to section 19 of the Penal Code to determine the maximum penalty that may be imposed for the offense. "Except in cases where a different punishment is prescribed by this Code," says section 19, "every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both." The offense, under section 636, is expressly declared to be a misdemeanor, and by the same section the minimum punishment for the offense is designated. It is to my mind both just and natural to conclude that the legislature in such a case designed that the maximum penalty should be that laid down in section 19, rather than to ignore this plain provision, and to say that in this latter part of the nineteenth century of the Christian era a man, for illegally casting his net in the stream, may forfeit all his property, and be imprisoned in a common jail for the term of his natural life.

I concur: BEATTY, C. J.

123 Cal. 525

In re LA SOCIETE FRANCAISE  
D'EPARGNES ET DE PREVOY-  
ANCE MUTUELLE (S. F.  
846.)

(Supreme Court of California. March 21, 1899.)

Modified opinion. For former opinion, see 56 Pac. 458.

PER CURIAM. The opinion heretofore filed herein is modified by striking therefrom that portion in the last paragraph beginning with the words, "and especially must this be true," and thence to the end of the paragraph.

124 Cal. 147

SACRAMENTO BANK v. PACIFIC BANK  
(McDONALD, Intervener). (S. F. 1,069.)  
(Supreme Court of California. March 28,  
1899.)

BANKS—INSOLVENCY—STOCKHOLDERS' LIABILITY—  
SUBROGATION.

1. A creditor of an insolvent bank, who recovers a portion of his debt from stockholders on their personal liability, is not thereby prevented from sharing with other creditors on the basis of his entire debt in the assets of the corporation, to the extent of the balance due.

2. A stockholder of an insolvent bank, who has been compelled to pay the claim of a creditor because of his additional statutory liability, is, under Civ. Code, § 309, not entitled to be subrogated to the creditor's interest in the assets of the corporation.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by the Sacramento Bank against the Pacific Bank, J. M. McDonald, intervener. There was a judgment for plaintiff, and defendant and intervener appeal. Affirmed.

Sawyer & Burnett, for appellant. Freeman & Bates, for respondent. Roger Johnson, for intervener.

GRAY, C. Appeal from judgment for plaintiff for the sum of \$1,014.38, claimed to be due on the sixth dividend declared in favor of creditors by directors of defendant. The appeal is taken on the judgment roll, from which it appears that the defendant became insolvent, and was placed in liquidation by proceedings of the bank commissioners in 1893; that it was indebted to plaintiff in the sum of \$20,272.70, or thereabout; that plaintiff presented its claim for that amount to the defendant, and that defendant in due form allowed the same; that from the defendant plaintiff has collected of this indebtedness, before the commencement of this suit, five dividends of 5 per cent. each, or a total of 25 per cent., of its original claim, amounting in the aggregate to about \$5,071.90; also from the solvent stockholders plaintiff recovered about \$5,100, being the proportion of the remaining 75 per cent. of plaintiff's claim due from them, leaving a little over \$10,000 unpaid on plaintiff's original claim. After all these collections, a sixth dividend to the creditors of 5 per cent. was declared by the directors of the insolvent defendant, and the first question presented to the court in this case is, how should plaintiff's right in that dividend be computed, and how much is plaintiff entitled to recover on account of such dividend? The trial court decided that plaintiff's share in the sixth dividend was the same as it had been in each of the first five dividends, and that it was entitled to 5 per cent. of its original claim as it was before anything was collected. There is no explicit statute or previous decision of this court to guide us in this matter, but I think the trial court reached a conclusion that is correct upon principle, and is borne out by decisions of courts in other states on questions bearing a close analogy to those involved in this case. "If both the maker and indorser of a promissory note are declared bankrupts, the holder may prove the note for the full amount thereof against the estate of each, and the amount for which he may prove it against the estate of each cannot be affected by any dividends received from the estate of the other, except that the dividends received from the two estates will not, in any event, be permitted to exceed in the

aggregate the amount of the note." In *re Meyer*, 78 Wis. 615, 48 N. W. 55; In *re Bates*, 118 Ill. 524, 9 N. E. 257. In *Bank v. Porter*, 122 Mass. 308, where the question was what the dividend against the indorser should be where the payee had already received 50 per cent. of his note from the maker, the court says: "The plaintiff had received fifty per cent. of his debt from the estate of the maker, but this was no reason why the defendants should not pay them the fifty per cent. upon the whole debt as they had entered it upon their schedule. The plaintiff was entitled to the benefit of its double security. Where both maker and indorser are liable, the holder of a note may prove the amount against each, and receive dividends to the full amount of his debt." On the principle followed in these cases it appears that the plaintiff in this case is in the position of a creditor having two debtors, one being the corporation, all the stockholders representing the other, each of whom owe him his entire claim; and that he is at liberty to proceed against both, or either separately, without reference to the other, until his entire claim shall be satisfied; and that the plaintiff's right to share in the dividends with the other creditors of the insolvent bank is to be measured by the amount of its claim as it was fixed by the approval of the same, made in course of the liquidation of the Pacific Bank; and it would follow from this that the plaintiff's share in the sixth dividend would be the same in amount as its share has been in every preceding dividend. By prosecuting its rights against the stockholders, the plaintiff forfeited no right that it had against the Pacific Bank. The law is swift to bestow a premium upon promptness and vigilance in the pursuit of one's rights, and will not rob plaintiff of any advantage it may have gained over the other creditors by its early suit against the stockholders. If, however, the appellants were to prevail in their contention that plaintiff's right to share in dividends should be measured by the amount of its claim left after deducting all that it had received on it, the plaintiff might soon find itself in a worse position than it would have occupied had it refrained from suing the stockholders until the assets of the bank were exhausted. A construction of the law that would lead to such a result should be avoided.

The intervener also appeals from the judgment, contending that he, being a stockholder owning 1,738 out of the total 10,000 shares of the Pacific Bank, had been compelled by plaintiff to pay it  $1738/10000$  of its demand against the bank, and that he is, therefore, entitled to be subrogated to the extent of the last-named fraction in and to plaintiff's right in the sixth dividend. It is clearly the law that the funds of an insolvent corporation are all to be dispensed solely for the benefit of its creditors, and, while the stockholder may be compelled to put a great deal into the funds of such a corporation in the way of assess-



ments, he is not as a stockholder permitted to share in its dividends either by subrogation or otherwise. Civ. Code, § 309. Under the constitution and statutes of this state each stockholder may be compelled to pay to the corporation assessments to the full amount of his subscription to the capital stock of the corporation for the payment of creditors of such corporation, and also be individually liable to each creditor for such proportion of his claim as the amount of stock held by such stockholder bears to the whole of the capital stock. These two liabilities and the remedies based thereon are concurrent. Civ. Code, § 322; Const. art. 12, § 3; *Hiller v. Collins*, 63 Cal. 235; *Harmon v. Page*, 62 Cal. 448. It follows, then, that whatever the intervener has paid, either directly to the corporation in the way of assessments, or on account of his personal liability as a stockholder directly to the creditor, he was bound to pay under the law, and can recover no portion of the same back, either by subrogation or otherwise. The conclusion of law found by the court against the intervener is therefore correct. For the foregoing reasons I advise that the judgment be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

124 Cal. 128

KNOTT v. McGILVRAY. (S. F. 1,566.)

(Supreme Court of California. March 27, 1899.)

DEATH BY WRONGFUL ACT—ACTION BY WIDOW—  
NEGLIGENCE—STREETS.

1. Under Code Civ. Proc. § 377, providing that the heirs of a person whose death is caused by the wrongful act or neglect of another may recover damages, a complaint alleging that plaintiff, at the time of the injury to, and the death of, such person, was his wife, and is his surviving widow, states a cause of action, as the widow is an heir of the deceased husband, and, under certain conditions, may be his sole heir.

2. A person engaged with tools and materials directly over a thoroughfare where people are rightfully traveling must exercise the greatest care to prevent injury to travelers.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Jane Knott against John D. McGilvray. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

C. H. Wilson, for appellant. Jas. Alva Watt, for respondent.

VAN DYKE, J. This action is to recover damages for the death of one Benjamin Knott, and was originally instituted against Claus Spreckels and John D. McGilvray. During the trial, on the motion of Spreckels, a nonsuit was granted as to him, and the case proceeded to judgment against the defendant

McGilvray. An appeal is taken from the judgment, and also from the order denying the defendant McGilvray's motion for a new trial.

The first contention of the appellant is that the complaint does not state a cause of action, inasmuch as the surviving wife, as such, has no cause of action, but only the heirs of the deceased. By section 377, Code Civ. Proc., it is provided: "When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or, if such person be employed by another person who is responsible for his conduct, then also against such other person." The complaint alleges that the plaintiff is the surviving wife and widow, and that at the time of his injury and death, as aforesaid, was the wife of said Benjamin Knott. The surviving wife is an heir of the decedent, and, by the law of succession, "if the decedent leave a surviving husband or wife, and neither issue, father, mother, brother nor sister, the whole estate goes to the surviving husband or wife." Civ. Code, § 1386, subd. 5. There is nothing in the record to show that there were any other heirs than the plaintiff. If it appear upon the face of the complaint that there were other heirs who were not joined, the objection could have been taken by demurrer. If it did not appear upon the face of the complaint, but as a fact, there were other heirs, their nonjoinder could have been taken advantage of by answer. The question of a nonjoinder was not raised either by demurrer or answer in this case. "If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action." Code Civ. Proc. § 434. Hence the appellant, realizing that the objection as to nonjoinder of other heirs, if there were any, has been waived, falls back upon the contention that the complaint fails to state a cause of action. But the complaint clearly does state a cause of action, and is sufficient to support the judgment.

Under said section 377, Code Civ. Proc., the defendant Spreckels, as owner of the premises, was joined with the defendant McGilvray, upon the theory, doubtless, that he was considered responsible for the latter's conduct. Spreckels appeared by his counsel, demurred to the complaint, which was overruled, and afterwards separately answered. At the trial, after the evidence was in, upon motion of his counsel, a nonsuit was entered as to the defendant Spreckels, on the ground, as it would seem, that the defendant McGilvray was an independent contractor and alone liable. Defendant McGilvray thereupon moved the court, upon affidavit, to remove the cause as to him to the United States cir-

cult court, on the ground that he was a citizen and resident of the state of Colorado. He further states in his affidavit that Claus Spreckels was fraudulently and improperly joined as a party defendant for the sole purpose of defeating the rights of said petitioner, McGilvray, to remove the cause to the United States circuit court; and that within 10 days after the commencement of the action, on his application, the cause was removed to the circuit court, and that the same was remanded to the superior court on the ground of the joinder of said Spreckels, who was a resident of this state, as a defendant with petitioner. The counter affidavit denies that Spreckels was fraudulently joined as a party defendant, and alleges that the plaintiff believed, and still believes, that he is a proper party, and that McGilvray has been and now is an actual resident of the city and county of San Francisco, having and maintaining a residence therein for the period of two years last past, and that the cause was not remanded by the United States circuit court on the ground of the joinder of Spreckels, but upon the ground that the petition for the removal filed by the defendant McGilvray was defective in form and substance, and did not show any right of removal. The court below, it is presumed, found the fact to be as stated in the counter affidavit; that Spreckels was not fraudulently joined as a party defendant, but was joined as such defendant in good faith, and not for the purpose of defeating a removal by the petitioner; and that the cause had been remanded by the United States circuit court on the ground that the petition was insufficient, and did not show any right of removal. In *Gregory v. Hartley*, 113 U. S. 745, 5 Sup. Ct. 745, the court say: "The mere filing of a petition is not enough, unless, when taken in connection with the rest of the record, it shows on its face that the petitioner has, under the statute, the right to take the suit to another tribunal." See, also, *Railroad Co. v. Koontz*, 104 U. S. 5; *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799; *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518; *Crehore v. Railroad Co.*, 131 U. S. 240, 9 Sup. Ct. 692.

Appellant contends that the trial court erred in charging the jury as follows: "Upon this subject the supreme court have said that where one is engaged with tools and materials directly over the thoroughfare where people are constantly traveling, and have an undoubted right to travel, that under such circumstances the law demanded of such party more than ordinary care. Such party is bound, under such circumstances, to exercise the greatest care and caution in the performance of his work, in order that travelers may not be injured." This portion of the charge is nearly in the precise language used in *Dixon v. Pluns*, 98 Cal. 388, 33 Pac. 270. The court there says: "The motion for a nonsuit was properly denied. Upon the evidence, we cannot say that the respondent

was guilty of contributory negligence in walking upon the sidewalk at the time the injury was inflicted. She had a right to be there, and had no sufficient reason to anticipate danger from overhead. Respondent's evidence also established a prima facie case of negligence upon the part of the appellant. He was engaged with tools and materials directly over a thoroughfare where people were constantly traveling and had an undoubted right to travel. Under such circumstances, the law demanded of him more than ordinary care. He was called upon to exercise the greatest care and caution in the performance of his work in order that travelers might not be injured. The injury was received at the hands of the appellant by the dropping of the chisel while respondent was walking upon the public street." See, also, *Judson v. Powder Co.*, 107 Cal. 549, 40 Pac. 1020. There are no other matters disclosed by the record, to which our attention has been called by the appellant, which require consideration. Judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

DINGLEY v. McDONALD et al.  
(S. F. 1411.)

124 Cal. 90

(Supreme Court of California. March 24, 1899.)

BANKS AND BANKING — INSOLVENCY — DEPOSITS — REPAYMENT — REVIEW — HARMLESS ERROR — EVIDENCE — ACCOUNT STATED — CLAIMS — STATEMENTS BY BANK AFTER INSOLVENCY — ASSIGNMENT — PAROL POWER — VALIDITY.

1. A depositor paid his bank checks on his deposit for drafts on Chicago. His bank book was then balanced, showing the amount of his deposit after deducting the checks. Two days later the bank failed, and, the drafts not being paid, and returned to the depositor, he subsequently surrendered them to the bank, and it credited their amount to his account in his pass book. *Held*, in an action to enforce a stockholders' liability, that the delivery of the drafts did not constitute payment pro tanto of his deposit, and that the depositor's claim at the time of the failure was the amount of the original deposit.

2. Where the amount of plaintiff's claim against an insolvent bank had been fully proved by other competent evidence, the erroneous admission of additional evidence, merely cumulative, in corroboration, is harmless.

3. Where a depositor's bank book showed his balance after deducting certain checks given for drafts which were protested because of the failure of the bank, a subsequent statement of his claim, executed by the manager of the bank, showing the amount to be his previous balance, is admissible to rebut the presumption arising from the bank book showing his claim to be the balance, less the checks at the date of the failure.

4. Where a depositor's bank book showed the balance due him, less certain checks for drafts which had been protested because of the failure of the bank, the fact that he waited some time before protesting against the deduction in his account by the checks does not make the book an account stated, where it was afterwards credited with the unpaid drafts, and his



claim certified by the bank to be the original deposit.

5. Where an insolvent bank was still under the control of its directors, the statement of a claim of a depositor by the bank's officers is not invalid as a declaration after insolvency, since it is but the statement of an old indebtedness, and not the creation of a new one.

6. Since the assignment of a claim against an insolvent need not be in writing, a parol power authorizing another to make such assignment is valid.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Charles L. Dingley, Jr., against R. H. McDonald, James McDonald, and others. From a judgment in favor of plaintiff, defendant James McDonald appeals. Affirmed.

Sawyer & Burnett, for appellant. H. A. Powell and W. A. Dow, for respondent.

PRINGLE, C. This action is brought against stockholders of the Pacific Bank to recover the portions of the debts of the bank for which they are respectively liable as stockholders. Many claims are consolidated. But only in the case of two claims are questions presented on this appeal.

1. The complaint alleges: That on the 23d day of June, 1893, there was on deposit in said bank, belonging to and to the credit of H. D. Rowe, the assignor of the plaintiff, the sum of \$4,891.01; that on the said 23d day of June the bank closed its doors, and suspended business. The answer denies that on the 23d day of June there was on deposit to the credit of Rowe any more than \$228.25. The court finds that there was on deposit as alleged in the complaint the sum of \$4,891.01. Appellant claims that the evidence is insufficient to justify the finding. The evidence shows that Rowe had that amount—\$4,891.01—on deposit on the 17th of June; that on that day and on the 21st of June he drew two checks for drafts or bills of exchange by the Pacific Bank on the National Bank of Illinois at Chicago in favor of Charles A. Capwell. These checks were charged against his account, and reduced the account on the books to \$228.25, the balance shown by his bank book on June 22d. The checks were not paid in money, but were given for the drafts. The drafts were refused payment, were protested, and returned to Rowe, and by him surrendered to the Pacific Bank. The bank gave him credit on his bank book for the amount of the checks which it had charged against him, restoring his credit account to \$4,891.01. This credit was not entered on the bank book until December 14, 1893. The appellant claims that by the issuance of the drafts payable to Capwell the bank assumed a liability to him different to its liability to Rowe for his original moneys on deposit; and that, whatever may be its liability on the drafts, it was not for moneys on deposit, as charged in the complaint. But that is not of the substance of the transaction as between the bank and Rowe. Rowe had moneys on deposit with the bank.

He instructed the bank to pay his moneys to Capwell in Chicago, and drew a check to appropriate moneys for such payment. The bank, by its draft upon Chicago, ordered payment to be made to Capwell; but the bank failed, payment was not made to Capwell, and the draft was protested, and returned to the bank. This is the meaning of the transaction between Rowe and the bank, consisting of check and of draft protested and returned. There was no payment of the check which could withdraw Rowe's deposit. The draft was not received in payment of the check. It is well settled that a note, even if it be the note of a third person, or a bill of exchange in favor of another, does not operate as payment except by express agreement. The presumption is not in favor of its being received as payment. *Comptoir d'Escompte de Paris v. Dresbach*, 78 Cal. 15, 20 Pac. 28 (in which it was said that, when a check is given for payment of a debt, the giving of a receipt in full does not establish an agreement for an absolute payment); *Steinhart v. Bank*, 94 Cal. 362, 29 Pac. 717 (in which the original note was stamped as "canceled"); *Society v. Burnett*, 106 Cal. 516, 39 Pac. 922 (where the old obligation was surrendered).

Appellant claims that it was error to admit in evidence the "claim" delivered by the bank to Rowe in the place of the bank book surrendered by him. The claim is as follows: "\$4,891<sup>01</sup>/<sub>100</sub>. No. 1,059. Certificate of Proof of Claim. San Francisco, August 5, 1895. This is to certify that the Bank of Sisson, Crocker & Co. (for claim No. 52, H. D. Rowe, manager) has this day made legal and satisfactory proof that it is a creditor of the Pacific Bank, of San Francisco, California, to the amount of forty-eight hundred and ninety-one dollars and one cent, upon the following claim, to wit: Balance due on open account of said H. D. Rowe, manager, as per pass book now on file in Pacific Bank (for proof of claim see No. 52, filed December 12, 1893), and said bank, or the lawful assignee of this claim, will be alone entitled to the dividends thereon. No assignment of this claim, or any portion thereof, will be recognized in the payment of dividends, unless notice of such assignment is given, and entered upon the books of the bank, before such dividends are declared, as evidenced by the indorsements hereon. This certificate is to be surrendered to the bank upon the payment of the final dividend. Pacific Bank, by J. E. Farnum, Manager." It is contended by the appellant that this claim is a mere declaration by an officer of the bank, made after the insolvency, and that, even if it be admissible against the bank, it cannot affect the stockholders. If it were relied on as proof of the original deposit, there might be force in the contention. But the original deposit was clearly proved. The controversy is only over the account, whether the deposit remained undiminished, or whether it was reduced to \$228.25. And upon this question the bank book was introduced in evidence by both sides, the appel-

lant expressly offering it on his behalf. This claim was merely the restatement by the manager of what the bank book offered by the appellant showed, being delivered to Rowe in place of the bank book when he surrendered his book to the bank. Hence the appellant could not object to its competency, whatever fault he might find with its weight or significance. The bank book which he had offered in evidence was itself merely the declaration of an officer of the bank. This claim was the declaration of its manager. But, indeed, the deposit was, as we have said, proved without the claim. The case really depends upon the effect of the checks drawn for the purchase of the drafts. If they were not paid by the drafts, the deposit stood unreduced; and this is the plaintiff's case. The subsequent declarations of officers of the bank were only corroborative of the case thus made by the plaintiff. They were not necessary to the plaintiff, and for that reason were of no injury to the defendant. Besides, they were admissible to rebut the presumption claimed by the appellant to arise from the delivery to Rowe of the bank book showing on the 23d of June a balance in his favor of \$228.25. Appellant claims that the failure by Rowe, for some uncertain time, to protest against the apparent reduction of his account made an account stated between the parties by reason of his presumed assent. This presumption is rebutted by the entry which the bank book offered by him shows to have been made in it on December 14th, and by this claim, afterwards substituted for the bank book. They were both declarations, as potent to exhibit the true state of the account after the protest and surrender of the drafts as was the book before their protest. That the claim was a declaration made after the insolvency of the bank was, in this aspect, not fatal to it. The bank was still under the control and management of its directors. Long v. Court, 102 Cal. 449, 36 Pac. 807. The claim was signed by the manager. It did not purport to be the creation of a new indebtedness, but to be the statement of the old account.

2. The same point is made in reference to a deposit of \$250 made by the plaintiff on June 13th, against which a check was drawn in purchase of a draft on Chicago. The facts are substantially the same, and the same reasoning applies.

3. An assignment of cause of action is made by F. M. Parcels acting for and in the name of Mrs. Fitch. Her authority to him was only verbal. But, as such an assignment is not required to be in writing, the verbal authority was sufficient.

4. The only other point made by the appellant is that the claim of Mrs. Fitch was barred by the provisions of section 359, Code Civ. Proc., which requires the action to be brought within three years "after the liability was created." Mrs. Fitch deposited \$208.85 on the 10th day of March, 1893. Action was brought on the 10th day of March, 1896. There were at one time conflicting decisions in England

and in this country on this question, many cases holding that in the computation of time the first day should be included. The appellant cites a case to that effect. Presbrey v. Williams, 15 Mass. 192. But in Bemis v. Leonard, 118 Mass. 502, Mr. Justice Gray reviews the cases in both countries with much learning and discrimination, and shows that the whole current of modern authority in both countries is in favor of excluding the first day in cases where the expression of our statute is used, "after the liability was created." The case of Presbrey v. Williams is discredited in that case. Weeks v. Hull, 19 Conn. 379; Cornell v. Moulton, 3 Denio, 12. In this state the case is set at rest by section 12, Code Civ. Proc., which requires the exclusion of the first day. Misch v. Mayhew, 51 Cal. 514. I advise that the judgment and order denying new trial be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and the order denying new trial are affirmed.

124 Cal. 123

BRASLAN v. SUPERIOR COURT OF  
SANTA CLARA COUNTY.  
(S. F. 1,852.)

(Supreme Court of California. March 25,  
1899.)

BANKS—LIQUIDATION—APPOINTMENT OF DIRECTOR  
—NOTICE—EVIDENCE.

1. In proceedings for the liquidation of a bank, notice of an application to the court to appoint a director to take place of one who has resigned pendente lite need not be given a person claiming to have been elected to such office, where he has given no notice to the court of his incumbency, the statute not requiring any notice.

2. On application, in proceedings to liquidate a bank, for the appointment of a director to take the place of one who has resigned, the burden is on one claiming to have been elected to the office to show such election, and where there is no evidence of, but merely an answer to the petition alleging, such appointment, the court is authorized to appoint another.

In bank.

Application by Charles P. Braslan against the superior court of Santa Clara county for a writ of certiorari to review an order of said court appointing directors for the Union Savings Bank of San José, in proceedings by the attorney general for the liquidation of the affairs of said bank. Denied.

Reddy, Campbell & Metson, for petitioner.  
Atty. Gen. Ford, for respondent.

BEATTY, C. J. The attorney general commenced an action against the Union Savings Bank of San José and its seven directors, in pursuance of the provisions of section 11 of the amended bank commissioners' act (St. 1895, p. 175), to enjoin them from the transaction of any further business and to compel



a liquidation of the affairs of the bank. Subsequent to the commencement of the action, and to the appearance of the original defendants therein, several of the directors resigned, and the petitioner claims to have been elected in place of one of them; but it is not shown that he was ever substituted as a defendant, or that he entered an appearance or gave any notice to the court or to any of the parties of his election as a director. This being the situation of affairs, the attorney general, by leave of the court, filed and served upon the defendants who had appeared a supplemental complaint, alleging that all the directors of the corporation had resigned, and that there were no directors, and praying the appointment of seven directors by the court. To this supplemental complaint an answer was filed containing no direct denials of its allegations, but merely alleging the fact that at different dates several of the directors had resigned, and that their resignations had been accepted by the remaining directors, and other persons elected in their place. Among other similar allegations, it was alleged that this petitioner, at a date prior to the filing of the supplemental complaint, had been elected a director in place of one who had resigned, and that he had entered upon the discharge of his duties; but it did not allege that he was still a director. It was also alleged in this answer to the supplemental complaint that six of the directors last appointed—all of them, that is to say, except Braslan, the petitioner here—had resigned, and their formal resignation was attached to the answer, which was signed by an attorney at law describing himself as attorney for all of the defendants and their successors, except Braslan. No summons, citation, or other notice of the proceeding appears to have been served upon Braslan, but the matter was submitted to the court "on the pleadings"; whereupon the court appointed a full board of seven directors of the corporation. This is the order which the defendant seeks to have reviewed, and such are the facts disclosed upon the hearing of a rule to show cause why a writ of certiorari should not issue.

The petitioner contends that the order appointing a full board of directors, which practically ousts him from an office to which he claims to have been duly elected, was in excess of the jurisdiction of the court, and void, because it was made without notice to him, and because it does not appear that the occasion had arisen for action by the court.

Upon these propositions, the first question to be considered is whether the law under which the court was proceeding gave the petitioner any right to personal notice of the application for the appointment of directors to fill vacancies. The statute is by no means explicit or plain upon this point, but I think it may be gathered from its various provisions that the intention was to invest the superior court with a very extensive authority

and jurisdiction over the corporation during the whole progress of liquidation, and, among other things, authority to fill all vacancies in the board of directors as often as they might occur, if the remaining directors failed or were unable to fill them. To call the powers of the court into action for this purpose I do not think a supplemental complaint is necessary, or even appropriate. The proceeding is independent and collateral, and may be taken by or on behalf of any party interested, by petition to the court, based upon the fact of malfeasance, neglect, or vacancy caused by death or resignation. When the court is asked to remove a director for fraud, malversation, or neglect, the statute expressly provides for a citation to the person accused and a hearing, but no notice is provided for when the court is asked to fill a vacancy. It may be contended, however, that, in the absence of such a provision, the director whose place is alleged to have become vacant is, if living, entitled to notice, upon general principles, in order that he may have an opportunity of showing that he has not vacated or abandoned the office. This is certainly a reasonable contention, but, whether well founded or not, it does not help the case of this petitioner, because here all the directors of the corporation, of whose existence the court was advised, and whose places the court was asked to fill, were notified of the proceeding. The petitioner had never, so far as appears, made known to the court, or to the other parties interested, the fact that he was, or claimed to be, a director, and the only mode of notifying him would have been by a general notice to all the world. But no such notice is prescribed or authorized, and, therefore, unless the court can proceed to act upon an alleged vacancy without notice to every unknown claimant of the office it cannot act at all, and the statute is in this respect nugatory. But this result cannot be allowed, and therefore I conclude that a director, or one claiming to be such, is not entitled to notice of an application to fill a vacancy unless he has given previous notice of his incumbency.

Upon the second point the case is more simple. Treating the so-called "supplemental complaint" as a petition to fill a vacancy, and allowing that a petition by the attorney general need not be verified, it stated a case calling for the action of the court; and, even if the answer could be construed as making an issue upon the allegation of a vacancy in the directorship claimed by petitioner, still the only way it raised such issue was by the affirmative allegation that petitioner had been appointed to fill a vacancy admitted to have been created by the resignation of another director. Therefore the burden of proof was upon those alleging the appointment, and since the whole matter was submitted on the so-called pleadings, without further evidence, the court did not even err, much less exceed its jurisdiction, in declaring a vacancy and

proceeding to fill it. The writ is denied and the proceeding dismissed.

I concur: VAN DYKE, J.

I concur in the judgment: TEMPLE, J.

McFARLAND, J. I concur in the judgment denying the writ and dismissing the proceeding and in the opinion of the Chief Justice. Furthermore, I think that the petitioner is not in a position to invoke the writ of certiorari. He was not a party to the proceeding in the court below, and did not attempt to make himself a party thereto by intervention or otherwise; and he is not in the exceptional position where, although he was not a party to the record, he might resort to certiorari, for the reason that he has substantial interests involved. The only interest which he shows is an asserted claim to an office, and certiorari is not the proper remedy for trying title to an office. Moreover, although this case is before us upon notice to show cause why a writ of certiorari should not issue, yet at the hearing the record was produced, and it was agreed by the parties that the matter should be determined as though a writ had been issued and the record of the lower court was here; and, therefore, even if the petitioner had the right to invoke the writ, the record shows no want of jurisdiction whatever. Moreover, as at present advised, my opinion is that from the time the board of bank commissioners take possession and control of a bank and its assets under the statute, until the adjudication of the court as to whether it shall be put into liquidation or not, the directors have no power to perform the corporate act of electing a new director.

GAROUTTE, J. I concur in the judgment. This is a proceeding to review the action of the superior court of the county of Santa Clara (Lorigan, Judge) in appointing seven directors for the Union Savings Bank of San José, an insolvent institution. Conceding the action of which complaint is made involved the exercise of judicial functions, and that, therefore, the legal remedy invoked is the proper one, still the showing made demands a denial of the relief sought. Upon a writ of review, the record is placed before this court, and the presence or absence of power in the lower court to make the order sought to be reviewed must appear from the face of that record. In this proceeding it appears that the bank corporation had no directors. Such is the positive allegation of the supplemental bill. There is no denial of this allegation, and the fact stands admitted. Under such circumstances, the court not only had the power to appoint seven directors, but it was its duty to exercise that power and make the appointment. Petitioner insists that he was a director of the bank corporation at the time this order of appointment was made, and that he had no notice of the proceeding, although a

party directly interested in the matter. It is a full and complete answer to this claim of petitioner when it is said that none of these facts appear from the record, and it is by the record that the case must be decided. If petitioner's rights have been affected by the act of the court in appointing these directors, he must seek some other remedy by which to protect himself.

124 Cal. 110

SPIRES v. URBACH et al. (L. A. 524.)  
(Supreme Court of California. March 24, 1899.)

CONTRACT—AVOIDANCE—MUTUALITY.

The owner of land, who made a contract permitting an electric railroad to be built thereon, and agreed to deed a right of way therefor if it was completed and in operation within a stipulated time, cannot avoid his contract, for want of mutuality, after the road is built and in operation within the time fixed therefor.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by Joseph H. Spires against Max Urbahn and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Walter F. Haas, for appellants. John D. Pope, for respondent.

PRINGLE, C. Action brought to enforce the performance by the defendants of the following contract: "The undersigned hereby agrees to deed to J. H. Spires or assigns, as a right of way for an electric railway, the south thirty feet of my seventeen and one-half acre tract in section 35, township 1 south, range 14 west, S. B. M., Los Angeles county, California. Said right of way to be deeded to said Spires or assigns within thirty days after an electric railway has been built and in operation on said right of way, permission being hereby granted: provided said road shall be built and in operation by July 1, 1897; provided said road shall give through transportation between the business center of the city of Los Angeles and Santa Monica, California. I further agree that, if said Spires or assigns shall build and operate said road as above, that I will deed to said Spires or assigns, free of incumbrance, within thirty days after said road is built and in operation, the following described property: One and one-half acres of land off my said seventeen and one-half acre tract, etc. [Description.] Franziska C. Gottleber. J. H. Spires. Witness: Isidore B. Dockweiler." The complaint alleges that Spires, plaintiff's assignor, built and put in operation an electric road in pursuance of the agreement, and within the time limited. And the court found the allegations of the complaint to be true. The point contended for by the appellants is that there was no consideration for the contract, no obligation to build the road having been assumed by Spires, and hence there was no mutuality



in the contract. It is now too well settled to permit of controversy that in such cases the completion of the work is an executed consideration which is sufficient to give mutuality to the contract. It is true that there was no mutuality until the road was built. But when the offer of the contract was accepted by the performance of its condition, it was too late to deny the consideration. These contracts have become familiar as stimulants to the construction of railroads and other public works, the inducement to the promisor, whether expressed or presumed, being the probable enhancement of the value of property by the construction. That such contracts or mere offers, unilateral at first, may be enforced when mutuality is secured by an executed consideration, is sustained upon well-recognized principles. The consideration takes its strongest form when it is executed. The question was lately under consideration in this court in the cases of *Thurber v. Meves*, 119 Cal. 35, 50 Pac. 1063, and 51 Pac. 536, and *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853, and 52 Pac. 44. In the latter case it was said: "An original lack of mutuality in the right to specific performance will not preclude the enforcement of the contract, where this want has been removed at the time the action is brought." The case of *Cooper v. Pena*, 21 Cal. 404, is cited by appellant. That case is reviewed in *Vassault v. Edwards*, 43 Cal. 458, and it is shown that the ruling in *Cooper v. Pena* is not at variance with the principle stated above. In the case of *Wilks v. Railroad Co.*, 79 Ala. 186, a contract essentially the same as the present one is considered by the court, and the objection of want of mutuality meets with scant favor from the court, which said, "There is nothing in this objection." I advise that the judgment appealed from be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

124 Cal. 95

WHITE v. CITY OF ALAMEDA.  
(S. F. 1,391.)

(Supreme Court of California. March 24, 1899.)

MUNICIPALITIES—OFFICERS—MASTER AND SERVANT.

1. One appointed and employed by resolution of a city "as driver of the street wagon, and to care for its horses," at so much a month, is not constituted an officer of the city, entitled to hold his position until discharged or the resolution is rescinded, or to receive pay for months in which he did not work.

2. The fact that he was able and willing to perform the services did not put on the city the duty of keeping him employed, nor make it liable for failing to do so.

Commissioners' decision. Department 1. Appeal from superior court of Alameda county.

Action by Thomas White against the city of Alameda. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Clinton G. Dodge, for appellant. E. K. Taylor, for respondent.

CHIPMAN, C. Action for services as driver of a street wagon. The complaint alleges that one M. M. White (plaintiff's assignor) was employed by defendant on April 19, 1897, "to drive the street wagon, and to take care of the horses of defendant, at a salary of sixty dollars per month"; that this employment was by virtue of a resolution of the trustees of defendant, passed on said day, "appointing and employing" said White "driver of the street wagon, and to take care of the horses of defendant, at a salary to be paid said White therefor by defendant of sixty dollars per month." It is alleged that "said resolution remained in full force and effect from and including the said 19th day of April, 1897, to the 1st day of November, 1897, on which said last-named date said M. M. White resigned from said employment." It is further alleged that defendant failed to furnish any work to be performed by White for the months of June, July, August, September, and October, 1897, "but that during all of the period of said last-named months said M. M. White was able, ready, and willing to perform the work authorized to be done, and which he was employed to do under and by virtue of said resolution." It is alleged that said White was paid to June 1, 1897, but no more. The action is for \$300, wages for five months at \$60 per month. Defendant demurred to the complaint on the grounds: (1) Insufficiency of facts, (2) uncertainty in some particulars. Judgment was given for defendant on demurrer, from which plaintiff appeals.

Appellant says in his brief that he alleged in the complaint that no services were performed during the months for which pay is claimed, although he was ready and willing to perform, "for the purpose of shortening the case and testing the question on demurrer." It is claimed by appellant that "the contract was a definite, entire, and continuing one, lasting to a certainty as long as the same was not discontinued by legislative action on the part of defendant"; that the resolution of defendant created an office, and appointed plaintiff to it, and that the office and employment continue until the resolution is rescinded or plaintiff is discharged from the employment,—citing *People v. Oulton*, 28 Cal. 45; *People v. Hammond*, 66 Cal. 654, 6 Pac. 741; *Stone v. Bancroft*, 112 Cal. 652, 44 Pac. 1069; *Webster v. Wade*, 19 Cal. 292; Civ. Code, § 1999. Replying, defendant claims that there is nothing in the pleadings to show that the resolution relied upon created or attempted to create an office, or that plaintiff was appointed to any office, or became a public officer; the city of Alameda is a municipal corporation of the fifth class, organized under the act of March 13, 1883

(St. 1883, at page 250, c. 6), and the charter creates no such office; that plaintiff's assignor, White, was employed for no special term, and the time adopted for estimating his wages was one month, and his hiring is presumed to be for one month (Civ. Code, §§ 2010, 2011); and that his service comes within the definition of master and servant (Id. § 2009). The resolution under which defendant entered service is not pleaded, nor is its substance given, otherwise than it is alleged that defendant adopted a resolution appointing and employing one M. M. White "driver of the street wagon and to take care of the horses of the defendant." This did not constitute White an officer, such, for example, as the state librarian, mentioned in 28 Cal., supra, who, it was held, continued in office after the expiration of his term, and until his successor was duly selected and had qualified, although the law creating the office did not authorize him to do so. The rule there laid down was based upon the reason that civil functionaries, like the state librarian, are charged with the duty of the safe-keeping and current management of public property committed to their custody, and are by law made responsible as such custodians; and that the public business requires that these duties shall be discharged without interruption. The case in 66 Cal. and 6 Pac., supra, was that of police commissioners, whose appointment was under an act which did not fix the term. But we cannot regard the driver of a street wagon as any such officer, or as coming within the reason of the rule stated in 28 Cal. Nor can we regard the resolution, so far as we can judge from what is said of it in the complaint, as amounting to anything more than a minute entry by defendant in its proceedings that it had hired plaintiff to do the work at the monthly compensation of \$60. No inference can be drawn from anything in the pleadings or the resolution that defendant was to receive pay when he did no work, or that it was a continuing employment, to last until the resolution might be rescinded, or until defendant was formally discharged. The complaint alleges that defendant "failed to furnish any work to be performed by said M. M. White under said resolution for the months," etc.—the months for which he now claims salary. Doubtless this was because the defendant had no use for White's services. We cannot see that the fact that White was able and willing to perform the services put any duty upon defendant to keep him employed, or that it became liable for failing to do so.

Appellant insists that White was not a servant in the sense that term is used in the Civil Code (sections 2009–2011), but that he was an employé (if not an officer), as defined in section 1965, Id. As we understand title 6 (entitled "Service"), Civ. Code, § 1965 et seq., there is no necessary distinction between the terms "servant" and "employé." The title deals with three classes of service, and the obligations of the employer and employé towards

each other. Under this title of "service" are agents, factors, shipmasters, mates, and seamen under the head of "particular employments," where are found "master and servant." The term "employé" may sound more euphonic than the term "servant," but there is no substantial difference between the two except as the statute makes a difference. All public officers are "servants" of the people. In speaking of the various occupations which fall under the head of "workmen" or "employés," Mr. Schouler says that the relation of master and servant may well be said to apply, and he adds that in this country "it is gratifying to reflect that the servant is frequently the social equal, or even the superior, of his master." Schouler, Dom. Rel. § 455. Section 1997, Civ. Code, provides that: "Every employment is terminated: 1. By the expiration of the appointed time. \* \* \*" Section 2010, Id., provides that: "A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages;" and section 2011, Id., provides that: "In the absence of any agreement \* \* \* as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the service is performed." Here the complaint shows a hiring for no specified time, but at a monthly rate of wages, and it shows payment for all the time that service was rendered. The claim now urged, in our opinion, rests upon a false basis, to wit, that the resolution created an office, and that White, upon his appointment, continued in office, and was entitled to pay as such officer, whether he performed service or not, at the stipulated monthly salary, because the defendant did not formally repeal the resolution. We think the relation of master and servant was created by the employment, nothing more nor less, just as the relation is created and regarded between a railroad or other private corporation, where persons are employed to perform special service, not "an independent calling." The books are full of cases where the relation of master and servant is recognized, and so designated, as existing between railroad and other corporations and their employés. It is possible that under the allegation in the complaint that White "continued to be employed by defendant in said capacity at said salary of sixty dollars per month until the 1st day of November, 1897," would be sufficient upon general demurrer. Plaintiff, however, does not rely upon that allegation, but seeks a decision only upon his theory of the case. As we think his theory is unsound, it is advised that the judgment be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.



124 Cal. 132

FRASHER v. RADER et al., Fire Com'rs.  
(L. A. 359.)

(Supreme Court of California. March 27, 1899.)

CERTIORARI—MUNICIPAL BOARD—JUDICIAL FUNCTIONS.

Certiorari will not issue to review the action of a board of fire commissioners granting permission for the erection of a building on land within the city, under an ordinance allowing them to grant such permit only on petition of three-fourths the property owners in the block where the building is proposed to be erected; the action of the board not being the exercise of a judicial function.

In bank. Appeal from superior court, Los Angeles county.

Application by George W. Frasher against Frank Rader and others, as fire commissioners of the city of Los Angeles, to review an order of defendants permitting the erection of a blacksmith shop within the city. From a judgment denying the writ, petitioner appeals. Affirmed.

Will D. Gould, for appellant. W. E. Dunn, for respondents.

HENSHAW, J. The defendants, constituting the board of fire commissioners of the city of Los Angeles, granted Dennison & Tucker permission to build a blacksmith shop upon a certain piece of land within the city. Under the municipal ordinance a structure for such purpose could not be built "without a permit from the fire commissioners so to do, which permit shall be granted only upon the petition of three-fourths of the property owners in the block in which said building is proposed to be erected." Permission was granted upon October 23, 1895. Upon October 20, 1896, this petition for a writ of review was filed. It averred that the requisite number of property owners had not petitioned on behalf of Dennison & Tucker, and that the board of fire commissioners granted the permit well knowing such to be the fact. Upon these averments it was sought to review and annul the order of the board.

The writ of certiorari runs to review the action of an inferior tribunal, exercising judicial functions, only upon a showing that such tribunal has exceeded its jurisdiction, and that the legal remedies applicable to the case are inadequate to afford protection or relief. It cannot be used to review the acts of a legislative, executive, or ministerial body, or even the acts of a judicial tribunal in the exercise of its discretion. The board of fire commissioners had for its duty—First, to determine "whether three-fourths of the property owners in the block" had petitioned; and, second, if the determination upon this was favorable to the applicant, then to decide whether to grant or refuse the permit. In neither nor in both of these acts did it render a judicial decision. In the second, it was but exercising a discretion not the subject of review. In the first (since it will not be contended that the board could pass on conflict-

ing titles to real estate), it was but making a mathematical computation, no more judicial in its nature than is the sheriff's determination, when he executes his deed, that six months have elapsed since the execution sale, and no more judicial than the act of a board in awarding a contract to the lowest bidder. *Townsend v. Copeland*, 56 Cal. 612. All political, executive, legislative, and ministerial boards, bodies, and offices are constantly, and, indeed, perpetually, called upon to make decisions affecting the conduct of matters intrusted to them. They exercise their judgments in so doing, and they determine the existence or nonexistence of facts. No street in any municipality of the state may be ordered improved until the proper authorities have first decided as a fact that a public necessity or convenience requires it. Such decisions, however, are not judgments pronounced by a judicial tribunal. They do not, as to be judicial decisions they must, declare the law and define the rights of the parties under it. But this subject has been discussed so recently and so fully in *Quinchard v. Board*, 113 Cal. 664, 45 Pac. 856, and in *People v. Board Sup'rs Contra Costa Co.* (Cal.) 55 Pac. 181, that it would be supererogatory to continue. The judgment appealed from is affirmed.

We concur: McFARLAND, J.; TEMPLE, J.; GAROUTTE, J.; HARRISON, J.

124 Cal. 134

CRESCENT CANAL CO. v. MONTGOMERY  
et al. (S. F. 1,084.)

(Supreme Court of California. March 28, 1899.)

JUDGMENT—VACATION—AFFIDAVIT OF MERITS—STIPULATION—FRAUD—PARTIES—SUBSTITUTION.

1. Defendant, in a suit to restrain him from destroying a canal on his land, resold the land to his grantor, and he sold it to one J., who intervened, and with consent of defendant, and with notice to plaintiff, substituted his attorney for defendant's, withdrew his intervention, and filed an answer and cross complaint. Thereafter defendant stipulated for entry of judgment against him. On motion to reinstate, J. and his attorney deposed that defendant agreed to the substitution, and to J.'s defending in his name for J.'s benefit, and that plaintiff knew it, and the attorney deposed that he stated in open court that he would defend in the name of defendant for J.'s benefit. Two others deposed to defendant's knowledge that the land was purchased by J. for the purpose of defending in the action. Defendant did not deny such knowledge, but claimed he had a verbal option of buying the land back, but did not state that he had done anything, nor intended to do anything, under it. Defendant's attorney deposed that no statement was made in court that he heard or understood as to J.'s defending the action, and he did not know that J.'s attorney was defending. *Held*, that defendant's stipulation for judgment was a fraud on the real defendant, and the judgment should be reopened.

2. Where the court allowed a party to file an intervention, and afterwards an answer and cross complaint, to authorize reopening a judgment against such party an affidavit of merits need not be filed.

3. A motion to set aside a judgment on account of fraud need not set out an affidavit of merits.

4. Under Code Civ. Proc. § 385, permitting an action to be continued in the name of the original party in case of any transfer of interest, the transferee of a part only of a cause of action may continue it in the name of the original party.

5. A stipulation for judgment, signed by a party, is of no effect, he being represented in court by an attorney.

Department 1. Appeal from superior court, Fresno county.

Action by the Crescent Canal Company, a corporation, against John Montgomery and others. There was a judgment for plaintiff, and, from an order refusing to vacate and set aside the judgment, defendant J. G. James appeals. Reversed.

W. C. Graves and E. D. Edwards, for appellant. F. H. Short, for respondent.

VAN DYKE, J. This appeal is from an order denying the motion of J. G. James for an order to vacate and set aside the judgment made and entered herein on the 19th day of May, 1897. The motion is based upon affidavits, pleadings, and files in the case, minutes of the court and certain deeds of conveyance, all of which are embodied in the bill of exceptions brought up with the appeal. The facts of the case are about these: William Johns and Thomas Poyser were owners and in possession of fractional section 4, lying north of the Laguna De Tache grant, in township 18 S., range 19 E., Mount Diablo base and meridian, containing 480 acres, more or less. The plaintiff canal company entered upon this fractional section without permission of Johns and Poyser, and constructed levees and dams over and upon said section, and across and in the bed of a natural stream of water called "North Fork of Kings River," flowing through said section, without the consent or knowledge of said Johns and Poyser. In 1889 the said Johns and Poyser sold and conveyed said fractional section 4 to the defendant L. Y. Montgomery, and the said Montgomery, to secure the payment of a sum of \$4,000 purchase money, mortgaged said lands to said Johns and Poyser. Thereafter Poyser sold and assigned his entire interest in and to said mortgage to said Johns, and he became sole owner thereof. Thereafter the defendants Montgomery commenced to dig and tear down and remove the said levees and dams, and the plaintiff thereafter, on the 5th of December, 1891, commenced this action in the superior court of Fresno county against said Montgomerys, and obtained a temporary injunction against said defendants Montgomery, restraining them from digging up and tearing down said levees and dam. Thereafter, on January 2, 1892, the defendants filed an answer to said complaint, and at the same time a cross complaint, in which it was alleged that the said canal had been constructed across said land as stated, and that the same obstructed and dammed up a

natural water course, and backed the water up over the banks and upon the lands of the said defendants; that the same was a nuisance, and caused great damage to the defendants; and asking that said nuisance be abated. Thereafter, on September 19, 1896, said L. Y. Montgomery resold said fractional section 4 to William Johns, and the said Johns satisfied and released the mortgage, and canceled said debt due him from said Montgomery. Thereafter, on October 12, 1896, said Johns sold and conveyed 40 acres, more or less, of said section 4 to said J. G. James, and the said James paid therefor the sum of \$600. Thereafter, on the 1st day of December, 1896, by leave of the court, James filed his complaint in intervention in this action. In his complaint in intervention said James set up his ownership of a portion of said section 4, and alleged that the North Fork of Kings river is a natural stream or water course, and that during ordinary stages of water it has and continues to carry down and through said tract a continuous stream; that prior to the action of the plaintiffs in constructing their canal the greater part of the waters of Kings river were accustomed to and did flow in their natural channel through said North Fork of the Kings river by and past said tract of land, and that Johns and Poyser, grantors of the intervener, were the owners and in possession of the tract of land during the time plaintiffs wrongfully entered upon the same and obstructed said natural water course; that Johns intended, after repurchasing said fractional section 4, to sell and convey the 40 acres to James, as stated, and said Montgomery consented and agreed thereto, knowing at the time that said James wanted to and intended to defend said action for his own use and benefit; and asks affirmative relief that the plaintiff be restrained and prevented from maintaining or continuing said dam and canal across the bed of said North Fork of Kings river. Thereafter, on December 22, 1896, W. C. Graves was substituted as the attorney of record for the defendants in place of R. B. Terry, the defendants signing the following consent: "We hereby consent to the foregoing substitution of attorneys, the same having been made at our special instance and request. John Montgomery and L. Y. Montgomery." Plaintiff's attorney admitted service of notice of substitution of attorneys for the defendants, December 24, 1896. Thereupon it was agreed between the defendants and their substituted attorney, W. C. Graves, and James, that the complaint of said James in intervention should be withdrawn without prejudice, and that said James should maintain and defend the action in the names of the said John and L. Y. Montgomery for his (James') own protection and benefit; and thereafter said Graves, as such attorney, May 10, 1897, filed an amended answer and cross complaint, in the names of said defendants John and L. Y. Montgomery, but in the in-



terest and for the benefit of said James, according to said agreement. May 19, 1897, the following stipulation, dated April 17, 1897, was filed: "Whereas, all matters of dispute and difference have been settled in the above-entitled action, and the defendants admit and agree that the plaintiff is entitled to judgment as prayed for in the plaintiff's complaint, except that it is understood and agreed he is not entitled to and does not claim any judgment against the defendants, and the defendants are not entitled to and do not claim any judgment against the plaintiff for damages in said action: Now, therefore, it is understood and agreed that the plaintiff may take judgment in said action as prayed for in plaintiff's complaint, except that no judgment for damages or costs shall be entered against the defendants, but that otherwise plaintiff is entitled to and shall have the relief sought in said action, and the defendants request that judgment herein be entered accordingly." Upon this stipulation the judgment in question was entered May 19, 1897. It recites: "Whereas, it appears to the court that the defendants above named have consented in writing that plaintiff may have and is entitled to judgment in said action as prayed for in plaintiff's complaint, except that no judgment for damages or costs shall be entered in said action in favor of the plaintiff or against defendants, but that otherwise plaintiff is entitled to the relief sought in said action, defendants requesting in writing that judgment be entered accordingly: Now, therefore," etc.

The motion to set aside and vacate the judgment entered upon such stipulation is based upon the ground, among others, that James was the real party defendant interested in the subject-matter in controversy in said action, and that the defendants Montgomery had no interest therein, or in defending the same, since the conveyances and substitutions already referred to, all of which was known to the plaintiff and its attorney; and that said purported stipulation made by said Montgomery was a fraud upon the rights and interests of said James and upon the court. There can be no doubt that, after the conveyances and substitutions referred to, James was the real party in interest as defendant in the subject-matter in controversy in said action, in place and stead of the nominal defendants. The stipulation signed by them states that "all matters of dispute and difference have been settled in the above-entitled action." What matters of dispute and difference have been settled? The only matter in dispute was as to the right of the plaintiff to maintain its canal in the manner in which it constructed the same along and across the tract of land known as "Fractional Section 4." This right was asserted by the plaintiff and denied by the defendants, and also by the intervener, James, and the only way that matter in dispute is shown to have been settled, as far as the plaintiff and nom-

inal defendants are concerned, is by the sale and transfer of all interest of the defendants in and to the premises in question, to wit, fractional section 4. The showing made in support of the motion of appellant was all in this line. The affidavit of the appellant, James, states that while the action was pending defendants "conveyed to William Johns all their right, title, and interest in and to said section 4, over, along, and upon which said canal, dam, and other obstructions have been constructed by said plaintiff"; and further states his purchase of the 40-acre tract for \$600, and "that thereafter, and while said action was still pending, this affiant and the said defendants came to an agreement in and by which it was agreed between them that affiant would withdraw his said complaint in intervention, and would undertake to carry on and maintain defense to said action in the name of the defendants for his (affiant's) own protection and benefit, and that he did, pursuant to said agreement, withdraw his said complaint in intervention, and did procure Walker C. Graves, his own attorney, to be substituted in lieu of the attorney for defendants in said action, and that he has ever since, and up to the time said action was attempted to be dismissed, maintained and carried on the defense of said action at his own cost and expense, and free of any costs or expense to said defendants; \* \* \* that the plaintiff well knew, long prior to said 17th day of April, 1897, that this affiant was defending said action in the name of said defendants, for his own use and benefit." The appellant's attorney, Graves, in his affidavit states that after filing of his petition in intervention he met L. Y. Montgomery, one of the defendants, "and it was then and there agreed between the said L. Y. Montgomery, acting for himself and his co-defendant, John Montgomery, and this affiant, acting for J. G. James, that affiant would withdraw the complaint of J. G. James in intervention in the above-entitled action, and would undertake to carry on and maintain the defense to said action in the name of the defendants, and for J. G. James' own protection and benefit, and free of any cost or expense to the defendants," and further details the steps that were taken thereafter pursuant to said agreement, substantially the same as in the affidavit of the appellant, James, and adds: "And affiant further states that upon the withdrawal of said complaint in intervention he stated in open court that he would defend the action in the name of defendants for the benefit of J. G. James, or words to that effect were used, and plaintiff knew long prior to the 17th day of April, 1897, that J. G. James was defending said action in the name of the defendants, for his own use and benefit." In Johns' affidavit he says: "On or about the 21st day of August, 1896, and while said action was pending in said court, the said L. Y. Montgomery proposed to affiant to sell and convey the said land back to him if affiant

would release and discharge said mortgage and cancel the debt secured thereby. This affiant consented and agreed to said proposal, and thereupon, in pursuance thereof, said L. Y. Montgomery did, on the said 19th day of September, 1896, by a deed of that date, reconvey said fractional section to this affiant." And further: "And when this affiant purchased said section from said L. Y. Montgomery, as hereinbefore stated, and while said action was pending in said court, the said James, in order to entitle him to protect his interests and rights to have said water flow over his said land, and with full knowledge and consent of said L. Y. Montgomery, purchased from this affiant forty acres of said fractional section, upon, over, and through which said canal is situated, and this affiant conveyed the said forty acres to said James, this affiant and L. Y. Montgomery well knowing that said James wanted to, and intended to, defend said action." Thomas Poyser in his affidavit says: "That this affiant was present on the Laguna De Tache grant, and heard the conversation between L. Y. Montgomery and the said William Johns, namely, on or about the 21st day of August, 1896, in the course of which the said L. Y. Montgomery proposed to sell and convey the said land back to the said William Johns if the said William Johns would release and discharge said mortgage and cancel the debt secured thereby; that said Johns consented and agreed to said proposal; and that said Johns then and there informed the said L. Y. Montgomery that he intended, after repurchasing said land, to sell and convey some forty acres to Jefferson G. James for six hundred dollars, upon, over, and through which said canal is situated." The only affidavits in reply on the part of the plaintiff were by its attorney and L. Y. Montgomery, one of the defendants. The affidavit of the plaintiff's attorney in response to that portion of the affidavit of Graves, the appellant's attorney, as to what occurred in open court, merely says "that no statement was made in open court or otherwise, at the time the complaint of Jefferson G. James was withdrawn, or at any time or at all, that was heard or understood by affiant." And also that he did not know at the time that James was defending the action for the Montgomerys. The affidavit of L. Y. Montgomery admits the reconveyance of the said fractional section 4 to William Johns, as stated, and also that at and before the execution and delivery of said deed it was understood and agreed that said Johns would convey 40 acres of said land to J. G. James for the consideration of \$600. He does not deny that the mortgage held by Johns for \$4,000 was satisfied of record and the debt secured thereby canceled, but claims that at the time of the reconveyance he had a verbal understanding with Johns that he (Johns) would convey the said land to affiant, or to affiant and his brother, upon demand therefor, and upon payment to him of \$3,000,—\$400 in cash at the

time of said reconveyance, and a note and mortgage upon the land for the remainder, payable within a reasonable time. Nothing is stated in his affidavit as to anything having been done under such alleged verbal agreement, or that he ever intends to do anything under it. He admits that the ditch or canal in question "runs through and over said section 4, and a portion thereof through and over the lands conveyed to the said James, and a portion thereof through and over the lands in which affiant retains title and interest, as hereinbefore stated and specifically set forth." That is the so-called "verbal agreement," which may never be carried out, and which could not be enforced. He does not deny anywhere the conversations and agreements detailed in the affidavits of the appellant, his attorney, and William Johns and Thomas Poyser.

At the time the stipulation was filed the defendants had no title of record to the premises involved or interest in further defending the suit, and the appellant, James, was an interested party in defending such suit. Section 385 of the Code of Civil Procedure provides that, in case of any transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. In the case of *Walker v. Felt*, 54 Cal. 386, the plaintiff, after having transferred his interest, through his attorney dismissed the action. The court says: "The party who had transferred his interest divested himself of any power to control the action. He could not dismiss it, because his successors had a right to have it continued. The validity of the order of dismissal in this case rests solely upon the consent of the original plaintiff. \* \* \* As he had no right to interfere with the action, the court, not being advised of that, should have vacated the order based upon it." The attorney who signed the stipulation as the attorney for the plaintiff did not assume to act as the attorney for his successor in interest, and states in his affidavit "that he signed the stipulation because he and the nominal plaintiff had parted with all interest in the land, and did not wish to prosecute the action any further, and did not desire to become liable for costs." The court, commenting upon this affidavit, says: "We cannot discover that this gave him any right to stipulate away the rights of his successors in interest. The attempt to do so should be defeated, if the court possesses the requisite power to defeat it. The act involves a flagrant breach of good faith, and that is a thing that justice abhors. \* \* \* The court which made the order dismissing the action must have been imposed upon, and, after discovering the fraud and imposition, the order should have been promptly vacated." In this case the nominal defendants signed the stipulation, and not an attorney, and they substantially give the same reason as given in the case cited, to wit, that they had no



further interest in the litigation. In *Plummer v. Brown*, 64 Cal. 429, 1 Pac. 703, the defendant John A. Brown's interest had been transferred, pending the litigation, to Martha Brown and C. E. Thom. The court say: "They certainly had acquired the right to represent him. The transfer of his interest to them entitled them to have the action continued in his name, or the court might allow them to be substituted for him. Code Civ. Proc. § 385. After transferring his entire interest in the subject of the controversy, the defendant was only nominally a party to the action. The real parties in interest were his grantees. The entry of his default affected them, not him. It is the duty of all courts to construe the provisions of the Code 'liberally, with a view to effect its objects and to promote justice.'" In that case the motion was made under section 473, Id., and the court set aside the default entered against the original defendant upon the motion of his successors in interest, which order was affirmed by this court. In *People v. Mullan*, 65 Cal. 396, 4 Pac. 348, a motion was made by the Cucamonga Company, to which the land involved in the action had been conveyed, and a certificate therefor assigned by Mullan, to set aside a pretended service on Mullan, which motion was denied by the court below, and on appeal the order was reversed by this court. This court say: "We regard the corporation as, in legal effect, the assignee and legal representative of Mullan, and standing in his shoes. We think the motion was well made. Code Civ. Proc. § 473; *U. S. v. Patterson*, 15 How. 12. The company could have moved in the name of Mullan, and it has substantially done this. We should be sacrificing substance to form to hold otherwise."

It is contended on the part of respondent's attorney that if the motion was made under section 473, Code Civ. Proc., it was properly denied for want of an affidavit of merits. However, the attorney for appellant, James, files an affidavit of merits, and the appellant himself states facts disclosing merits. Besides, this contention on the part of respondent's attorney is answered by the action of the court below in allowing the appellant to file, first, a complaint in intervention, and subsequently, through the nominal defendants, allowing to be filed by the appellant's attorney the last amended answer and cross complaint. The court, therefore, at the time of granting such orders, must have considered that the appellant had a meritorious defense to the action. But this motion is not based on section 473, Code Civ. Proc., but upon the rights of a party succeeding to the interests of a litigant, pending the litigation, under section 385, Id. Further, the motion is not to set aside a default obtained "through his mistake, inadvertence, surprise, or excusable neglect," but is to set aside a judgment entered upon a fraudulent stipulation.

It is too plain to be questioned that the nominal defendants, at the time the stipula-

tion was filed, knew that the real party defendant was the appellant, James, and that they had parted with what interest they might have had. As to them, therefore, it was clearly a fraud upon the appellant to sign the stipulation and have judgment entered thereon. "When a judgment or decree of any court, whether inferior or superior, has been obtained by fraud, the fraud is regarded as perpetrated upon the court as well as upon the injured party. \* \* \* The equitable jurisdiction to cancel and set aside or to restrain judgments and decrees of any court obtained by a fraud practiced upon the court and the losing party is well settled and familiar." 2 Pom. Eq. Jur. 919. See, also, *Baker v. O'Riordan*, 65 Cal. 370, 4 Pac. 232. In *Norton v. Railroad Co.*, 97 Cal. 388, 30 Pac. 585, and 32 Pac. 452, the motion was made to quash the summons, and to set aside and vacate the default of the defendant, on the ground that the service was not such as authorized by law, and a fraud on defendant, and that the court had no jurisdiction to enter the default and judgment. It was contended in that case that the application could only be made under section 473, Code Civ. Proc., based upon an affidavit of merits. This court say, in response to that contention: "The main provision of that section is that a court may relieve a party from the judgment taken against him 'through his mistake, inadvertence, surprise, or excusable neglect,' and it is quite clear that the provision just quoted has no application to the ground upon which the respondent moved in the case at bar. Defendant here is not asking a relief on its neglect or mistake or default of any character. \* \* \* In the cases cited the parties making application to set aside the judgments confessed some neglect or misconduct from which they sought to be relieved, and thus come clearly within the provisions of said section, and, of course, were compelled to comply with the provisions of the section, under the construction which the court had given them." The order of the court below setting aside the default was affirmed by this court in bank, after full hearing.

But it is contended that the appellant only acquired a part of the former interest of the defendants in the premises, and not the entire interest. Even if this should be conceded, it does not help the respondent in the least. In *Cerf v. Ashley*, 68 Cal. 420, 9 Pac. 658, it is held: "The Code allows, in case of a transfer of a part of the subject-matter, the transferee to be joined as plaintiff with the original plaintiff. In case of a transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding. Code Civ. Proc. § 385. It would be too narrow a construction of this section to hold that it applies only where the transfer is of the entire interest." In *Stewart v. Spaulding*, 72 Cal. 264, 13 Pac. 661, one

of the plaintiffs became insolvent, and his assignee in insolvency continued to represent his interest, without substitution, in the name of the insolvent, and the court held that this was proper; that the action could be continued in the name of the original party, or the one to whom the interest was transferred could be substituted. *Railway Co. v. Hooper*, 76 Cal. 404, 18 Pac. 599. The nominal defendants in this case at the time of the stipulation were represented by an attorney of record, who was the attorney of the appellant, and also was known by them to represent the interests of the appellant in the action. A party to an action may appear in his own person or by attorney, but he cannot do both. If he appears by attorney, he must be heard through him, and it is indispensable to the decorum of the court, and the due and orderly conduct of the cause, that such attorney shall have the management and control of the action or of the defense, and his acts go unquestioned by any one except the party whom he represents. So long as he remains attorney of record, the court cannot recognize any other as having the management of the case. If the party whom he represents at any time becomes dissatisfied, his remedy is pointed out by law,—to procure a change or substitution. Until this has been done, the client cannot assume control of the case. In *Board v. Younger*, 29 Cal. 149, the court say: "While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the court, unless the same is signed or assented to by such attorney. \* \* \* Such a rule is not only indispensable to the orderly conduct of a cause, but is likewise a safeguard to the client against the intrigues of his adversary. \* \* \* To entirely ignore the attorney of record, and enter, without his consent, into secret negotiations with his client touching the management of his case, is unbecoming the dignity of the legal profession, and destructive of that courtesy which is due from one member to another." In *Mott v. Foster*, 45 Cal. 72, the court say: "The stipulation signed by the plaintiff in person goes for nothing. He had at the time an attorney of record, who as such had the exclusive management and control of the case." In *Wylie v. Gold Co.*, 120 Cal. 486, 52 Pac. 810, the court say: "When a party appears and is represented by an attorney of record, he cannot assume contr<sup>l</sup> of the case, and, if he signs a stipulation dismissing the action, or extending time for any purpose, the stipulation will have no effect, and will be disregarded by the court." On the showing made in this case, the court below should have promptly granted the motion to set aside the judgment entered upon the stipulation of the nominal defendants. Order denying the motion reversed.

We concur: HARRISON, J.; GAROUTTE, J.

(6 Cal. Unrep. 257)

**McPHERSON v. SAN JOAQUIN COUNTY.**  
(Sac. 498.)

(Supreme Court of California. March 24, 1899.)

**ACTION ON CONTRACT—PLEADING—COUNTIES—PRESUMPTIONS—AUTHORITY—OFFICERS—NEGLECT OF DUTY.**

1. In an action on a well contract, where plaintiff alleged that he was prevented from finishing the well because of defendant furnishing unsuitable casing, which collapsed and stopped up the well, an allegation that plaintiff offered to dig another well without profit, at its actual cost, was unnecessary to the cause of action, and ineffectual as an offer to perform.

2. Where a county having a well bored was to furnish the casing, the presumption that it should be suitable and of proper strength is not overcome by Civ. Code, § 1654, providing that an uncertainty in a contract between a public body and a private person shall be presumed to be caused by the latter, and most strongly construed against him.

3. Specifications for a well contract provided that all materials should be of the best quality and suitable. *Held*, that this applied to the casing to be furnished by the county having the well bored, as well as to the material furnished by the contractor.

4. In an action on a well contract, a count for extra work caused by and on account of improper casing furnished by defendant having the work done states a cause of action.

5. Where, under a well contract, the owner could stop the work at any time, the contractor cannot recover damages for being prevented from completing the contract by the owner's furnishing defective materials; this not being done willfully.

6. In an action against a county on a well contract, the petition alleged that the county entered into the contract, acted on it, and made payments under it; and the contract recited that the county made it through its duly authorized agent. *Held*, on demurrer, that the petition was not bad as not setting out the authority under which the agent acted.

7. A county cannot escape liability under its contract to furnish suitable casings for a well being bored for it because of the neglect of duty of its officers in selecting the casings.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by J. K. McPherson against San Joaquin county. There was a judgment for defendant, and plaintiff appeals. Reversed.

Louttit & Middlecoff, for appellant. W. B. Nutter, for respondent.

CHIPMAN, C. Action upon contract. The complaint alleges that plaintiff and defendant entered into a written contract by which plaintiff agreed to bore, for the use of defendant, "a well for flowing water and gas in accordance with the specifications prepared therefor." Plaintiff agreed to furnish all necessary tools and labor for the work, and bore the well to the depth of 2,000 feet, unless defendant "direct the discontinuance of the work." The size of the bore of the well was to be 12 inches, carried down to the greatest possible depth. Where changes were found necessary in the size of the bore, in going down, defendant was to have the right to decide as to such changes. The contract provided "that



the casing to be used in said well should be furnished by the said party of the first part [defendant], \* \* \* and shall be selected and designated by the said party of the first part." Usual covenants were given by plaintiff to make the work first-class in all respects. Plaintiff was to keep an accurate account of developments in striking water or gas as the work progressed, and report fully to defendant the results obtained. Plaintiff was to be paid at the rate of \$2.25 per foot for the first 1,000 feet, \$2.50 per foot for the next 500 feet, and an increased amount per foot as the well was deepened. The contract also further provided: "The total number of feet of said well to be bored being two thousand feet, unless a sufficient flow of gas shall be found at a lesser depth, or work be sooner suspended by" defendant. A provision required plaintiff to make a statement to defendant on the 1st of each month of the number of feet completed the preceding month, and, if found correct, the account should be approved by defendant, and a warrant issued to plaintiff for the amount due, less 25 per cent. reserved until full completion of the contract. Full and detailed specifications were made part of the contract. In the specifications is the provision following: "The casing to be furnished to the contractor, delivered on the grounds; he to place the same in position. \* \* \* All casing and steel shoes for the well will be furnished by the board of supervisors." It was provided that, if the work should be discontinued by defendant, plaintiff was to "be entitled to the full payment of such portion of the work as has been satisfactorily completed, at rates that have been agreed upon in the contract"; defendant reserving the right to order the work stopped at any time. The complaint alleges "that plaintiff duly performed all the conditions on his part to be performed under said contract until said well was bored and completed to a depth of eleven hundred feet," about July 10, 1897; "\* \* \* that the casing selected, designated, and furnished by said defendant to plaintiff to be used in said well was of such inferior quality that on said day said casing, without any fault on the part of plaintiff, and while plaintiff was in the due performance of his part of said contract, failed, collapsed, gave way, and obtruded itself into said well, and stopped up said well at a point about one thousand feet in depth in said well to such an extent that it was impracticable and impossible for plaintiff to further proceed with the boring and completion of said well; that, prior to the time that plaintiff had used said casing which failed \* \* \* and obtruded itself into said well as aforesaid, said plaintiff had warned said defendant and its officers and agents that said casing was insufficient and unfit to be used in said well, and had protested against being required to use the same in said well, but said defendant had required said plaintiff to proceed to use said casing in said well, and had refused to procure proper casing to be

used in said well." At this point in the complaint it is alleged that, after the casing collapsed as stated above, plaintiff offered to bore a new well, without profit to him, to the depth of 1,000 feet, if defendant would furnish casing and pay the actual expense of boring the well, and from that point plaintiff would proceed to complete the new well under the terms of the contract. This clause was stricken out on motion. The complaint then alleges that the sum of \$2,500 was due for boring the well to the depth of 1,100 feet, no part of which has been paid, except \$1,875.01, leaving due the sum of \$624.99. Allegations are made showing that the claim was duly presented, and was rejected by the supervisors. A second count alleges the sum of \$250 to be due for extra work caused by and on account of the improper casing furnished plaintiff. A further claim is also made of \$500 damages for being prevented from completely performing the contract. Judgment was entered for defendant on the general demurrers to the several counts, from which, and also from the order granting the motion to strike out the clause above noted, plaintiff appeals.

1. The motion to strike out was properly granted. The objectionable matter was not necessary to the cause of action alleged in the complaint. If it was intended as an offer to perform, it failed of that object; for it was entirely different from the contract and was, in effect, an offer to dig a new well on different terms.

2. Respondent claims that defendant had the right to select the casing, and, if it erred in exercising its discretion, that fact gave plaintiff no right of action. Respondent invokes section 1654, Civ. Code, which provides that where uncertainty exists in a contract between a private party and a public officer or body, as such, the uncertainty is presumed to be caused by the private party, and the contract must be interpreted most strongly against the private party. We can discover no uncertainty in the provision that defendant was to supply the casing. If there is any uncertainty, it is as to whether defendant was at liberty to furnish unsuitable casing. It is claimed that in the contract defendant did not in terms agree that the casing shall be of proper strength and suitable for the purpose. But this would be implied, and no presumption should be indulged, under section 1654, to overcome an implied covenant so obviously just. When defendant undertook to furnish casing, it agreed to furnish casing suitable for the purpose. But in the specifications is a clause which, fairly construed, we think, in terms put upon defendant the duty to furnish suitable casing. It reads: "The bidder to whom the contract may be let will be required to enter into an agreement \* \* \* to furnish and erect machinery and plant of the most approved kind, and all tools and materials of every description used in the prosecution of the work shall be of the best quality and suitable for

the services to be performed, so that every possible security may be afforded to guard against accidents, so that the work may be successfully prosecuted and speedily completed." Quite as much depended upon having suitable casing, as in having suitable machinery with which to do the work; and this clause refers to the materials to be used, as well as to the machinery. Respondent contends that it was plaintiff's duty to use any casing furnished, and, if it happened to be worthless and wholly unsuitable, it was still his duty to use it, and take the consequences, to which the maxim, "Damnum absque injuria," applies. This contention is neither sound in law nor in morals. Respondent makes the same, but no other, objections to the second count. We think a good cause of action is stated for the extra work. As to the claim for damages, we find nothing in the contract to support it. Defendant reserved the right to terminate the contract at any stage of the work. When the casing collapsed, the work ceased, and defendant refused to allow resumption of any further boring of the well. We do not think plaintiff is entitled to recover for profits he might have made on the unfinished portion of the well. If it had been alleged that defendant willfully, and for the purpose of evading the contract, caused the bad casing to be used, it might be otherwise; but, so far as the complaint shows, it was the bad judgment of defendant, honestly exercised, that caused the trouble.

3. Respondent contends that the complaint is insufficient because it fails to show that the contract was made by authority of defendant. This contention rests upon the recital in the contract that it was entered into "by and between the county of San Joaquin, state of California, by and through James Brown, the duly-authorized agent of said county for said purpose, party of the first part," and plaintiff, the second party. The contract is signed: "James Brown. J. K. McPherson;" the attestation reading: "In witness whereof, the said parties have caused this instrument to be properly subscribed." The complaint alleges that the contract was entered into by defendant. Respondent cites section 2 of the act of April 1, 1897 (St. 1897, p. 452), which provides that the power of a county "can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law." It is claimed that the contract set forth in the complaint shows that it was executed by an agent of the county, and it therefore became necessary to allege the authority under which the agent acted. Furthermore, it is claimed that while, under the allegations, the proof at the trial might have shown authority, still, upon demurrer, the complaint is insufficient; citing *Murphy v. Napa Co.*, 20 Cal. 497; *House v. Los Angeles Co.*, 104 Cal. 79, 37 Pac. 796; *Jerome v. Stebbins*, 14 Cal. 457; *Green v. Palmer*, 15 Cal. 411; and other

cases. This is not an instance of powers delegated to an agent, as was that in 104 Cal., 37 Pac., supra, nor is it a case where there is a failure to allege every fact essential to be proved, as were the other cases cited. Here the allegation is that the county entered into the contract, and the contract itself recites that the county made it by and through its duly-authorized agent. The complaint also shows that the county acted under the contract, and made payments for work done under it. We think the allegations were sufficient. Defendant's point must be made by the answer, and upon the trial.

4. It is next contended that the county is not liable for the neglect of duty of its officers; citing *Crowell v. Sonoma Co.*, 25 Cal. 316; *Santa Cruz R. Co. v. Santa Clara Co.*, 62 Cal. 180; *Chope v. City of Eureka*, 78 Cal. 588, 21 Pac. 364; and other like cases. The cases cited are actions arising out of the tortious acts of public officers, and are not in point. The cause of action here arises from breach of contract. Defendant cannot escape liability by setting up its neglect of duty in failing to perform its part of the contract. Even actions for damages arising out of the neglect of public officers, formerly held not to be maintainable, are in some cases now allowed, under the new constitution. *Tyler v. Tehama Co.*, 109 Cal. 618, 42 Pac. 240. See, also, *Denning v. State* (filed Jan. 19, 1889) 55 Pac. 1000. The judgment should be reversed, with directions to overrule the demurrer.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to overrule the demurrer.

PEOPLE v. GONZALES. 6 Cal. Unrep. 263 (Cr. 477.)

(Supreme Court of California. March 28, 1899.)

ROBBERY—INFORMATION—VARIANCE—EVIDENCE—SUFFICIENCY—APPEAL—PRESUMPTION.

1. A variance between the name of the owner of the property, as given in an information for robbery and as shown in evidence, is immaterial.

2. In a prosecution for robbery, the owner of the property testified that defendant knocked him down, rendering him insensible, and that on recovering consciousness his purse and watch were missing. Another witness testified that he saw defendant holding the owner of the property on the ground. No one distinctly saw defendant rifle the latter's pockets, nor was the property found in defendant's possession. *Held*, that a conviction was justified.

3. Where the court, of its own motion, gives an instruction based on a contention which it states was made on the trial, it cannot be presumed on appeal, in the absence of such fact being affirmatively shown by a bill of exceptions, that the contention was not made.

Department 2. Appeal from superior court, Santa Clara county.



Jack Gonzales was convicted of robbery, and he appeals. Affirmed.

H. E. Wilcox and D. M. Burnett, for appellant. Atty. Gen. Ford, for the People.

PER CURIAM. Gonzales (the appellant here) and one Fernandez were charged by information with the crime of robbery, committed by forcibly taking from one P. Santonette a brass watch and also the sum of \$40 in money, the personal property of said P. Santonette. Gonzales was tried separately, and convicted. At the trial it appeared that the true name of the person called P. Santonette in the information is Peter Lattonette. He testified, however, that he is known by the name of Pete Santonette, and was so known to Gonzales at the time of the alleged robbery, and gave that as his name on the preliminary examination of this case. It further appeared from his testimony that he came from his residence in the Santa Cruz mountains to the city of San Jose "for amusement and rest," and to promote these objects he formed the acquaintance, on the night of the alleged robbery, of said Gonzales and Fernandez, and also of one Pitts. All took several drinks at the expense of Santonette, after which, as the four persons named were walking along one of the streets of the city about the hour of 12 midnight,—Pitts being a few paces behind the others,—Santonette received a blow on the head, struck by Gonzales, and fell to the ground, where he remained insensible about 15 minutes. When he recovered consciousness, he was alone, and then missed his purse, containing \$40, which he had carried in his pocket, and his brass watch, which he wore when he was knocked down. He immediately complained to the police. Said Pitts testified: That a scuffle occurred between Santonette and Gonzales. He saw Gonzales holding the former on the ground. "I can't swear positively that he went through the man's pockets, but the best of my knowledge is that he did. I believe this from the way they acted. It was so dark I could not see well." That they left Santonette lying on the ground where he fell. A certain police officer testified to a declaration of Gonzales to the effect that Santonette insulted him, and he (Gonzales) knocked him down. Rosia Garcia, a witness for defendant, testified that Pitts came to her house about 1:30 a. m. of the night in question, and said he and Gonzales had robbed a man; that he (Pitts) struck him, and Gonzales "went through his pockets." Other evidence produced on either side need not be stated. It must be assumed, in support of the verdict, that the jury found the testimony on behalf of the prosecution to be true. Among the instructions of the court to the jury was the following matter: "It is contended in this case that the witness Pitts was an accomplice in the commission of a robbery, if it was committed, and therefore his testimony should

not be considered by the jury, unless corroborated by other facts and circumstances in the case." The court then stated to the jury the rule forbidding a conviction on the uncorroborated testimony of an accomplice, in the language of section 1111, Pen. Code.

1. It may be, as defendant claims, that the name of the owner was a necessary part of the description of the property taken (*People v. Hughes*, 41 Cal. 234); but no objection to the information was taken, by demurrer or otherwise. It was no material variance when it appeared in evidence that his true name was something different. *People v. Woods*, 65 Cal. 121, 3 Pac. 466; *People v. Armstrong*, 114 Cal. 570, 46 Pac. 611. See *People v. Prather*, 120 Cal. 660, 53 Pac. 259, and *People v. Plyler*, 121 Cal. 160, 53 Pac. 553.

2. Defendant urges that the evidence was circumstantial, and insufficient to show either that a robbery was committed or that he was guilty thereof. It is true that no one distinctly saw defendant rifle Santonette's pockets, nor was the property of Santonette found in defendant's possession; but the property was taken from him, the evidence tended to show, after he was knocked down, and before he recovered consciousness, and why was Gonzales "holding him on the ground," as Pitts testified? Hardly for the purpose of preventing violence at his hands, for, according to Santonette's testimony, he was then insensible. We are satisfied that this court is not warranted in interfering with the conclusion drawn by the jury from the evidence.

3. The court gave an instruction, correct in point of law, upon the kind and character of corroboration necessary to support the testimony of an accomplice before conviction could be had. It introduced the instruction by the following sentence: "It is contended in this case that the witness Pitts was an accomplice in the commission of a robbery, if it was committed, and therefore his testimony should not be considered by the jury, unless corroborated by other facts and circumstances in the case." It is said of this that the instruction was given by the court of its own motion, that no such instruction was asked by either the people or the defendant, and that no such contention as that Pitts was an accomplice was made by either party in the action. The injurious effect of the language is pointed out, and that effect may be conceded. While it is true that there is nothing in the record to show that such a contention was in fact made, upon the other hand there is nothing in the record to show that such a contention was not made. Error will not be presumed. If, in truth, no such contention was made, it was incumbent upon the appellant to have made that fact appear by a bill of exceptions. Failing to do so, the presumption must be that the instruction was addressed to a theory of the evidence advanced in the argument; and, if

such was the case, no error could be predicated upon it. The order and judgment appealed from are affirmed.

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124 Cal. 193

SWAN v. THOMPSON. (S. F. 1,124.)

(Supreme Court of California. April 6, 1899.)

SLANDER—ACTIONABLE WORDS—MALICE—EVIDENCE  
—PRIVILEGED COMMUNICATIONS—PLEADING—  
CROSS-EXAMINATION—TRIAL—OBJECTIONS.

1. Unless the vice in a question is latent, an objection that it is irrelevant, immaterial, and incompetent is sufficiently specific.

2. In an action by the captain and part owner of a vessel against another part owner for slander by accusing him of drunkenness, a third person, owning part of the vessel, testified that defendant had said that plaintiff was willing to cast the vessel on the rocks for the insurance, and because thereof witness and defendant concluded to get the command of the ship away from plaintiff. *Held*, that it was improper to ask him on cross-examination whether plaintiff had suggested that witness place heavy insurance on his interest, and he would take the vessel off shore and fix the rest.

3. The question was incompetent because it related to no issue in the case, and tended to prejudice plaintiff by showing his willingness to commit a crime.

4. The witness not having given any direct evidence concerning plaintiff's drunkenness or reports thereof, it was improper to ask him on cross-examination how many reports came to him that plaintiff was drinking during the time he was in command of the vessel.

5. In an action by the captain of a vessel against the owner of an interest therein for slander by accusing him of getting drunk while on voyages, evidence that officers and sailors on the vessel under the plaintiff's command had told defendant that plaintiff was in the habit of getting drunk while on voyages is admissible on the issue of malice, though inadmissible under a plea of justification.

6. Where the complaint charges slander by accusing plaintiff of habitual drunkenness and of being in the habit of getting drunk, a plea of justification, that the alleged slanderous words are true, is not too broad.

7. Under a plea of justification of a slander by accusing plaintiff of drunkenness, evidence of plaintiff's drunkenness during a period not covered by the plea is inadmissible.

8. Under Civ. Code, § 46, subd. 3, defining "slander" as a false and unprivileged publication which tends directly to injure another in respect to his profession or business, either by imputing general disqualification, or something with reference to his profession or business which has a natural tendency to lessen its profit, a statement that a master mariner is in the habit of getting drunk is actionable, since such charge includes his conduct while on voyage.

9. The defense that a slander was a privileged communication must be pleaded.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Charles F. Swan against Hans A. Thompson. There was a judgment for defendant, and from an order denying a new trial plaintiff appeals. Reversed.

Warren Olney, Jr., for appellant. H. W. Hutton, for respondent.

GAROUTTE, J. By this action it is sought to recover damages from defendant upon the grounds of slander and malicious prosecution. Plaintiff is a master mariner, and was for several years a part owner in the good ship *McNear*, and had command of her. Defendant was also a part owner in the ship, and managing owner. The claim for damages is based upon two grounds: First, it is charged that the defendant declared of plaintiff in the presence of certain people, comprising a committee representing certain insurance companies, that "he is a drunkard when he is away from town." It is further charged by the complaint that defendant said of plaintiff at another time, in the presence and hearing of one Magill, "Lately he has been in the habit of getting drunk, and a couple of days ago went on a debauch." It is further alleged that he said of plaintiff, in the presence and hearing of one Hanna, "He has been in the habit of getting drunk." As a second cause of complaint, it is alleged that defendant maliciously had plaintiff arrested without probable cause, etc. The answer denied the allegations of the complaint, and also declared that the alleged slanderous words were true. It was further claimed that the statement of the defendant to the insurance people was a privileged communication. The case was tried by a jury, and verdict and judgment went for defendant. This appeal is from an order denying a motion for a new trial.

Various assignments of error are relied upon to support the appeal, and we will at once pass to the consideration of some of the most important ones. It is first claimed upon the part of defendant that many of plaintiff's exceptions taken to the rulings of the court upon the admission and rejection of evidence cannot be considered, because the objections made are too broad and general. The objections found in the record are the ordinary ones, to the effect that the question "is irrelevant, immaterial, and incompetent." *Crocker v. Carpenter*, 98 Cal. 421, 33 Pac. 271, is relied upon to support defendant's conten-



tion in this regard. In certain cases specific objections should be made to questions, in order that the court and opposing counsel may know exactly the particular vice lurking in the question, relied upon by the party objecting. Especially in fairness to the court should this be the law. This is essentially the rule when the vice in the question is a latent one. But, if the question is objectionable from every standpoint, the court is not aided in making an intelligent ruling by a specific objection, and there the specific objection is not demanded. There is no reason for it, and where the reason is not present the rule fails. *Nightingale v. Scannell*, 18 Cal. 323. The objections relied upon in this case are sufficiently broad to meet the requirements of the law.

Wendt, a part owner of the vessel, gave evidence on behalf of the plaintiff. Upon direct examination he testified, among other matters, that defendant said that plaintiff had told him (defendant), in effect, that he was willing to cast the vessel on the rocks for the purpose of getting the insurance, and that for this reason and others he and defendant came to the conclusion to get the command of the ship away from the plaintiff. Upon cross-examination he was asked, under objection: "Q. Now, I want to ask you, didn't you on one occasion tell me that Captain Swan went to you, and suggested to you that you should put a heavy insurance upon your interest in the vessel, and he would take her off shore and fix the rest?" This question was clearly improper cross-examination. Neither was it competent evidence under any aspect of the case. It tended to show the willingness of the plaintiff to commit the crime of barratry,—a matter not involved in the case, and a matter tending strongly to his prejudice. The evidence was not proper as cross-examination, because it neither explained nor discredited any statement made by the witness upon his direct examination. Again, the witness having testified that plaintiff was in command of the vessel for three or four years, he was asked upon cross-examination: "Q. How many reports came to you, during that time, that Swan was drinking?" Under objection that the matter was not cross-examination, the witness was compelled to answer the question. This ruling was clearly erroneous. There is not a word in the direct evidence of the witness concerning plaintiff's drunkenness, or reports of his drunkenness.

Under objection, defendant testified that various officers and sailors under the command of plaintiff told him (defendant) that plaintiff was in the habit of getting drunk upon these voyages. The presence of malice in fact, as looking towards exemplary damages, was an element in the case. It was also an element in the case as bearing upon the privileged communication made by defendant to the insurance committee. Considerable evidence was introduced by plaintiff

upon this question of malice. In answer to this class of evidence, the statements made to defendant by men working under the plaintiff as to his (plaintiff's) drunkenness was material and competent evidence. While such evidence was, in a sense, hearsay, and clearly not admissible to prove the truth of the charge of drunkenness, still the good faith of defendant, as already suggested, was an important element in the case as bearing upon malice in fact. Especially is this true when we consider that plaintiff admitted that defendant's statements to the insurance companies were privileged. These statements of the sailors and officers to the defendant were not matters of mere general rumor and report, but were statements of parties claiming to be eyewitnesses to the occurrence. Many authorities are cited to the effect that general rumors and reports cannot be relied upon by defendant, even as evidence in mitigation of damages. *Preston v. Frey*, 91 Cal. 107, 27 Pac. 533. But here we have something much more direct and tangible as tending to disprove the charge of malice in fact. We hold the evidence admissible. This conclusion is supported by *Wilson v. Fitch*, 41 Cal. 363; *Edwards v. Society*, 99 Cal. 438, 34 Pac. 128; *Hearne v. De Young*, 119 Cal. 681, 52 Pac. 150, 499.

Upon the branch of the case appertaining to malicious prosecution, it became a material fact whether or not plaintiff used a pistol in an assault upon the defendant. The parties plaintiff and defendant directly contradicted each other as to the fact, and there were no other witnesses. Plaintiff admitted a pistol in his possession at the time, but denied exhibiting it. The evidence being in this unsatisfactory situation, plaintiff proposed to show his innocent possession of the pistol at the time by showing the circumstances under which he came by the weapon. This evidence was refused admission under objection. It is claimed by plaintiff that, if he came into possession of the pistol without any intent or purpose of using it in violence upon the defendant, then such evidence, to some degree, tends to show that he did not so use the weapon. We are not prepared to say the ruling of the court was erroneous.

By objection to the admission of evidence, and in other ways during the trial, plaintiff made the point that the justification of the charge as set forth in the answer was fatally defective by reason of its general character. In view of the allegation of the complaint which charged that the defendant accused the plaintiff of habitual drunkenness, and of being in the habit of getting drunk, we are satisfied that the justification is not couched in language too broad. Specific accusations of drunkenness upon certain specified days would hardly be a justification of the charge either of habitual drunkenness, or of the habit of being drunk.

The court committed a substantial and prejudicial error in admitting the evidence of

the witness Broman. While his testimony went to the effect of plaintiff's drunkenness, it was entirely outside of the justification, for it covered a period of time not included therein. Not being within the justification, plaintiff had no notice that such evidence would be introduced, and necessarily was unprepared to meet it. If acts of drunkenness may be testified to which are not included within the lines marked out by the plea of justification, then the plea is useless, for it serves no purpose. The authorities are all one way upon this proposition.

By the complaint it is charged that defendant used in the presence and hearing of one Hanna the words, "He [plaintiff] has been in the habit of getting drunk." Defendant now insists that these words are not actionable. This contention is based upon the claim that they were not spoken of plaintiff in his position as a master mariner. In other words, it is claimed that he was not charged to have been in the habit of getting drunk while navigating his vessel. We cannot agree with this contention. To say that a "master mariner is in the habit of getting drunk" is a charge so broad as to cover the mariner's conduct upon his voyages as well as between his voyages, upon the sea as well as upon the land. There is no qualification of the language. It covers the drinking habits of the master mariner, wherever he may be. We can imagine no language better calculated to ruin a master mariner than the language here used, to wit, "He is in the habit of getting drunk." No man of the slightest business prudence would employ such a master mariner to navigate his ship. No insurance company would take a risk upon the cargo or the ship under the command of such a captain. Upon this question the test seems to be, do the words used directly tend to injure the party by reason of their relation to his occupation? Applying this rule to the case at bar, the slanderous character of the words is fully apparent, for the reasons already suggested. The foregoing principle of law is more fully laid down in subdivision 3 of section 46 of the Civil Code, as follows: "Slander is a false and unprivileged publication other than libel, which \* \* \* (3) tends directly to injure him in respect to his office, profession or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit." Tested by this provision of the law, we are prepared to say an accusation against a master mariner, that he is in the habit of getting drunk, imputes to him a "general disqualification" in those respects which the occupation peculiarly requires. The occupation of master mariner, above all things, peculiarly requires a man who is not in the habit of getting drunk. See *Chaddock v. Briggs*, 13 Mass. 248; *Sanderson v. Caldwell*, 45 N. Y. 398.

The court refused to give the following instruction: "If you find from the evidence that upon or about the time mentioned in the amended complaint the defendant spoke of and concerning the plaintiff, in the presence and hearing of J. F. Hanna, the words alleged in the amended complaint to have been so spoken, to wit, the words, 'He has been in the habit of getting drunk,' and if you further find that the defendant has not proved to your satisfaction, by a preponderance of evidence, that said words were true of plaintiff, I instruct you that your verdict must be for the plaintiff." The reasons for refusing this instruction are given as: (1) It ignores the question of privileged communication; and (2) the words are not actionable. The court also refused an instruction to the effect that the aforesaid statement did not constitute a privileged communication. Both of these instructions should have been given. The words were actionable, and the statement was not privileged. Indeed, as to this statement there was no claim made in the pleadings that it was a privileged communication. *Gilman v. McClatchy*, 111 Cal. 611, 44 Pac. 241.

We refrain from a further discussion of the law embraced in the charge to the jury. Many objections have been made by appellant to its soundness. But, in view of what has been said, we feel that the lines are fairly marked out by which the court may be guided upon a second trial. As to the degree of evidence necessary to substantiate a plea of justification, *Hearne v. De Young*, supra, may be consulted. Upon many questions of law involved in this case,—especially upon the question of malice in law and malice in fact,—*Childers v. Publishing Co.*, 105 Cal. 288, 38 Pac. 903, affords valuable information. The order is reversed, and the cause remanded for a new trial.

We concur: VAN DYKE, J.; HARRISON, J.

(124 Cal. 200)

O'KANE v. WHELAN, Sheriff. (S. F. 999.) 1  
(Supreme Court of California. April 6, 1899.)

HUSBAND AND WIFE—GIFTS—FRAUDULENT CONVEYANCES—CHANGE OF POSSESSION.

1. A wife acquires no title to property, as against her husband's creditors, under a deed of gift executed by her husband when ill, to secure the property to her in case of his death, where he subsequently recovers, and uses the property in his business.

2. A wife must take possession of property purchased of her husband, as required by Civ. Code, § 3440, to render the sale valid as against his creditors, though the property is subsequently included in an inventory of her separate estate filed under section 165.

Department 1. Appeal from superior court, city and county of San Francisco.

Replevin by Julia O'Kane against R. I. Whelan, sheriff. Judgment for plaintiff, and defendant appeals. Reversed.

John H. Durst, for appellant. J. J. Coffey, for respondent.



VAN DYKE, J. This is an action in replevin against the defendant, as sheriff of the city and county of San Francisco, to recover two horses, one express wagon, and two sets of harness, or their value, found by the court to be \$500. The goods were seized by the sheriff under an execution issued upon a judgment recovered by F. W. Spencer Company against Frank O'Kane, April 18, 1893. The appeal is from the judgment in favor of the plaintiff and from the order denying the motion for a new trial.

The plaintiff claims the property as her separate property under a deed of gift, as to the wagon, executed to her by her husband in 1880; and as to all of the property in question, under a bill of sale from her husband to her, in consideration of one dollar, executed September 7, 1892. The deed of gift of 1880 cuts no figure, for the reason that the plaintiff herself testifies that the object of the deed was to secure the property to her in the event of her husband's death, and that he afterwards recovered and carried on his business as before his sickness, in the same manner and at the same place, and used and kept the wagon in the same manner and at the same place. The finding of the court that the plaintiff has been, for more than four years prior to the filing of the complaint in this action, in the possession of the property mentioned in the complaint, is entirely unsupported by the evidence. The testimony of the plaintiff is: "On September 7, 1882, my husband executed and delivered to me a bill of sale of six horses and three wagons and certain harness. The wagon, horses, and harness seized by the sheriff were included in this bill of sale. \* \* \* The only consideration passing was the one dollar which I paid to my husband. My husband had no other property than that conveyed to me. After the execution of the bill of sale my husband continued the express business in the same way as before, and carrying on the business at the same place and stand. The horses, wagon, and harness were stabled and kept at the barn on the premises at 1036 Golden Gate avenue, and cared for the same way after the sale as before. Over the stable door after the sale, and at all times before and since, there was the sign, 'Washington Furniture Express,' 'Frank O'Kane & Son.' On the wagons are the names, 'Washington Furniture Express,' 'Frank O'Kane,' and 'Frank O'Kane & Son.' These names have at all times been on the wagons and unchanged." Frank O'Kane testified as follows: "After the bill of sale to my wife, I carried on the business the same as before, but for her. The only difference was that, while before I kept all the money, afterwards I gave all to her except the spending money which she allowed me. The team, wagon, and harness were at all times kept in the same place; that is, at our residence 1036 Golden Gate avenue. The business stand was at the same place. There remained the

same signs and names over the stable door and on the wagons, and the same business card was used." This is all the testimony on the question of sale and delivery. September 8, 1892, the plaintiff filed for record in the office of said city and county an inventory of her separate property, including therein the horses, wagon, and harness now sued for. "Every transfer of personal property, other than a thing in action, \* \* \* is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession." Civ. Code, § 3440. To meet this provision of the law against fraudulent conveyances, the respondent relies upon sections 165, 166, providing for the filing of an inventory of the separate personal property of the wife. This question was directly passed upon in *Murphy v. Mulgrew*, 102 Cal. 547, 36 Pac. 857. In that case the wife claimed that she had purchased the horses in question from her husband, Wyman Murphy, on January 11, 1890, which were seized by the defendant, as sheriff of Sonoma county, November 16, 1891, under a writ of attachment in favor of the Santa Rosa Bank and against her husband, the said Wyman Murphy. The court there say: "From the evidence of the plaintiff it will be perceived that no actual change of possession of this property took place at the time of the delivery of the bill of sale, but, on the contrary, in all its surroundings, it remained entirely in statu quo. Mrs. Murphy attempts to escape the legal effect of the foregoing evidence by the claim that she had appointed her husband her agent to take the possession and control of the horses for her, and, as such agent, his possession was her possession; but there is nothing to be urged in favor of such a contention. Both the letter and spirit of the law contained in section 3440 would be defeated by the recognition of such a principle. The object of the statute is to require notice to the world of the transfer of personal property, in order that men may be able to deal with each other upon equal terms and from a common level. The efficacy of the statute would be entirely destroyed if the vendor were allowed to remain in possession of the property as the agent of the vendee, in the absence of any notice to the world of such a change of conditions. A practice of that kind would be in direct conflict with the terms of the statute itself." Further: "The transfer of the property in litigation by bill of sale was made January 11, 1890, and upon December 30th following plaintiff filed an inventory of her separate property in the recorder's office, in accordance with the provisions of section 165 of the Civil Code. The Santa Rosa Bank became a creditor prior to the recording of the inventory, and the at-

tachment proceedings upon the husband's indebtedness were begun November 16, 1891. It is now insisted by respondent that, conceding no immediate delivery and actual and continued change of possession took place at the date of the bill of sale, still the subsequent recording of the inventory in the recorder's office of her separate property, including these horses, cured any defective compliance with the provisions of section 3440, and gave her good title against the world from that day. It is unnecessary to pass upon the scope and purpose of section 165 of the Code. Whatever may be its scope and purpose, we are well satisfied it is not entitled to a construction that would nullify the provisions of section 3440 as to fraudulent transfers of personal property." On the authority of that case, as well as from the fact that the finding of the court referred to is unsupported by the evidence, the judgment and order refusing a new trial are reversed.

We concur: GAROUTTE, J.; HARRISON, J.

6 Cal. Unrep. 278

SAN FRANCISCO SAV. UNION v. LONG.  
(S. F. 1,041.)

(Supreme Court of California. April 5, 1899.)

APPEAL—RECALL OF REMITTITUR.

A remittitur will not be recalled where it conforms to the judgment as rendered, and it is too late to amend the judgment.

For opinion in department, see 53 Pac. 907, and for opinion in bank, see 55 Pac. 708.

PER CURIAM. The motion to recall remittitur heretofore issued in this case is denied. It conforms to the judgment as rendered, and it is now too late to amend the judgment. The motion to amend our record nunc pro tunc, so as to show that the order made on the 1st day of November, 1898, was an order directing the amendment of the record by supplying the deficiency specified in the plaintiff's suggestion of diminution, is granted.

124 Cal. 102

PEOPLE v. PATTERSON. (Cr. 484.)

(Supreme Court of California. March 24, 1899.)

ROBBERY—EVIDENCE—CHARGE—CONDUCT OF COUNSEL.

1. Prosecuting witness testified that he left a saloon with accused and another in the evening, and, as they walked along the street, the two suddenly attacked him, and knocked him insensible, and, when he became conscious, he found that he had been robbed of \$18. He soon after returned to the saloon, bleeding from a wound in the head. He was corroborated as to his leaving the saloon with the two. He was considerably under the influence of liquor, and, before leaving the saloon, had pretended to the bartender that he had no money to pay for drinks. *Held*, that a verdict of guilty was justified.

2. In a prosecution for robbery, accused's witness testified he heard of the robbery on the

24th of February. On cross-examination he was asked, "How did you know that he was robbed that evening?" and answered that he had not said that he knew on the 24th of the robbery, but that he had merely heard at some other time of the robbery on the 24th. *Held*, that there was nothing prejudicial to accused in the question.

3. One accused of robbery testified he lodged at a certain house, and was asked by the state, "When did you pay your rent there?" Objection was sustained. *Held*, that the mere asking of the question was not cause for reversal.

4. The prosecuting attorney, in argument to the jury, said, speaking of accused's attorney: "Why, this child talks to you as if you were a band of idiots." *Held* that, while it was not courteous language, it was not prejudicial to accused.

5. A requested charge that, if a witness named swore falsely in one place, the jury could believe his entire testimony false, was properly modified to read, "any witness."

Department 2. Appeal from superior court, Los Angeles county.

James Patterson was convicted of robbery, and he appeals. Affirmed.

Geo. L. Sanders, for appellant. Atty. Gen. Fitzgerald, for the People.

McFARLAND, J. The defendant was convicted of robbery, alleged to have been committed by the felonious taking away from the person of one Heisler of \$18 in money. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The main point of the appeal is that there was not sufficient evidence to warrant the verdict. But Heisler testified that during the evening of February 24, 1898, he left a certain saloon in company with the appellant and one McMahon, who was also convicted of the same crime, and that while the three were walking along the street the appellant and McMahon suddenly attacked him, seized him by the throat, and struck him a blow which knocked him down and rendered him for a time insensible, and that when he recovered his consciousness he found that he had been robbed of about \$18 in coin. He soon afterwards returned to the saloon, bleeding from a wound in the head. As to the fact that he had left the saloon a short time before, in company with the appellant and McMahon, he was corroborated by the witness Swope. No doubt the testimony of Heisler was somewhat weakened by the fact that he was a good deal under the influence of liquor, by the fact that shortly before leaving the saloon he had pretended to the bartender that he had no money to pay for drinks, and by a few other circumstances. But, although the case made out by the prosecution was not a particularly strong one, yet we would not be justified in saying that the jury should not have believed his testimony, and, therefore, under the rule so well established, we cannot say that there was not sufficient material evidence to warrant the jury in finding a verdict of guilty.

The judgment cannot be reversed on account of any alleged errors of law. It was not



error in the court to refuse to strike out the testimony of the witness Hughes, who was called for the prosecution. His evidence had some relevancy to the issues in the case, and, at all events, it was not prejudicial to the appellant, but was really to his advantage.

On the cross-examination of appellant's witness McMahon, the prosecution asked him, "How did you know he was robbed that evening?" To this appellant objected as not cross-examination, and the objection was overruled. On his examination in chief he had said, "I heard of his being robbed on the 24th day of February." This fairly bore the construction that he had heard on the 24th day of February that the robbery had occurred, and it was quite proper to ask him, on cross-examination, how he knew on the 24th that the robbery had occurred. The witness' answer was that he had not said that he knew on the 24th that he (Heisler) had been robbed, but that he had merely heard at some other time that he had been robbed on the 24th. There was nothing in this improper or prejudicial to the appellant.

The appellant when on the witness stand, having testified that he stopped at a certain lodging house, was asked by the district attorney, "When did you pay your rent there?" Whether this question was proper or not, the objection to it was by the court sustained, and the mere asking of the question would certainly not warrant a reversal of the judgment. It is not within the principle of those cases where it has been held that numerous repetitions of questions clearly improper, and evidently done for the purpose of taking an unfair advantage, will warrant a new trial. Neither did the court err in denying appellant's motion to strike out certain testimony of the witness which had been introduced without objection, on the ground that it was not cross-examination. It was about matters about which the witness had testified in chief.

The alleged misconduct of the assistant district attorney who tried the case is not sufficient to warrant a new trial. It seems, although it does not clearly appear, that the prosecuting attorney said something to the effect that the attorney for the defendant was a shyster, but the court immediately said that the language used, whatever it was, was improper and out of place, and the prosecuting attorney withdrew it. Afterwards the prosecuting attorney, after alluding to certain things which, as he said, the attorney for the appellant was trying to impress upon the jury, said, "Why, this child talks to you as if you were a band of idiots." This was certainly not courteous language, and the court was wrong in saying, "I think it does not transcend legitimate argument;" but it is evident that this language, however distasteful it may have been to the attorney for the appellant, could not have been, in a material sense, prejudicial to the appellant.

Appellant asked the court to give the following instruction: "The jury are instructed

that it is a maxim of our law that when testimony is false in one part it is false in all, and that, if you find in this case that the witness Swope testified falsely in one place, you are at liberty to believe his testimony false in every part, and to entirely disregard it in your consideration of the facts in this case." The court struck out the words, "the witness Swope," and inserted in place thereof the words, "any witness," and as thus modified gave the instruction. Assuming, but not deciding, that the instruction in either shape is not in contravention of section 19 of article 6 of the state constitution, which provides that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law," still the instruction as given by the court was all that appellant was entitled to upon the subject. Reference by the court to a particular witness is dangerous; it tends to lead the jury to believe that the court itself is suspicious of the witness named. If such instructions can be demanded by the defendant in a criminal case, they can also be demanded by the prosecution; and it is much better for such instructions to state the general principles of law, and allow counsel to make the application. There are no other points which call for special notice. The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(124 Cal. 160)

MENKE v. LYNDON et al. (S. F. 1,162.)  
(Supreme Court of California. March 29,  
1899.)

PRINCIPAL AND AGENT—INSOLVENCY—ASSIGNEE—  
ELECTION—REMOVAL—PARTIES—PLEADING—EVIDENCE.

1. Civ. Code, § 3449, as amended in 1895, provides that at a meeting of the creditors of an insolvent to elect an assignee in place of the sheriff for the purpose of voting thereat the sheriff shall accept the sworn statement of a creditor as to the correct amount of his claim. Held, that a power authorizing an attorney to "protect in every respect" a creditor's interests, and to do everything necessary with reference to disputed claims, authorized the attorney to make the sworn statement of the demand, and also to vote as the creditor's proxy at the election of the assignee.

2. For purposes of evidence, no weight attaches to a sworn denial of a fact based on a statement that the party making the denial "has no information or belief" as to the fact.

3. An application to have an election of an assignee for an insolvent in place of the sheriff declared void need not allege that it is prosecuted for the benefit of all the creditors.

4. Under Civ. Code, § 3449, as amended in 1895, providing that at a meeting of the creditors of an insolvent to elect an assignee in place of the sheriff "a majority in amount of demands present or represented by proxy shall control all questions and decisions," a majority in amount of the demands "voted" is not sufficient per se.

Commissioners' decision. Department 1.  
Appeal from superior court, Santa Clara county.

Action by J. H. Menke against James H. Lyndon and another to restrain the delivery of property to an assignee, and to have his election declared void. From an order denying plaintiff's motion for a temporary injunction, he appeals. Reversed.

Lowry & Gutsch, for appellant. Jos. R. Patton, for respondent Lyndon. Hiram D. Tuttle and W. L. Gill, for respondent Roemer.

BRITT, C. On January 18, 1897, one Werner H. Menke, being insolvent, made to the defendant Lyndon, who was the sheriff of Santa Clara county, an assignment of property in trust for the benefit of his creditors under the provisions of section 3449, Civ. Code, as amended in the year 1895. Thereupon the sheriff called a meeting of the creditors, as required by said statute, "for the purpose of electing one or more assignees in the place and stead of the said sheriff." At the meeting thus called the sheriff presided, and declared as the result of the vote of the creditors that the defendant Roemer was duly elected assignee. The sheriff was about to deliver to Roemer, as such assignee, the property of the assigning debtor, when plaintiff brought this action to restrain such delivery, and to have the supposed election of Roemer judicially declared void. In his complaint, duly verified, plaintiff alleged that he was a creditor of said debtor at the time of said assignment, and yet is, to the amount of \$13,269. He applied for an injunction pending the action. His application was denied by the court, and this is an appeal from the order denying the same.

Said section 3449, Civ. Code, provides that at the meeting of creditors for electing an assignee in the place of the sheriff "a majority in amount of demands present or represented by proxy shall control all questions and decisions"; also that for the purpose of voting at such meeting the sheriff shall accept as correct the statement of the amounts of the demands, respectively, of the creditors as set forth in the debtor's assignment to him, unless a creditor, finding the amount of his claim to be incorrectly stated in the assignment, file "a statement, under oath, of his demand," which statement shall, for the purpose of voting, as aforesaid, be accepted by the sheriff as correct. At the hearing of plaintiff's motion for an injunction it appeared, among other things, that plaintiff resides at the city of Bremen, Germany. A few days prior to the aforesaid assignment of January 18, 1897, he made to one Gutsch, of the city of San Francisco, in this state, a power of attorney, duly executed and acknowledged, in terms purporting to authorize the latter to "protect in every respect" the interests of plaintiff in all parts of the United States, and to act in plaintiff's name for that purpose, and to collect debts, and bring actions, and do everything necessary with reference to claims in dispute. In the

said assignment plaintiff was named as a creditor to the amount of \$12,650; but before the meeting of creditors said Gutsch, on behalf of plaintiff, filed with the sheriff a statement of plaintiff's demand, under oath, stating the same to be \$13,269, and by virtue of said power of attorney he voted at said meeting, as plaintiff's proxy, the amount last stated. On that occasion the "amount of demands present or represented by proxy" was \$28,770.88, so that a majority of the same was above \$14,385.44. Defendant Roemer received the vote of \$14,301 thereof for the office of assignee; one H. A. Diehl received the vote of demands (including that of plaintiff) amounting to \$13,858; and the holder of a demand for above \$600—one Spingler—declined to vote at all. The sheriff, as already stated, declared Roemer duly elected; to which ruling plaintiff, by his said attorney, then and there protested on the ground that the claim of Spingler should be counted against Roemer in determining whether he had received a majority.

At the meeting of creditors the sheriff overruled all objections to the right of Gutsch to vote the plaintiff's demand, but both defendants urge now sundry of the objections then taken. Thus, they assert that the power of attorney was insufficient to authorize Gutsch to make affidavit to the claim of plaintiff or to vote the claim as proxy for plaintiff. As regards the affidavit,—made to correct the statement of amount of the demand contained in the assignment,—it is not apparent from the statute but that it may be made on behalf of the creditor by any person who has competent knowledge of the facts. And if express authority from the creditor is required for the filing thereof with the sheriff, still the power of attorney held by Gutsch was in language both broad enough and specific enough to include it, and was also sufficient evidence of his right to vote as plaintiff's proxy at the meeting.

It is further said that on the hearing of the motion for injunction the question whether plaintiff was a creditor of the assigning debtor to any amount was in dispute; but to raise that question the record shows only the affidavit of the sheriff to the effect that he has no information or belief as to the indebtedness of Werner H. Menke to plaintiff, "and, basing his denial on that ground," he denies that such indebtedness ever existed. It was said in *People v. Smith*, 1 Cal. 9, that an affidavit made upon information merely is entitled to but little weight in any legal proceeding; and certainly for purposes of evidence no weight at all can be accorded to an affiant's denial based on the want of any information whatever.

Another objection is that plaintiff does not avowedly prosecute the action for the benefit of all the creditors. We know of no valid reason why he should so allege. Of course, if he succeeds, the result inures to the advantage of all,—if such they regard it.



On the showing made it must be held that Roemer was never elected assignee. He did not receive the vote of "a majority in amount of demands present or represented by proxy," which, by the requirement of the statute (section 3449, Civ. Code), "shall control all questions and decisions." The thirteenth section of the former federal bankrupt act (section 5034, Rev. St. U. S.) provided that the choice of assignee should be made by the greater part in number and in value of the creditors who have proved their debts. The question of the construction of that statute was stated and ruled as follows: "Must a person, to be elected assignee, receive only a majority of the votes actually cast, or a majority of all who have proved their claims? The register thinks that a majority of all the claims that are proved is requisite, and I agree with him in this opinion. \* \* \* If no one receives the vote of this majority, no choice is made by the creditors." In re Purvis, 20 Fed. Cas. 74. And a like decision was rendered in Re Scheiffer, 21 Fed. Cas. 657. Our statute here under view does not differ materially (as regards the present question) from that considered in the cases cited; and, in our opinion, it requires the same interpretation. See O'Neill v. Reynolds, 116 Cal. 264, 48 Pac. 57. The court should have issued the temporary injunction asked, and the order denying it should be reversed.

We concur: GRAY, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a temporary injunction is reversed.

6 Cal. Unrep. 275

STOCKTON ICE CO. v. ARGONAUT LAND & DEVELOPMENT CO. (Sac. 462.)  
(Supreme Court of California. March 31, 1899.)

AGENCY—REVOCATION—NOTICE—LIABILITY OF PRINCIPAL.

1. Liabilities incurred by an agent on behalf of his principal after the termination of the agency, in favor of one having no notice of the revocation of the agency, are binding on the principal, though he never ratified the agent's act.

2. Findings on conflicting evidence will not be disturbed, though the appellate court differs with the trial court as to the weight of the evidence.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by the Stockton Ice Company against the Argonaut Land & Development Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

James A. Louttit, for appellant. Dudley & Buck, for respondent.

HAYNES, C. Both parties are corporations. The action is for coal sold and deliv-

ered to appellant, and for freight paid and advanced by plaintiff for the defendant, all at its request. The plaintiff had judgment, and defendant appeals therefrom; and also from an order denying a new trial. No question is made but that the findings are sufficient to support the judgment, but it is contended that the evidence does not justify the findings, and this is the only question presented.

The principal controversy was as to the authority of Mr. Fairbrother to incur the indebtedness for the defendant corporation. It appears from the evidence that, prior to the transactions here in question, Fairbrother had been the duly-authorized agent of the defendant, and at various times purchased coal, as such agent, from the plaintiff, to an amount exceeding \$1,700, for all of which the defendant paid. It is claimed by the defendant, however, that his agency had ceased before the transactions here in question took place. To this contention the plaintiff replied that, whether his authority had in fact ceased or not, he continued to act as such agent as before, and that plaintiff had no notice of the revocation of the agency. If this be true, it is immaterial whether the defendant did or did not subsequently ratify Fairbrother's acts in incurring these liabilities. All the liabilities sued upon were such as the corporation defendant could properly incur, and hence the only question was whether Fairbrother was the agent, actual or ostensible, of the defendant. The evidence was conflicting, but quite sufficient to justify the findings. The facts were for the trial court to determine, and, even if we differed with that court as to the weight of the evidence, we could not disturb its action. The judgment and order appealed from should be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

6 Cal. Unrep. 277

STOCKTON SCHOOL DIST. v. GOODELL.  
(Sac. 662.)

(Supreme Court of California. April 5, 1899.)

APPEAL—DEFECTIVE BOND.

An appeal bond must conform to the notice of appeal.

Department 2. Appeal from superior court, San Joaquin county.

Action by the Stockton School District against one Goodell. From the judgment an appeal was taken. Dismissed.

J. G. Swinnerton and Ed. R. Thompson, for plaintiff. O. B. Parkinson, Carpenter & Slack, and A. H. Carpenter, for defendant.

PER CURIAM. The undertaking on appeal in this case does not conform to the no-

tice of appeal. The appeal is from the whole judgment for plaintiff in a mandamus proceeding. The undertaking recited an appeal from a judgment for \$10 costs. Appeal dismissed.

123 Cal. 657

BRIGGS et al. v. BREEN et al. (S. F. 1,076.)

(Supreme Court of California. March 31, 1899.)

In bank. For opinion in department, see 56 Pac. 633.

PER CURIAM. Affirmed.

BEATTY, C. J. I dissent from the order denying a rehearing in this case, because I think an erroneous construction has been given to the contract of the parties, and a precedent established which can never fail to work an injustice as often as it is followed. When the defendants employed the plaintiffs to perform the necessary legal services incident to the administration of the estate of which they were executors, without any express agreement as to compensation, there was, of course, an implied agreement to pay the reasonable value of the services. But if it can be justly inferred from the nature of the transaction that they had each in mind, and expected to be governed by, a particular rule or method of ascertaining such reasonable value, then that is as much a term of the contract as the agreement to pay. The contract of the defendants was like any other implied contract, and their promise such, and such only, as can be reasonably inferred from all the circumstances. If I order a sack of flour from a grocer, the promise which the law implies is that I will pay the reasonable value of the flour, as determined by its current market price at the time and place of delivery; and this because market price is the generally accepted standard of value, and is therefore presumed to have been the thing intended and understood by buyer and seller. But suppose current market price not to be the accepted standard of value. Suppose, for instance, that some board or officer is invested by law with the power to ascertain and fix the value of provisions. In that case the only promise the law could imply from a simple order for the delivery of a sack of flour would be a promise to pay its value as determined by such board or officer. Now, to apply this illustration to the case in hand: When an executor, administrator, or other trustee employs an attorney to serve him in his representative capacity in the care and due administration of the subject of the trust, they both know that the services are to be rendered, not for the personal advantage of the trustee, but solely in the interest of the beneficiaries of the trust,—not for the executor, but for the distributees of the estate. They both know that it is not just that for such services the trustee should pay out of his own pocket a

sum in excess of that allowed by the court in the settlement of his accounts, and the attorney knows perfectly well that the trustee does not expect or intend to be held to a personal liability beyond the sum allowed by the court. They both know that the reasonable fees of the attorney are a charge upon the trust fund, because it is made the duty of the chancellor or probate court, in settling the accounts of the trustee, to ascertain and allow such reasonable fee as a preferred claim. By express mandate of the statute (Code Civ. Proc. § 1616), it is made the duty of the probate court, in settling the account of an executor, to allow, and necessarily to ascertain, his reasonable expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in court. The amount so ascertained is all that the executor can take out of the trust fund to reimburse himself, and, if he may be compelled by the attorney in another forum to pay a larger sum, he must lose the difference. Now, this being the law, known to the parties, and vitally affecting the relation upon which they are about to enter, the question to be determined is, what understanding is to be inferred, what promise implied, as to the rule and mode of ascertaining the attorney's compensation, in the absence of an express agreement? To me it seems perfectly clear that the only reasonable inference is that the attorney expects to receive, and the executor expects to pay, only that reasonable compensation which the probate court, in the settlement of the executor's account, shall ascertain and allow; and, if such is their understanding, such necessarily is their contract. Of course, no attorney would be bound to accept the employment on those terms; but, if he is unwilling to do so, it is for him to insist upon an express agreement of a different character. The duty of having the agreement made express, if he intends to hold the executor to a personal liability for a sum in excess of the court's allowance, devolves upon him especially, because, from the very nature of the transaction, he must know that the executor cannot intend deliberately and advisedly to incur an indefinite and perhaps serious personal liability for the sole benefit of heirs and legatees. It is no argument against this position to say that the executor cannot make the estate liable to the attorney, and that the allowance on account of the attorney's fees is made, not to the attorney himself, but to the executor. The question is not as to the power of the executor to subject the estate to a liability, but as to the extent and measure of his own liability. It is conceded in the opinion of the court, and is unquestionably true, that the executor can, by express stipulation, limit his liability to the amount allowed him out of the estate; and the only question we have to determine is whether, in the absence of such express stipulation, the law will imply the same thing. The question,



in other words, is whether the law will adopt a presumption which in nine cases out of ten will correspond with the fact, or a presumption which in nine cases out of ten will be directly contrary to the fact. Moreover, this proposition that the executor cannot subject the estate to a liability to the attorney, and that the allowance of attorney's fees is made to the executor, and not to the attorney, in addition to being an utterly false quantity in the discussion here, is all the more deceptive, because, while it is formally and technically true, it is substantially false. If it is the duty of the probate court to apply the funds of the estate to the payment of the fees of the attorneys employed by the executor, and if the fees allowed to the executor merely pass through his hands to the attorney, the proposition that the executor cannot subject the estate to the liability has nothing substantial to rest upon. The decision in *Dwinelle v. Henriquez*, 1 Cal. 387, is not in conflict with the conclusions above stated. All that is there decided is that by a general retainer the administrator of an estate incurs a personal liability. That, however, is not the question here. Concede the personal liability of the executors; the question still remains, how is the extent of that liability to be determined? My contention goes no further than this: That it is to be determined by the express stipulation of the parties, if it is express, and, if not express, by the tacit understanding which ought to be inferred from the nature of the transaction,—an understanding, that is to say, that the attorney will claim no more than the probate court will allow; that he will not subject his own client to a loss and damage which he well knows he does not intend to incur.

The court, in noticing the argumentum ab inconvenienti urged by counsel for respondents, suggests that the hardships involved in the rule here announced are more apparent than real, because, they say, the executor or administrator will commonly be able to procure counsel of ability who will agree to render their services for such compensation as the court will allow from the estate. This is undoubtedly true. I have no doubt that counsel of ability do commonly render their services for the amount which the court allows, and that without any express agreement, and without any idea that in accepting such allowance they are doing more or less than they and their client understood they would do, though nothing was said on the subject. The suggestion of the court, however, does not meet the real difficulty. The executor or administrator, though he can protect himself against a personal liability by an express agreement, will rarely think of doing so, simply because he will not be aware of the necessity of making an express agreement until it is too late.

Besides the injustice to individuals which must occasionally result from the rule of this case, a more serious mischief is involved.

Henceforth every executor or administrator who is not protected against a personal liability beyond the amount allowed for attorney's fees in the probate court will be compelled, in order to avoid risk of loss to himself, to urge a large and liberal allowance, for fear that in another forum a still higher estimate may be placed upon his attorney's services, for which he will be answerable. Instead of being free to protect the estate against an exorbitant demand, he will have an interest in sustaining it. Considerations of public policy, therefore, no less than of justice, require the construction of this contract for which the respondents contend. I think the judgment of the superior court should have been affirmed.

124 Cal. 175

LOWER KINGS RIVER RECLAMATION  
DIST. NO. 531 v. McCULLAH et al.

(S. F. 1,166.)

(Supreme Court of California. March 31,  
1899.)

DUE PROCESS OF LAW—SPECIAL LAWS—DRAINS—  
RECLAMATION—ASSESSMENTS—DESCRIPTION—  
TRUSTEES—DEALINGS WITH DISTRICT—APPEAL—  
REVIEW.

1. Pol. Code, § 3493½, providing that, at any time within a year after the filing of an assessment list for the expense of reclaiming land, the district board of trustees may prosecute an action to determine the validity of the assessment, which action shall not prevent another action to recover the money assessed, but the judgment wherein shall be conclusive between the parties as to the validity of the assessment, is not unconstitutional, as depriving the owner of a hearing.

2. Nor is such section a special law.

3. Under Pol. Code, § 3461, providing that the assessment list for the expense of reclaiming lands must contain a description, by legal subdivisions, of each tract assessed, the number of acres, the name of the owner, and the amount assessed against each tract, the land need not be described in the smallest legal subdivisions.

4. In an assessment for the expense of reclaiming lands, a description of a tract gave the east boundary as the east line of section 26 of a certain township, and the west boundary as the division line between the S. E. ¼ and the S. W. ¼ of said section 29; thence south, on such line, to a certain point. If the second and third calls were followed, the last point would not be reached; and if the second call was followed, and the course of the third call rejected, other land than that of the person named as owner would be included; but, if section 26 were substituted for 29, the description would close, and include no other land. *Held*, that the call for section 29 was a clerical error, and the description was sufficient to sustain the assessment.

5. Trustees of a reclamation district are not chargeable with fraud in purchasing rights of way from themselves individually, where such rights of way are necessary, and are paid for at the same rate as other lands similarly situated.

6. A claim for work on a reclamation improvement performed by one of the district trustees is not invalid, where the work was recommended by the engineer as necessary and approved by him as excellent, and there is no evidence that it was otherwise, or that the trustee derived profit therefrom, though such trustee

voted with the other two in favor of approving the claim.

7. The action of county supervisors in forming a reclamation district is conclusive that the lands therein are of the character for the reclamation of which such district is authorized by statute to be formed.

8. In an action by a reclamation district to determine the validity of an assessment, where there is a substantial conflict in the evidence as to the character of the land assessed for benefits, the finding of the court in favor of the assessment will not be disturbed on appeal.

In bank. Appeal from superior court, Fresno county.

Action by the Lower Kings River Reclamation District No. 531 against C. J. McCullah and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Daggett & Adams, for appellants. M. K. Harris and Denson & Adams, for respondent.

VAN DYKE, J. This is an action to have an assessment for \$20,500 adjudged to be valid. It is brought in pursuance of section 3493½ of the Political Code, a new section enacted in 1893. Plaintiff had judgment in the lower court as prayed, and costs, and the contesting defendants have appealed from the judgment and an order denying their motion for a new trial. The complaint follows the form prescribed in the section of the Political Code referred to, and seems to be sufficient as to its allegations. The answer denied most of the allegations of the complaint, except as to the organization of the district and the ownership of the lands assessed. The findings of the court are against the defendants upon all the issues presented in the answers.

It is contended on the part of the defendants that the complaint does not state facts sufficient to constitute a cause of action, in that the new section of the Political Code under which the action was brought is unconstitutional. It is provided by this new section of the Political Code that "at any time within one year after the filing of the list mentioned in section 3462 the board of trustees of the district may, in the name of the district, commence and prosecute an action \* \* \* to determine the validity of the assessment. \* \* \* In an action prosecuted under this section the court shall decree the validity or invalidity of the assessment in accordance with what the court may determine the facts to be." It is provided that the action brought under this section shall not be a bar to or prevent an action brought under other sections of the Code for the recovery of money assessed upon lands in a reclamation district, "but the judgment given and made in the action brought under the provisions of this section shall be conclusive between the parties thereto as to the validity or invalidity of the assessment." In *Reclamation Dist. v. Runyon*, 117 Cal. 164, 49 Pac. 131, it is said: "This proceeding is not an action in personam, and, while it is not in

strictness a proceeding in rem either, it partakes rather of the nature of the latter. It is designed as one of the processes to test the legal perfection of an assessment levied by a reclamation district. The property owner is entitled to a hearing at one time or another on the question of benefits. *Reclamation Dist. v. Evans*, 61 Cal. 104; *Reclamation Dist. v. Phillips*, 108 Cal. 306, 39 Pac. 630, and 41 Pac. 335; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663. Before the passage of section 3493½ of the Political Code, he made his showing when action was brought to enforce the assessment. But, to obviate the difficulties and delays which thus arose, this peculiar proceeding was established. By it is provided a forum before which a property owner may go and make full proof of his objections to the assessment. The final determination of the court upon the matter may be used by or against him in any future action to collect the tax. Thus, it gives the property owner the hearing to which he is entitled, but provides that such hearing may take place in advance of an action upon the assessment." There seems to be no doubt expressed by this court in reference to the constitutionality of the new section under consideration, although the question was not expressly raised nor passed upon. The case of *People v. Railroad Co.*, 83 Cal. 393, 23 Pac. 303, relied upon by defendants, was where the legislature undertook to prescribe a form of complaint in an action to enforce the collection of a tax. The court there held that the sufficiency of the complaint to recover delinquent taxes must be tested by the rules regulating pleadings in civil actions, and not by section 3670 of the Political Code as it stood at that date. The complaint in that case was held bad for the reason, among others, that it lacked the elements essential in stating a cause of action. The feature of the act in that case as to special legislation was wholly unlike the section under consideration here. The cases of *City of Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604, and *Darcy v. City of San Jose*, 104 Cal. 642, 38 Pac. 500, cited by defendants, do not support their contention in this particular. We do not think the new section is unconstitutional.

It is claimed by defendants, also, that section 3461 of the Political Code requires that in giving a description of the tract assessed the land must be described in the smallest legal subdivision under the congressional system of surveys, which is 40 acres. As an example, the description given of the land of defendant Wood is cited as follows: "Tract or parcel No. 13. Owner, George Wood. East ½ of S. E. ¼ of section 27, township seventeen, and south range twenty-one, containing eighty (80) acres, assessed at 114.01." It is contended that the description should have been the N. E. ¼ of the S. E. ¼, and the S. E. ¼ of the S. E. ¼, etc., and that each 40 should be separately assessed. The law does not sustain this



contention. The list mentioned in section 3460 of the Political Code is of "the charges assessed against each tract of land." Section 3461 of the same Code says the list must contain "a description by legal subdivisions, swamp land surveys, or natural boundaries of each tract assessed; the number of acres of each tract; the names of the owners of each tract; \* \* \* the amount of the charge assessed against each tract." The E.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  is a legal subdivision, although it is not the least subdivision known to our system of surveys, and the law, as already quoted, does not require that the description shall be by the least legal subdivision. *Robinson v. Forrest*, 29 Cal. 318, is not in conflict with this view. The meaning of the act of Congress in respect of making out a list and plats of swamp lands claimed by a state was there under consideration, and it was held that it meant the smallest subdivision, or 40-acre lot. This was, however, to determine what lands should be included as wet and unfit for cultivation, where the greater part of any subdivision was of that character. It is the tract as a whole described by legal subdivisions that is required to be assessed, and the assessment is not required to be carried out against each subdivision, but "the amount of the charges assessed against each tract." Section 3461. See, also, *Reclamation Dist. v. Wilcox*, 75 Cal. 443, 17 Pac. 241; *Reclamation Dist. v. Phillips*, 108 Cal. 324, 39 Pac. 630, and 41 Pac. 335. In the last case, a description reading, "W  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  of sec. 28 Tp. 17," in the assessment list, was held sufficient, as representing the W.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  of section 28, township 17.

It is claimed also by appellants' counsel that the assessment of tract 3 to Hames is void because of misdescription of the land. The description is as follows: "Beginning at the southeast corner of the north half of the northeast quarter of section thirty-five, township seventeen south, range twenty-one east; thence north on the east line of sections thirty-five and twenty-six in said township to the intersection of said east line with the line of levee of Lower Kings River reclamation district number 531; thence along the line of the said levee to its intersection with the line dividing the southeast and southwest quarters of said section twenty-nine; thence south on said quarter section line to the southwest corner of said north half of northeast quarter of said section thirty-four; and thence east to place of beginning,—containing one hundred and fifty-five acres." By a mere inspection of the map or diagram with this description it is apparent that 29 should be 26. Section 29 is not said section, because it has not been mentioned. Twenty-six is said section, and has been mentioned. Then, taking the next call, we find that it runs south on said quarter section line to the southwest corner of said N.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of said section 35, which renders it absolutely certain that the person who wrote the description intended to correctly describe the land of Mr. Hames, and that

29 was a mistake in the call, and should have been 26. Read literally, the description goes down the levee several miles to section 29, and to go south on that line section 35 would never be reached, and to go directly from the point in section 29 to the corner in section 35 the line would cut diagonally across several sections and include land other than Hames'; whereas, substituting section 26 for 29, the description closes, and embraces only Hames' land. An examination of the map in the original transcript makes the mistake apparent, and the acreage also corresponds with the description, assuming 26 to have been intended where 29 is written. No surveyor would have any difficulty in ascertaining the precise land intended. It is not a question of a double assessment so much as it is a manifest clerical mistake or blunder in writing one word or figure in place of another; but this does not destroy the description, because the identity of the land is apparent from the other calls. *Reamer v. Nesmith*, 34 Cal. 624; *Irving v. Cunningham*, 66 Cal. 15, 4 Pac. 766; *Helm v. Wilson*, 76 Cal. 476, 18 Pac. 604. Appellants' counsel, however, contend that the rule applicable to the description in a deed will not hold as to an assessment. We can see no reason for such a distinction; the main point is to have the land described so that its identity can be ascertained.

It is charged, also, that the trustees perpetrated frauds in the management of the affairs of the district, among these in the purchase of rights of way from themselves. The rights of way were necessary, and paid for at the same rate per acre as other landowners were paid whose lands were similarly situated. It also appears that the warrants were drawn and paid from the fund raised from the first assessment, and not included in the bills for the second assessment now in question. Some other claims were also paid from the first assessment, which are challenged.

The pertinent inquiry, however, is, is the present assessment necessary to meet the debts of the district, and to carry out the necessary improvements contemplated? In their reports to the board of supervisors, the trustees stated that there were outstanding debts, which, with accrued interest and the expenses of collecting and assessing, would amount to \$16,500, for repairs, care of levees, material, superintendence, etc., the estimated amount required being \$4,000, making \$20,500, for which the assessment was approved and ordered. Representing a part of the unpaid indebtedness are certain outstanding warrants stated in the report to be \$14,286.41, exclusive of interest. Certain warrants were issued to Trustee Paige, aggregating \$6,305.61. A small part of this is for traveling expenses, and per diem attendance upon the board, the balance being for money advanced by Paige to pay for work done on the levees by different persons, some part of which work was done by his own men and teams. The work done by him was recom-

mended by the engineer as necessary, and was reported to the board. The district was without funds, and the work was done under the supervision of the engineer. In the engineer's report he says, referring to this work: "I have just examined the work finished by Mr. Paige's force, and find they have done most excellent, and I think efficient, work where they have made repairs. The riprapping is the most thorough work of the kind ever done upon the river." The bills presented by Paige, and for which warrants were issued, received the approval of the full board. The minute entry reads as follows: "It was moved by Parkhurst, and seconded by Trustee Ray, that the bill of T. Paige for services on the levee, amounting to \$4,520.48, be paid by a warrant drawn on the funds of the district. After a careful examination of the said bill, the motion was unanimously carried, by Trustees Ray, Parkhurst, and Paige voting in the affirmative." There is no evidence to show that the work was unnecessary or not well done, nor is there any evidence that Trustee Paige derived any profit from the same. In other words, there is no actual fraud shown in the transaction, but it is contested on the ground of constructive fraud, in that a trustee cannot deal with himself, and that the corporation may at any time avoid the transaction, whether it be fair or unfair, advantageous or prejudicial. The rule is expressed in our Civil Code (section 2229): "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." In *Reclamation Dist. v. Turner*, 104 Cal. 334, 37 Pac. 1038, two out of the three trustees were interested in the old levee purchased by and for the use of the corporation district, and in passing upon the question now under consideration the court in that case say: "It may be conceded that, if one of the trustees was interested in the old embankment, the action of the others could be sustained in any purchase that might be made of them by the district; but it would be turning a very sharp corner for James to say to White, 'You and Mr. Hoyl fix the value on my embankment, and buy it for the district, and he and I will buy yours,' as each would be interested to increase the price of the other's property in order to increase the price of his own; and, if condemnation proceedings are resorted to, they would be defendants while prosecuting the proceedings on behalf of the district. If we are right in holding that the old embankments can be acquired by the district and used as part of the reclamation works, we think it must follow that, since all in the district are not owners of embankments, that at least a majority of the board of trustees must be composed of nonowners of such embankments." By indirection, this case seems to hold that one out of three trustees might be interested in dealing with the corporation, so that a majority remain uninterested and

capable of acting in the premises. *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788, was a case where the defendant, as president of a bank, helped to vote himself an increase of salary; and the court, after stating the general rule that it was against public policy to permit persons occupying fiduciary relations to be placed in such a position that the influences of selfish motives may be a temptation so great as to overpower their duty and lead to a betrayal of their trust, and therefore that they cannot be allowed to have any dealings in the trust property with themselves, adds: "Nor can they, in any instance, vote a salary to one of their number as president when he takes part in the proceeding, or his vote is essential to the adoption of the resolution;" again intimating that, if his vote were not essential, the transaction would not be invalid. The case of *Wickersham v. Crittenden* was again before the court in 106 Cal. 327, 39 Pac. 602, in which it is said: "The fact fully appears from the evidence 'that the increased salary of the president depended upon, and was accomplished by, his own vote as a trustee; \* \* \*'" referring to the former opinion in the same case in 93 Cal. and 28 Pac., and repeating the declaration there contained that Crittenden could not take part in a proceeding where his vote was essential to the adoption of the resolution raising his own salary. And in 110 Cal. 332, 42 Pac. 893, *Wickersham v. Crittenden* was again before this court. In the meantime a resolution was adopted by other directors, by which they "ratified, approved, confirmed, and adopted" the former resolution fixing the salary of the president. On page 334, 110 Cal., and page 894, 42 Pac., of the opinion, it is said: "In the case reported in 93 Cal. 17, 28 Pac. 788, it was held that the original resolution adopted at the meeting of directors of December 12, 1890, fixing the salary at \$400, was illegal. The resolution was, however, adopted by the board of directors of the corporation, and was spread upon its records, and on its face purported to be an authentic and sufficient act of the corporation. Its invalidity arose from the fact that Crittenden, whose vote was essential to its adoption, was personally interested in the subject-matter of the resolution, and therefore disqualified from voting thereon. The resolution was, however, within the power of the corporation to adopt; and, though invalid at the time it was adopted, could be subsequently ratified by a competent board of directors, or could be adopted anew, either by reference to it as it was spread upon the records, or by introduction as an original resolution." In *City of San Diego v. San Diego & L. A. R. Co.*, 44 Cal. 107, the question of a director dealing with himself was under consideration, and, after laying down the general rule as already briefly stated, the court say: "We do not doubt that a majority of the trustees might execute the power, but the question is whether Sherman, who



was a stockholder and director, could be one of that majority." Morawetz, in speaking of the rule disqualifying a director from dealing in any way with the corporation of which he is agent, says: "It is never necessary that all the directors should take part in the deliberations of the board. The general rule is that a majority of the board constitute a quorum for the transaction of business, and that a majority of those who attend the meeting, at which a quorum are present, have authority to bind the corporation by their vote. There is no necessary impropriety in a contract between a director and a corporation, if the latter is represented by other agents. On the contrary, such contracts are, in many cases, the natural result of circumstances, and are justified by the approved usages of business men. The directors of a corporation are generally selected by reason of their influence or wealth, and because they are interested in the success of the company and familiar with its affairs. Not infrequently persons who agree to advance money to the corporation expressly stipulate for a voice in the board of directors, so that they may be able to supervise the faithful application of the money advanced, and keep watch for their own security. To prohibit the directors, in all cases, from dealing with the corporation, would often deprive the latter, in time of need, of the assistance of those persons who have the greatest interest in its welfare and who are willing to give their time upon the most reasonable terms. But a transaction between a director and the corporation, even if the latter was represented by a majority of the board, will always be scrutinized by the court with strictness, and will be set aside, at the suit of the corporation, upon proof of the slightest unfairness or imposition practiced upon it." Mor. Priv. Corp. § 527. Many other cases are referred to in the briefs of respective counsel bearing upon this question, but we think the foregoing fairly present the rule that is applicable to the case; and in view of the fact, as already stated, that no actual fraud was shown in the transaction between the director in question and the corporation, we would not be justified in holding that his claim for services and money advanced is invalid, and not entitled to be allowed. At the same time, it may be pertinent here to add that a director should not act as such or take part in the proceedings of the board at which his claim is either acted upon or under consideration. His vote adds nothing to it. Besides, it is unseemly for a trustee to even appear to take part in a transaction in which he is interested against the corporation or cestui que trust.

The contesting defendants also contend that their lands are not swamp lands, within the meaning of the law for the organization of reclamation districts, or, at any rate, the greater portion of their lands is not of that character. The allegation in the complaint in reference to the formation of the district is

not denied. Therefore there seems to be no issue upon that question. In the formation of the district the supervisors were required to determine the character of the lands, and whether they were of the class to be included within a reclamation district under the law, and their action to that extent is held to be conclusive. *Reclamation Dist. v. Phillips*, 108 Cal. 306, 39 Pac. 630, and 41 Pac. 335. But, notwithstanding this, the court below afforded full opportunity to the contesting defendants to offer proof, not only in reference to the character of the land, but also as to the relative benefits arising from the reclamation proceedings. It appears from the transcript that a large amount of evidence was offered, both by the defendants contesting and also on behalf of the corporation district, bearing upon the character of the land, as well as upon the manner of assessing the same, and the question of relative benefits, and whether such assessment was in proportion to the benefits. And the findings of the court on all these questions are in favor of the plaintiff corporation, and against said defendants. From an examination of such testimony, it clearly appears that the most that can be said in favor of said defendants is that there is a substantial conflict in such testimony; but there is evidence sufficient to support the findings, and, that being the case, this court will not, under well-established rules, interfere with such findings.

Upon an examination of the whole case, we are of opinion that the judgment of the court below establishing the validity of said assessment and the order denying the appellants' motion for a new trial should be affirmed, and it is so ordered.

We concur: HENSHAW, J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.

124 Cal. 169

BALFOUR-GUTHRIE INV. CO. v. WOODWORTH. (S. F. 1,101.)

(Supreme Court of California. March 30, 1899.)

TRUST DEEDS—SUBSTITUTION OF TRUSTEES—  
CORPORATIONS—DIRECTORS—MEETINGS—  
NOTICE—PRESUMPTION—DISMISSAL.

1. A trust deed provided that the mortgagee company might appoint another trustee by resolution of its directors, and that a copy of the resolution, certified by the secretary, should be conclusive against the mortgagor that the substituted trustee had been duly appointed. *Held*, that this did not preclude the mortgagee from showing by its records that the substitution had been duly made.

2. Where a resolution adopted at a special meeting of directors was spread at length on the records of the corporation, and authenticated by the signature of its purported secretary, the presumption is that the directors were properly notified of the meeting.

3. The secretary of a corporation testified that he had notified the directors of a meeting by sending to each a written notice, by a boy from his office, 24 hours prior thereto. *Held* that, in the absence of evidence to the contrary,

the court was authorized to find that proper notice was given.

4. A mortgagor, under a trust deed authorizing the mortgagee company to substitute a trustee by resolution of its directors, cannot complain of the regularity of the stockholders' meeting at which such directors were elected.

5. The execution, by a trustee under a trust deed, of a defective conveyance, does not exhaust the trustee's power, but the trust continues until he has executed a valid conveyance of all his title.

6. A trust deed is not void as suspending the power of alienation, since the mortgagor can, by paying the debt, receive a reconveyance, or, by joining with the trustee and the mortgagee, can convey to a third person.

7. Dismissal of a former similar action before trial of a subsequent action removes the objection of another suit pending.

Department 1. Appeal from superior court, Fresno county.

Suit by the Balfour-Guthrie Investment Company against Benjamin R. Woodworth. From a decree for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Frank H. Short and L. L. Cory, for appellant. Page, McCutchen & Eells and Meux & Johnston, for respondent.

**HARRISON, J.** The appellant executed a deed of trust of certain lands in the county of Fresno, March 12, 1890, to Robert Balfour and Robert B. Forman, to secure the payment of certain indebtedness to the respondent. The deed of trust provided that, in case of any default in the payment of said indebtedness, the trustees, upon the request of the respondent, should sell the lands, after giving certain notice, and apply the proceeds to the payment of said indebtedness. It was also provided in the deed of trust that the respondent might, by a resolution of its board of directors, appoint other trustee or trustees in place of those named therein to execute the trusts, and that, upon a conveyance by the designated trustees to the trustee so appointed, he should be vested with all the estate, trusts, and powers in the premises conferred upon the original trustees. November 22, 1894, the respondent appointed the California Title Insurance & Trust Company as trustee to execute the trusts under said deed, in place of Balfour and Forman, and thereupon Balfour and Forman executed to the said substituted trustee a conveyance of the lands described in the deed of trust. The appellant made default in the payment of his indebtedness to the respondent, and on January 5, 1895, the respondent requested the substituted trustee to sell the land in accordance with the terms of the deed of trust. Thereupon, after giving the notice required by the instrument, the said trustee sold the same at public auction to the respondent, and on February 5, 1895, executed to it a conveyance thereof. The respondent entered into possession of the property, and subsequently brought the present action to quiet its title thereto. Judgment was rendered in its fa-

vor, and the present appeal is taken therefrom, and from an order denying a new trial.

1. The transfer and assignment from Balfour and Forman to the California Title Insurance & Trust Company purported to have been executed in accordance with a resolution of the board of directors of the plaintiff, and had attached thereto a copy of such resolution, certified by the assistant secretary of the plaintiff. When it was offered in evidence, the defendant objected upon the ground that no authority for making the assignment was shown; that the assistant secretary was not competent to authenticate the resolution so as to make the transfer effective. It was not requisite, however, to the validity of the assignment, that any copy of the resolution should be annexed thereto. The deed of trust provided that the plaintiff might appoint another trustee by resolution of its board of directors, and "upon such appointment," and a conveyance to him by the trustees named in the deed of trust, he should become vested with all the powers vested in the trustees originally named. The subsequent provision in the instrument that a copy of the resolution, certified by the secretary, should be conclusive against the grantor that the substituted trustee had been duly appointed, did not render such copy the exclusive mode of showing that the substitution had been made. The plaintiff had offered in evidence its records containing the original resolution adopted by its board of directors for the appointment of the substituted trustee, and a request for the transfer and assignment to it. This evidence sufficiently established the authority of Balfour and Forman to make the transfer and assignment.

When this resolution was offered in evidence, the defendant objected thereto upon the ground, among others, that it appeared to have been adopted at a special meeting of the board of directors, at which all of the directors were not present, and that it did not appear that notice had been given to all of the directors. The resolution was, however, spread at length upon the records of the corporation, and was authenticated by the signature of one purporting to be its secretary. In *Granger v. Mining Co.*, 59 Cal. 678, it was held that a similar objection was of no avail; that, in the absence of any evidence to the contrary, it will be presumed that proper notice was given; and that the burden of showing the contrary is cast upon him who would impeach the regularity of the meeting. See, also, *Barrell v. Land Co.* (Cal.) 54 Pac. 594.

At a subsequent stage of the trial the secretary testified, upon his cross-examination by the defendant, that he had given notice of this meeting to each of the directors by sending to them, by a boy from his office, written notices, at least 24 hours prior to the meeting. In the absence of any evidence to the contrary, the court was authorized to find that proper notice of the meeting was given.

The objection of the defendant to the regu-



larity of the stockholders' meeting at which the directors were elected was properly overruled. For the purposes of this action, it was immaterial whether this meeting was properly called or not, or whether the election was by the stockholders in person or by proxy, or whether the proxies were sufficient in form to entitle the holders to vote at the election. The records of the corporation show that five persons were elected at that meeting to serve as its directors, and, whether their election was regular or not, they assumed the trust, and became at least de facto directors. So long as they held this position unchallenged by any member of the corporation, their acts as directors were binding upon the corporation, and upon strangers dealing with it. *San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179.

2. The deed of trust required that, in case of a sale of the property, the trustee should publish notice of the time and the place thereof at least twice a week for three successive weeks in some newspaper published in San Francisco, and that the recitals in the deed executed upon such sale should be conclusive evidence of the facts so recited; and it was shown that notice of the time and place of sale was in fact published as required by the deed of trust. After the sale the trustee executed a deed to the plaintiff, which recited that such publication had been made "twice a week for three successive weeks" next before the day of sale, but, in specifying the days upon which the publications were made, one was omitted, so that it appeared therefrom that the notice had been published only once during one week of this period. After the discovery of this omission the trustee executed to the purchaser another conveyance of the property, in which the days of publication were correctly recited. When this deed was offered in evidence, the defendant objected thereto upon the ground that by the execution of the first deed the power of the trustee was exhausted, that the recitals therein were conclusive as to the days upon which the notice of sale was published, and that it was not competent for the trustee to impeach the effect of that deed by afterwards executing a conveyance in a different form. This objection was overruled, and an exception thereto taken. Without determining whether the prior deed was defective, it is sufficient to say that the purchaser at the sale acquired the right to have the trustee execute to him a deed which would transfer to him all the title to the land which the trustee had the power to convey under its sale; and, until the trustee had made such a conveyance, its power in the premises was not exhausted, and it could either be compelled to execute such a conveyance, or it could make it voluntarily when requested so to do. One of the trusts assumed by the trustee was to execute a deed of the premises sold, and this trust continued until it had executed a deed which would vest the purchaser with all the title with which

the trustee was vested, and which it purported to transfer by its sale.

3. The validity of the provisions of the trust deed was fully considered and sustained in *Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813. The power of alienation is not suspended when all the parties in interest, including the trustee and the beneficiary, can join in a conveyance and transfer a legal title. In the present case there was no suspension of the power of alienation, since Woodworth could at any time, by paying the indebtedness to the plaintiff, receive a reconveyance of the property, or, by uniting with the trustees and the beneficiary, execute a conveyance to a purchaser. *Toland v. Toland* (Cal.) 55 Pac. 681.

4. Prior to commencing the present action, the plaintiff had commenced a similar action against the same defendant, and in the answer herein this fact was alleged as a reason why the plaintiff should not recover. Before the trial of the present action, the plaintiff caused a judgment of dismissal to be entered in the former action. This removed the objection of the defendant. *Moore v. Hopkins*, 83 Cal. 271, 23 Pac. 318. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN DYKE, J.

(124 Cal. 126)

HEWITT et al. v. SAN JACINTO & P. V. IRR. DIST. et al. (L. A. 409.)<sup>1</sup>

(Supreme Court of California. April 3, 1899.)

IRRIGATION DISTRICTS — ACCUMULATED FLOW — USAGES — CONTRACTS — CONSTRUCTION — PAROL EVIDENCE — OWNERSHIP OF LAND — DAMAGES — PLEADING — HARMLESS ERROR.

1. A complaint against an irrigation district for failure to furnish water in an accumulated flow, which alleges that, in accordance with reasonable regulations, the district was accustomed to deliver the water in such manner, and that the purchaser had the right to so receive it, which averments are denied, raises the question of a usage to so deliver the water.

2. A contract to furnish a certain amount of water for irrigating purposes, the purchaser being required to give notice when he desires the use of the water, does not limit the latter's right to a constant flow, so as to exclude evidence of a general usage, conformed to by the parties, to furnish and receive the water in an accumulated flow.

3. Where it is a rule, among those engaged in supplying water for irrigation in a certain part of the state, to furnish the water in an accumulated flow, at stated periods, such method constitutes a general usage.

4. Where water for irrigation is worthless unless delivered in an accumulated flow, at stated periods, a general usage to so deliver it is reasonable and valid.

5. Where an irrigation district delivered water to purchasers in an accumulated flow, at stated periods, which was the general usage, knowledge of the district of such usage is sufficiently shown.

6. Possession by a wife of land, either severally or jointly with her husband, is *prima facie* proof of her ownership.

7. Where an irrigation district purchasing property of an irrigation company, except a

certain amount of water which the company was under contract to deliver to purchasers, the contracts not requiring delivery in any certain manner, which amount the district agreed to deliver, and, in consequence, retained a certain sum from the price it would have otherwise paid, it is bound to furnish the water in the way it was furnished by the company.

8. Where an irrigation district purchasing the property of an irrigating company agrees to deliver water to previous purchasers from the company, it is bound to deliver the water, though the lands lie outside the district.

9. Where an irrigation company contracts to furnish a certain amount of water, parol evidence that the purchaser, and others holding similar contracts, understood the same to confer the right of receiving the water in an accumulated flow, is inadmissible.

10. An irrigation district having agreed to furnish water to a purchaser, in an action by the latter for failure to do so the erroneous admission of parol evidence that such purchaser and others understood that their contracts conferred the right of receiving water in an accumulated flow is harmless, where a usage to that effect, conformed to by the district, was shown by uncontradicted competent evidence.

11. In an action against an irrigation district for failure to furnish water to a purchaser, there was evidence that in consequence some of the purchaser's fruit trees died, and that his crop of hay was diminished to a certain amount, the pecuniary loss being above a certain sum. The evidence for the district was mainly opinions as to the probable effect of deprivation of water on the land in question, one witness stating that it would cut off the hay crop to some extent, but not more than one-half. *Held*, that a finding that the purchaser sustained no substantial damage was unsupported.

Commissioners' decision. In bank. Appeal from superior court, Riverside county.

Action by Ruby Hewitt and husband against the San Jacinto & Pleasant Valley Irrigation District and another for mandamus to compel defendants to deliver water on plaintiff's land and for damages. Judgment was rendered allowing the writ and refusing damages, from which plaintiffs and the district appeal. Judgment allowing the writ affirmed, and denying the damages reversed.

Jas. F. Crowe, for Hewitt and others. Gibson & Titus and M. C. Hester, for San Jacinto & P. V. Irr. Dist.

BRITT, C. Ruby Hewitt and her husband, H. T. Hewitt, join as plaintiffs in this action to obtain a writ of mandate compelling the defendants to deliver on lands of the wife a flow of  $96\frac{3}{7}$  inches of water during the space of 48 hours, in successive periods of 30 days, when demanded by her, and also to recover damages for previous failure of defendants to supply the water in that manner on her request. The defendant San Jacinto Valley Water Company, a corporation (which for brevity we may designate as the "Water Company"), after filing an answer, took no further part in the case. The defendant San Jacinto & Pleasant Valley Irrigation District (hereinafter styled the "Irrigation District"), a corporation formed for the purpose of promoting irrigation, etc., under the act of March 7, 1887, has appealed from that part

of the judgment rendered by the court below allowing the writ as prayed by plaintiffs, and plaintiffs have appealed from that portion of the same denying their demand for damages. No question is raised as to the propriety of joinder of parties or of causes of action.

On September 25, 1890, the said Water Company made a contract in writing with said Ruby Hewitt, whereby it granted, bargained, and sold to her, her heirs, etc., forever, "the right to have conveyed and delivered, by means of and through" its canals, dams, and gates, "an amount of water equal to one irrigating inch of water to each seven acres" of certain described land. The area of such land was 20 acres, so that the water bargained and sold amounted to  $2\frac{6}{7}$  inches. It was provided in said instrument that the purchaser should notify the Water Company "when she requires the use of the water on said lands," the notice to be in such form as the Water Company might prescribe from time to time. On August 28, 1891, said Water Company, by a contract in form the same as that of September 25, 1890, granted and sold to said Ruby Hewitt the right to a further "amount of water equal to"  $3\frac{4}{7}$  inches, to be delivered to and upon certain other lands. On August 2, 1892, the Water Company executed a deed conveying to said Irrigation District various described lands, water, water rights, conduits, rights of way, etc. In this instrument there was an exception of 15 inches of water previously sold and conveyed by the Water Company to divers persons, which exception included the water sold to Mrs. Hewitt as aforesaid; and the deed provided that such 15 inches of water "shall be delivered by said Irrigation District" to said previous purchasers from the Water Company. Prior to said transfer of August 2, 1892, by the Water Company to the Irrigation District, the former had been accustomed to deliver the water sold to Mrs. Hewitt, as above stated, in an accumulated flow of  $96\frac{3}{7}$  inches during 48 hours, in successive periods of 30 days, which is the equivalent in quantity of  $6\frac{3}{7}$  inches flowing constantly; and after the date of such transfer the Irrigation District continued to deliver the water to Mrs. Hewitt in like manner, until April 28, 1894, inclusive. The next month it refused to accumulate the same, and claimed the right to deliver it in a constant flow of  $6\frac{3}{7}$  inches. Hence this action.

Plaintiffs alleged in their complaint most of the matters above stated, and also averred, among other things, that plaintiffs have been accustomed to allow the water to accumulate in defendants' dams, etc., for 30 days; that the rules and regulations of each defendant corporation permit such accumulation; that the same is reasonable; that said Ruby Hewitt is entitled to receive the water so accumulated, and that until the month of May, 1894, defendants delivered it in that manner. The court found that at the various times aforesaid it was, and yet is, the universal usage to



allow water to accumulate until demanded by the consumer or it becomes deliverable under the rules of the company supplying the same, and that it was the usage in the locality where defendants carry on their business of distributing water to deliver the same in a flow for 48 hours, equal to the accumulation of a constant flow for 30 days, and that said Irrigation District accepted said conveyance of August 2, 1892, with full knowledge of such usages.

1. On appeal, the Irrigation District contends that the said findings are outside the issues; that no allegation of the complaint is sufficient to raise a question of usage. We understand the case differently. The complaint does allege, in substance and effect, that, in accordance with reasonable regulations governing both defendants, they were accustomed to deliver the water accumulated in the manner specified, and that Mrs. Hewitt has the right to receive it so accumulated, which averments the Irrigation District denied. Usage may regulate conduct quite as well as formally promulgated rules, and the issue concerning the "regulations" of defendants was broad enough to include usages to which they respectively conformed their mode of business. Compare *Colman v. Clements*, 23 Cal. 245; *Jacob v. Day*, 111 Cal. 571, 44 Pac. 243. We agree that the complaint might have been more certain in some particulars, but there was no demurrer for uncertainty.

2. It is urged—and this seems to be the principal insistence of the Irrigation District—that said contracts between the Water Company and Mrs. Hewitt by their terms limit her right to a constant flow of the water, exclusive of any right to accumulate the same, and that averment or proof to the contrary cannot be considered. The instruments do not mention a constant flow. They grant an "amount of water equal to one irrigating inch," etc., and require the purchaser to notify the company when she desires the use of the water, the manner of notice to be subject to change by the company from time to time. The reasonable inference from these provisions is that a constant flow was not contemplated. Why require notice from the purchaser when she wants the water if she was to receive it all the time? We see nothing in the instruments to render them "proof and bulwark" against interpretation, in the light of usage and the practice of the parties. *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916; *McCarthy v. Water Co.*, 111 Cal. 328, 43 Pac. 956; *Robinson v. U. S.*, 13 Wall. 363. The District relies on *Water Co. v. Richardson*, 95 Cal. 490, 30 Pac. 577. That case involved the construction of a judgment determining that certain parties were the owners of a quantity of water "equal to a constant flow of 2½ inches," etc., and it was held that no right of accumulation arose thereon. Nothing appeared in the judgment indicative of a purpose that the use of the water should be

intermittent, as in the contracts here, nor had the court before it any question of usage or custom of the parties as a means of interpreting the judgment. The doctrine of the case has no rightful influence in the present controversy.

3. The findings relative to usage are attacked for alleged defect of evidence to support them. There was evidence that water provided for in the said contracts of the Water Company with Mrs. Hewitt, and in similar contracts held by other persons, is worthless for purposes of irrigation if it cannot be accumulated; also that it is the general rule among those engaged in supplying water for irrigation in that (the southern) part of the state to allow accumulation of the water for 30 days; that it was the custom of the Water Company, and after it the Irrigation District, until the refusal alleged in the complaint, to deliver the water in question so accumulated; and that other purchasers of the water which was the subject of the exception in the deed of the Water Company to the Irrigation District received their supply accumulated in like manner. There was no substantial conflict in this evidence. In our opinion, it sustained the finding, and characterized the usage as one known, certain, uniform, reasonable, and not contrary to law. The further objection, that neither of the defendants was proved to be cognizant of the usage, fails also. The usage being general, they are presumed to have known it; and that they delivered water for a series of years, in manner conforming to the usage, is a matter tending to show that they had such knowledge actually.

It is claimed that there was no evidence that Ruby Hewitt owns the lands described in her contracts with the Water Company. It is not clear that such proof was essential. If, however, it was, then the fact appears sufficiently from evidence in the record that she had possession of the land, either severally or jointly with her husband, which is *prima facie* proof of ownership. *Kelly v. Mack*, 49 Cal. 523.

A further contention is that the Irrigation District never undertook to deliver the water accumulated at intervals. There was evidence tending to show that because of the assumption by the District of the duty to deliver the 15 inches of water excepted in the deed of August 2, 1892, it retained the sum of \$12,000 from the price it would otherwise have paid the Water Company as the consideration of said deed. Looking to all the evidence, we perceive no valid reason why the manner of delivery assumed by the District should be understood as anything different from that proved to have been practiced by the Water Company. It is suggested, rather than urged, that the District has no power to deliver water on lands outside its own territorial confines, which is the situation of Mrs. Hewitt's land. It purchased the property of the Water Company subject to this burden, and on no just principle can hold the property discharged thereof.

A municipal corporation may, for proper corporate purposes, both hold property and perform contracts beyond the municipal boundaries. *City of Pasadena v. Stimson*, 91 Cal. 238, 259, 27 Pac. 604; *Lester v. City of Jackson*, 69 Miss. 887, 11 South. 114.

4. Over the objection of the Irrigation District, plaintiffs were allowed to introduce parol evidence that Mrs. Hewitt, and other persons holding contracts with the Water Company similar to hers, understood the same to confer the right of receiving the water in accumulated flow, and that this was the reasonable construction of said contracts. Plainly, the evidence was improper, but it is equally plain that the case of the District was not prejudiced thereby. Opinions of witnesses as to the meaning of said instruments could neither add to, nor take from, the construction which the court rightly placed on the same, in view of the uncontradicted competent evidence in the case.

5. There was evidence for plaintiffs that, as a consequence of withholding the water by the District for about 60 days, some of the fruit trees on Mrs. Hewitt's land died, and part of the land set with alfalfa had to be reseeded; that the yield of alfalfa hay was diminished some 50 tons, worth \$6 per ton; and that the pecuniary loss was above \$300. The evidence on this point produced by the District consisted mainly of opinions to the probable effect of deprivation of water on the land in question. The witness whose testimony was most favorable to the District said the effect on the alfalfa crop would be to "cut it off some; \* \* \* it surely would not cut off more than one-half." It must be said that the evidence showed, without conflict, that some substantial damage resulted from failure to deliver the water, and the finding of the court to the contrary is without support. An irrigation district may be sued. *Boehmer v. Irrigation Dist.*, 117 Cal. 20, 48 Pac. 911. And it was observed in that case that "the legislature did not intend that such actions should be profitless to the parties." Damage being proved to result from the default of the District, the appropriate judgment should have followed. Upon defendant's appeal the judgment, so far as it is in favor of plaintiffs, should be affirmed, and upon plaintiffs' appeal that part of the same directing that they recover no damages should be reversed, with directions to the court below to try the issue as to damages anew.

The question whether or not the contract of the Irrigation District is ultra vires is not presented upon this appeal. No such question, therefore, has been decided.

I concur: CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment, so far as it is in favor of plaintiffs, is affirmed, and that part of the same directing that they re-

cover no damages is reversed, with directions to the court below to try the issue as to damages anew.

6 Cal. Unrep. 277

JONES v. MCGARVEY et al. (S. F. 1,466.)  
(Supreme Court of California. April 5, 1899.)

APPEAL—NOTICE—ATTORNEY.

Under Code Civ. Proc. § 940, requiring notice of appeal to be served on the adverse party or his attorney, and section 1015, requiring the service of papers on the attorney, instead of the party, where he appears by attorney, notice of appeal must be served on appellee's attorney, if he have one.

Department 2. Appeal from superior court, Mendocino county.

Action by one Jones against McGarvey and others. There was a judgment for defendants, and plaintiff appeals. Dismissed.

David Jones, for appellant. Chas. E. Wilson and J. A. Cooper, for respondents.

PER CURIAM. Plaintiff served his notice of appeal upon one of several co-defendants, all of whom had appeared by an attorney. Construing section 940 and 1015, Code Civ. Proc., together, they require service of notice of appeal to be made upon the attorney of a party who has appeared by attorney. In such case service upon the party personally is not authorized. Appeal dismissed.

124 Cal. 154

MORSE v. HINCKLEY. (S. F. 1,479.)  
(Supreme Court of California. March 29, 1899.)

GUARDIANS—CONTRACTS—VALIDITY—LIABILITY OF ESTATE—PLEADING.

1. Even if there can be a recovery in equity for services rendered in good faith for the benefit of an estate, in reliance on the estate for compensation, under a contract with a guardian unauthorized by court, the complaint must show that the services were accepted by, or were of benefit to, the estate.

2. Under Civ. Code, § 249, providing that a guardian must safely keep the property of his ward, and not make sale thereof without an order of court, but must, so far as in his power, maintain the same out of the income or other property of the ward, and deliver the property in as good condition as when received, a contract made by a guardian, without order of court, for legal services in establishing the right of the ward to an estate, payment to be made out of the proceeds of such estate, if obtained, is invalid.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Henry N. Morse, as administrator of the estate of George P. Goff, deceased, against Florence Blythe Hinckley, to recover for legal services under a contract with the guardian of defendant. From a judgment for defendant, plaintiff appeals. Affirmed.

Noble Hamilton and R. M. F. Soto, for appellant. W. H. H. Hart and Aylett R. Cotton, for respondent.



VAN DYKE, J. The action was commenced by George P. Goff, deceased, December 5, 1896. It is alleged in his complaint that in October, 1885, said defendant, her name then being Florence Blythe, by her guardian, James Crisp Perry, filed her petition in the matter of the estate of Thomas H. Blythe, deceased, in the superior court of the city and county of San Francisco, under section 1664 of the Code of Civil Procedure, wherein she claimed and asserted that she was the daughter and sole heir of Thomas H. Blythe, deceased, and prayed to be so adjudged. That on the 22d day of October, 1890, said superior court, in the matter of the said estate, did adjudge that she was the daughter and sole heir of said Blythe, and entitled to distribution of all of his estate; and that the judgment was affirmed by the supreme court. That, among the issues which arose on said petition, and the answers thereto, was the issue whether or not, under the laws of this state, she had been legitimated as the child of said Thomas H. Blythe, deceased. That in the year 1889, while such issue was pending and undetermined, said guardian of the person and estate of said Florence entered into a contract with said Goff, an attorney and counselor at law, whereby it was agreed that said Goff should and would prepare and furnish to one W. H. H. Hart, the leading counsel in said matter of said claimant, a brief on her part, on the question whether or not she had been legitimated under the laws of this state; and that, in consideration thereof, as soon as and when it should be finally determined that she had been legitimated by said decedent, and she should come into the possession of his estate, said Goff would be paid out of such estate a reasonable compensation for preparing and furnishing such brief. That said Goff entered upon the discharge of his obligations under said contract, and did prepare, and afterwards, and before the 21st day of May, 1891 (the date of the death of said Perry), did furnish to said Hart a brief on behalf of said claimant on that question. That the reasonable value of said services of said Goff, performed under said contract, in preparing and furnishing said brief, is the sum of \$20,000. That the defendant, within two years preceding the commencement of this action, came into the possession of the whole of the estate of said decedent, Thomas H. Blythe, as his only child and sole heir at law, under and by virtue of a decree of final distribution made in the matter of said estate. The court is asked to decree that the sum claimed is due for the services rendered; and that it be declared a lien upon the real property which so came into possession of said defendant, and which is described in the complaint; and that said real property be sold, and the proceeds applied to the payment of the sum adjudged to be due, together with costs. Subsequent to the bringing of the action, said Goff died, and the present plaintiff was appointed administrator in the matter of his estate, and on February 5, 1897, as such

administrator, was substituted as plaintiff. Thereafter an amendment was added to the complaint, to the effect that, at the time of the making and entering into the contract between said Goff and said Perry, guardian of the estate of defendant, it was understood and agreed between them that said Perry should not individually become personally liable, and that the brief mentioned in the original complaint was furnished by said Goff to said Hart in the month of July, 1890, and that said defendant had no other property other than the property inherited from the estate of said Thomas H. Blythe. To this complaint, as amended, a demurrer was interposed, specifying, as the grounds thereof, that said complaint, as amended, did not state facts sufficient to constitute a cause of action; that it did not appear therefrom that any order of court was ever obtained or made authorizing Perry, as guardian of said defendant, or otherwise, to enter into the contract alleged and set forth in the complaint so amended; and that the action is barred by the provisions of sections 337, 339, and 343 of the Code of Civil Procedure. The court below sustained the demurrer, without leave to amend, and judgment was entered thereon accordingly, in favor of the defendant. This appeal is from the judgment so entered.

It is admitted by the appellant that no personal liability could have been enforced against the guardian had he lived under the contract set out in the complaint, and also that no personal liability can or could be enforced against the defendant under said contract made by her guardian; but it is claimed that, where moneys have been advanced or services have been rendered in good faith for the benefit of the estate, relying solely on the estate for reimbursement or compensation, the claim for such advances or services may be enforced out of the estate by a suit in equity. Counsel in his brief says: "If it be contended that the case is novel, or that there are no precedents in this case for this suit, that argument furnishes a strong reason why in this case a precedent should be established, that justice may be done, so that the defendant shall not retain the vast estate which she has gained, without compensating those who have assisted her in securing the victory for their labors in that behalf." If, however, a precedent should be established in this case, as suggested, there is nothing in the complaint, as amended, to bring this case within the rule suggested by appellant's counsel. It nowhere appears therefrom that the brief was ever accepted by the leading counsel, or used in the settlement of the Blythe estate, or that it aided the defendant in the least in obtaining the judgment of the court establishing her heirship, and by which judgment she succeeded to the possession of the property of the Blythe estate. Besides, in this state the guardian has no power, without the order of court, to sell or encumber the property of his ward. "A guardian of the property must

keep safely the property of his ward. He must not permit any unnecessary waste or destruction of the real property, nor make any sale of such property without the order of the superior court, but must, so far as it is in his power, maintain the same, with its buildings and appurtenances, out of the income or other property of the estate, and deliver it to the ward at the close of his guardianship in as good a condition as he received it." Civ. Code, § 249. To incumber the property with liens, which may be foreclosed or enforced, and the property sold, without an order of court, would not be complying with the provisions of the Code. In *Guy v. Du Uprey*, 16 Cal. 195, it was sought to hold the ward's property liable for improvements put thereon, under a contract made with the guardian. The court say: "This contract the guardian had no authority to make, and we do not see upon what principle it can be used to support an equitable claim against the property. The person who made the improvements, and to whose rights the plaintiff succeeded, was fully informed of the title and condition of the property, and his position was not analogous, in any respect, to that of a purchaser or bona fide possessor. He acted upon the faith of a contract which had no validity, and, however meritorious his claim may be in a moral point of view, it does not come within any principle upon which equity administers relief in such cases." *De La Montagnie v. Insurance Co.*, 42 Cal. 290, was a case where the guardian of a minor assumed to sell and transfer stock belonging to her ward, without an order of the probate court; and the question was whether such sale transferred the title of the stock to a party who bought in good faith, and without knowledge of the fact that it belonged to a minor; and it was held that the sale was void, referring to *Kendall v. Miller*, 9 Cal. 591, and *Schmidt v. Wieland*, 35 Cal. 343,—the court adding: "We think, too, irrespective of adjudged cases, that the plain intent of the statute is to make void every alienation of the property of the ward, if made by the guardian without the order of the court, and that the rule in itself is one of wholesome application to such sales, whether of the personal or real estate of the ward." *Hunt v. Maldonado*, 89 Cal. 636, 27 Pac. 56, was an action to recover an attorney's fee for services rendered to the guardian of a minor in pursuance of a written contract. The action was against the minor, the same as in this case. The court say: "If the guardian made a valid contract with the attorney, he may be held liable; and if he pays it, and the probate court shall deem the expenditure reasonable and necessary to protect the estate of the ward, it may be allowed from the ward's estate; but it is an expense incurred by the guardian, in the performance of his duties, for which he is primarily liable." *Fish v. McCarthy*, 96 Cal. 484, 31 Pac. 529, was an attempt to enforce a mechanic's lien upon property of a minor, in a suit

against both guardian and minor. The complaint showed that the defendant, Mary McCarthy, in her character of guardian of the estates of Mary, Joseph, and Patrick Powers, minors, employed the plaintiff to repair a certain building, the property of her wards. The plaintiff repaired the building, furnished all the materials necessary for that purpose, and regularly filed and recorded his claim and notice of lien. "Assuming," the court say, "that the allegation in question is equivalent to an averment that the defendant McCarthy, as guardian of the minor defendants, and on their behalf, made the contract in question, it seems clear that the defendant, as such guardian, could not subject the estate and property of her wards to a lien such as here sought to be enforced, without first obtaining an order of court authorizing her to do so,"—citing with approval, *Guy v. Du Uprey* and *Hunt v. Maldonado*, supra. "As the mechanic's lien arises from work done and materials furnished under an obligatory contract, if the contract be not binding the lien necessarily fails." If a guardian cannot enter into a valid contract, without first obtaining an order of the probate court, for repairs and improvements of buildings on property belonging to the ward, surely a guardian without such authority cannot enter into a contract for the employment of legal services, so as to bind the ward, or in any way affect his property. The powers of guardians over the estate of the ward, the same as of executors and administrators, cannot be exercised except according to the provisions of law and under the orders of the court which has jurisdiction of the estate. The contract, as alleged in the complaint, which assumed to incumber the property of the ward, without an order of the probate court, is invalid. This renders it unnecessary to consider the question of the statute of limitations. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

124 Cal. 106

DUNCAN et al. v. CURRY et ux. (Sac. 511.)  
(Supreme Court of California. March 24,  
1899.)

#### HOMESTEAD—MORTGAGES—RECORDATION.

Civ. Code, § 1241, subd. 3, provides that a homestead is exempt from forced sale, except a sale "on debts secured by mortgages on the premises, executed \* \* \* by the husband and wife." Subdivision 4 provides that the homestead shall be so exempt from sale, except "on debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." *Hebl*, that a mortgage executed by both spouses need not be recorded, to be paramount to the homestead right.

Department 2. Appeal from superior court, Yolo county.

Action by W. G. Duncan and others against F. M. Curry and wife. From a judgment for plaintiffs, defendants appeal. Affirmed.



R. Clark and Hudson Grant, for appellants.  
F. E. Baker, for respondents.

McFARLAND, J. This is an action to foreclose a mortgage executed by the defendants, F. M. Curry and his wife, A. V. Curry. Judgment was rendered in the court below foreclosing the mortgage as against both defendants; and the defendants appeal from the judgment, and particularly from that part of it which decrees that the lien of the mortgage is paramount to a certain homestead right set up in the answer.

On the 24th day of November, 1894, the appellants, husband and wife, executed the mortgage in question, which, however, was never recorded. On December 14, 1895, the appellant A. V. Curry, the wife, duly executed a declaration of homestead upon the mortgaged premises, which was on said day duly recorded; and it was contended by appellants that this declaration of homestead defeats the mortgage lien. It is true that the homestead is exempt from forced sale, except in the instances enumerated in the four subdivisions of section 1241 of the Civil Code. But subdivision 3 of that section is as follows: "On debts secured by mortgages on the premises, executed and acknowledged by the husband and wife, or by an unmarried claimant;" and, of course, the case at bar is clearly within the terms of that subdivision. It is contended by appellants that the case is governed by subdivision 4 of this section, which is as follows: "On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record." It is quite evident, however, that subdivision 4 relates to mortgages not embraced in subdivision 3. There is clearly room for such a construction of the two subdivisions as will allow both to stand. Subdivision 3 relates to mortgages executed by both husband and wife, and its provisions as to that class of mortgages are positive and beyond doubt. Subdivision 4 applies to mortgages—and, of course, there are many such—which are not executed by both husband and wife. The two subdivisions, considered together, clearly mean that a mortgage not recorded before the declaration of homestead is filed cannot be enforced as against the homestead, unless it had been executed by both husband and wife. The cases of *Bank v. Gerry*, 91 Cal. 98, 27 Pac. 531, *Bank v. Bruce*, 94 Cal. 77, 29 Pac. 488, and *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549, 955, cited by appellants, are not in point. In all of these cases a mortgage had been executed by the husband alone, and the wife had not executed any instrument or performed any act which had in any way compromised her homestead right. In neither of them, nor in any case decided by this court to which we have been referred, is there any reference to, or discussion of, subdivision 3. In *Downing v. Le Du*, 82 Cal. 471, 23 Pac. 202, the action and the facts were substantially like those in the case at bar. There, as here, the mortgage was

executed by both husband and wife, and the wife claimed that her homestead was paramount to the mortgage, because the latter had not been recorded. Judgment in the court below was for plaintiff and against both defendants, and the judgment was here affirmed, although the justice who wrote the opinion in that case made no allusion to subdivision 3. But the reasons there given for affirming the judgment were undoubtedly those which moved the legislature when enacting subdivisions 3 and 4 of said section 1241.

For these reasons, we think that the court below properly decided the case. The judgment appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

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124 Cal. 292

In re ENGLE'S ESTATE. (L. A. 473.)

(Supreme Court of California. April 14, 1899.)

WILLS—PERSONS INTERESTED—PROBATE—PUBLIC ADMINISTRATOR.

1. One to whom is assigned a share in a devise is a "person interested in the will," within Code Civ. Proc. § 1323, providing for probate of foreign wills when presented by the executor or a person interested in the will.

2. Under Code Civ. Proc. §§ 1323, 1324, authorizing administration of a foreign will when produced by the executor or other person interested in the will, letters must, in the absence of a petition by the executor, be granted to a "person interested" applying therefor, to the exclusion of the public administrator.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Petitions for the probate of the will of William Engle, deceased, by C. S. Engle, and by Frank M. Kelsey, public administrator. There were orders granting administration to the former, and denying the petition of the latter, and he appeals. Affirmed.

Flint & Barker, for appellant. Graves, O'Melveny & Shankland, for respondent.

GRAY, C. William Engle died in the county of Riverside, state of California. At the



time of his death he was a resident of the territory of Arizona, and had \$729.96 deposited in a Los Angeles savings bank, and also held a note for \$8,500 secured by a mortgage on real property situated in the city and county of Los Angeles. The deceased left a will, in which he made C. S. Engle, a resident of Chicago, Ill., his sole devisee, and appointed him sole executor of the will. This will was duly admitted to probate in the territory of Arizona. C. S. Engle granted a one-tenth interest in the property of the estate situated in Los Angeles to the respondent Griffith, who is a resident of Los Angeles; and thereafter the respondent presented to the superior court and filed therein a copy of said will, and the probate thereof, duly authenticated, together with a written assignment of C. S. Engle to respondent of the one-tenth interest aforesaid, claimed to be interested in said will, and petitioned the said court to admit the will to probate, and issue to him letters of administration with the will annexed. Subsequently the public administrator of Los Angeles county, Frank M. Kelsey, also filed a petition for the probate of said will and for the issuance of letters of administration to him. Both the petitions were heard together, the court admitted the will to probate, found that said Griffith was interested in said will, ordered that letters with the will annexed be granted to him, and denied the petition of Kelsey; and Kelsey, the public administrator, appeals from these orders.

The assignment to the respondent by the devisee of an undivided one-tenth interest in the Los Angeles property of decedent vested in him all the interest in the will that the devisee had by virtue of being the owner of that one-tenth interest. If, then, the devisee was interested in the will, within the meaning of section 1323 of the Code of Civil Procedure, so as to entitle him to letters of administration as against the public administrator, it follows that his assignee, who is the respondent in this case, is likewise entitled to letters in preference to the public administrator. The right of the devisee, as against the public administrator, in a case of exactly the same character as this, was determined in *Re Bergin's Estate*, 100 Cal. 376, 34 Pac. 867. This court held in that case that on the probate of a foreign will in this state, in the absence of a petition by the executor named in the will, letters of administration must be granted to a person interested in the will who applies for them. The rule and reasoning of *In re Bergin's Estate*, supra, clearly supports the decision of the trial court in this matter, and, on the authority of that case, we advise that the orders appealed from be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion the orders appealed from are affirmed.

124 Cal. 204

MARTIN et al. v. WAGNER et al. (Sac. 294.)  
(Supreme Court of California. April 6, 1899.)

APPEAL AND ERROR—REVERSAL—RECALLING REMITTITUR—JURISDICTION—DEATH OF RESPONDENT—SUBSTITUTION.

1. After a judgment of reversal and the issuance of a remittitur, the supreme court has no jurisdiction to recall the remittitur for mere error, if no fraud is shown invalidating the judgment.

2. After the death of a respondent pending an appeal, his attorneys filed a brief, and stipulated for a hearing, but made no suggestion of his death until after reversal, when, acting for the representatives of the deceased respondent, they moved for a substitution, but did not show cause for not making an earlier application. *Held*, that the representatives were not entitled to have the remittitur recalled in order that they might be substituted in the proceedings in the supreme court.

In bank. Heard on motion to recall the remittitur and substitute the executrices of defendant Wagner, deceased. Motion denied.

For former opinion, see 53 Pac. 167.

HENSHAW, J. The appeal in the above-entitled cause was pending in this court upon the 24th day of October, 1896. Upon that day defendant and respondent Wagner died. After his death a brief was filed by James A. Louttit on behalf of the appellants, and by Elliott & Elliott on behalf of respondents. Subsequently these attorneys entered into a stipulation submitting the cause for decision, and upon April 19, 1898, this court rendered its decision and judgment reversing the judgment of the trial court. No petition for a rehearing was presented, and the remittitur issued in due time. No suggestion of the death of Wagner, nor request for a substitution of his representatives, was made until December 5, 1898, when Elliott & Elliott, who had been Wagner's attorneys in the litigation, and who now appear as the attorneys for his executrices, moved the court to recall the remittitur and to substitute the executrices in place of Wagner, deceased. No attempt is made to excuse the delay, nor is any explanation offered why the suggestion of the death of Wagner was so long delayed. Were the judgment so rendered by this court void, it would be its plain duty to recall the remittitur and restore the appeal to the calendar; and this not upon the ground that the court could resume jurisdiction which it had lost, but because it had never lost jurisdiction at all. Such is the well-established rule in those courts which treat a judgment so pronounced against a dead man as a mere nullity. In this state, however, it has been decided that when jurisdiction of the subject-matter and of the party, in his lifetime, has been acquired, the rendition of a judgment after his death, without substitution of parties, is not void, but at the most erroneous. *Phelan v. Tyler*, 64 Cal. 80, 28 Pac. 114; *Wallace v. Center*, 67 Cal. 133, 7 Pac. 441. Where fraud or imposition has been practiced upon this court in procuring its judgment, the remit-

tutur will be recalled, and jurisdiction here will be asserted upon the ground that the judgment so procured is a nullity. But in this case no charge of fraud is made. In its legal aspect, it stands in no different position from that of any other case in which an erroneous decision may chance to have been made by this court. Under the constitution, by the lapse of time and the issuance of the remittitur the judgment has become a finality, beyond the power of this court to modify or amend. But, aside from the question of the power of the court under these circumstances to recall the remittitur, the facts presented in this case do not invite the exercise of such power. No reason is shown why the death of Wagner was not suggested earlier. Elliott & Elliott, who had represented him in his lifetime, continued to act in the case. The respondents thus were represented by the very attorneys who had been under the employ of Wagner. They filed a brief on his behalf. They stipulated to a submission of the cause. Not till long after the issuance of the remittitur did they suggest his death, and in the suggestion offer no showing as to why it was not more timely made. The same attorneys appear for the representatives of Wagner. It is not asserted that the decision of the court is erroneous in point of law, in any other respect than in the manner of its rendition. No injury is shown to have resulted from the decision, and no possible advantage is to be gained to the executrices of Wagner by granting this motion, other than that of unduly delaying and prolonging this litigation. By the judgment of this court the cause was remanded for a new trial. Upon the new trial in the superior court the proper substitution can be made, and the litigation determined upon its merits. The application to recall the remittitur and substitute his personal representatives in the place of Wagner, deceased, is therefore denied.

We concur: BEATTY, C. J.; TEMPLE, J.; HARRISON, J.; GAROUTTE, J.

124 Cal. 206

PEOPLE v. EVANS. (Cr. 454.)

(Supreme Court of California. April 6, 1899.)

HOMICIDE—MALICE—COMPETENCY OF JUROR—INSTRUCTIONS—NEW TRIAL—APPEAL.

1. A conviction will not be reversed for error in instructing that malice is not necessary to constitute murder of a homicide committed under certain circumstances, if in other instructions the jury are told that the presence or absence of malice is the distinguishing feature between murder and other degrees of homicide.

2. An appeal lies from an order denying a challenge to a juror for bias, if the question of the juror's competency is one of law, and not of fact.

3. The trial judge stated the general qualifications required of jurors, and instructed them to answer as to such qualifications in response to questions by counsel. Held that, since the examination by the court was not sufficient to relieve counsel from making an examination of jurors, a new trial will not be granted be-

cause one of the jurors was not a citizen, as an examination would have disclosed the juror's disqualification at the trial.

Temple, J., dissenting.

In bank. Appeal from superior court, Nevada county.

Thomas Evans was convicted of murder, and appeals. Affirmed.

J. M. Walling, for appellant. W. F. Fitzgerald, Atty. Gen., for the People.

GAROUTTE, J. The defendant has been convicted of the crime of murder, and sentenced to imprisonment for life. He now appeals to this court.

The following instruction given to the jury is assailed as containing an unsound declaration of law: "If the jury believe from the evidence that the defendant, with malice aforethought, or without considerable provocation, inflicted a wound upon Robert Holland, and that Robert Holland died from the wound so inflicted by the defendant, and that there was no justification for the infliction of said wound, the defendant must take the whole consequence of his wrongful act, and the jury find him guilty of murder." We have been referred to no instruction in the reports of this state couched in language at all similar to the foregoing, and we apprehend there is none. It has been suggested by this court upon many occasions in the past that it is always dangerous to attempt the statement of well-established principles of law in new and different ways. Approved instructions bearing upon the question of malice in cases of murder may be found in the reports of this state by the score. It would have been much better to have followed the lines there marked out. It is always the safer, and therefore the better, course for trial judges to follow the broad and well-traveled road laid out by the decisions of this court, rather than to take the chances of traveling upon crooked and unknown paths. These suggestions have been made many times, yet thus far they appear to have fallen upon stony places; for they have brought forth no fruit.

The foregoing instruction has called for careful consideration. It has given the court much thought. Upon first inspection it would seem that the giving of it demanded a new trial of the case, but it has been finally concluded to the contrary. The court has arrived at this conclusion in view of the many other instructions bearing upon the question of malice which are found in the charge, and which are legally sound. Malice aforethought, as a necessary element of murder, is clearly declared. The jury are told that there is no such thing as murder, unless malice aforethought is present in the mind of the defendant at the time of the killing. The jury are instructed: "Murder is the unlawful killing of a human being, with malice aforethought. If you find that the defendant killed the deceased, then you must determine if the killing was with malice aforethought; for this is the grand



criterion that distinguishes murder from other killing; and this malice aforethought is not merely a spite or malevolence to the deceased in particular, but is an evil design in general." It is then declared that malice is express "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or where the circumstances attending the killing show an abandoned and malignant heart." In another portion of the charge the jury are told: "The presence or absence of malice is the distinguishing feature between murder and manslaughter. If malice enters into the unlawful act by which death is caused, it is murder; but, if malice be wanting, it is but manslaughter." In view of these instructions, which appear to cover every phase of the law as to malice in cases of murder, it is apparent that the jury could not have been misled by the instruction of which complaint is made.

The statute says that malice is implied when no considerable provocation appears, or where the circumstances of the killing show an abandoned and malignant heart. If the killing be unlawful, and the circumstances of the act show an abandoned and malignant heart, then there is no room for manslaughter in such a case. It is murder. Or, if the killing be unlawful, and the act of killing be done without considerable provocation, there is no room for manslaughter in such a case; for the circumstances, ex necessitate, show a case of implied malice, and, therefore, a case of murder. *People v. Bruggy*, 93 Cal. 476, 29 Pac. 26. This seems to be the line followed by the trial judge in giving the instruction. The language used is somewhat unfortunate in this: that it is susceptible of the construction that, first, defendant may be guilty if malice aforethought is established; or, second, he may be guilty under certain circumstances, even though there be no malice aforethought. Of course, in every case of murder there must be present the element of malice. The judge recognized that fact, and stated the law to the jury to that effect more than once; and, if this instruction declared the law otherwise, it would be clearly and prejudicially erroneous. But, as already suggested, in view of the other instructions covering the law upon the question, wherein it is declared that malice aforethought is the grand criterion that distinguishes murder from other killing, and wherein it is further said that the "presence or absence of malice is the distinguishing feature between murder and manslaughter," it is evident the jury could not have been misled. In view of the direct and explicit instructions declaring that malice was a necessary element in every crime of murder, the court is bound to assume the jury so understood the law, in the absence of some other instruction declaring to the contrary. An instruction which may to some extent, only, inferentially point in that direction will not be held to be sufficient. Taking these instructions bearing up-

on malice altogether, the jury must have understood that malice was a necessary element in the crime of murder.

The second proposition discussed by appellant's counsel arises in the challenge of two jurors upon the ground of actual bias, appellant having exhausted all his peremptory challenges. It is suggested by the brief of the attorney general that the statute allows no exception to a ruling of the court in denying a challenge to a juror upon this ground. This position has no force. It comes too late. The law in this state at the present time is to the contrary. *People v. Wells*, 100 Cal. 231, 34 Pac. 718; *Same v. Collins*, 105 Cal. 511, 39 Pac. 16; *Same v. Fredericks*, 106 Cal. 559, 39 Pac. 944; *Same v. Owens* (Cal.) 56 Pac. 251. Yet, notwithstanding such is the law, it is said in the *Wells* Case, and again in the *Fredericks* Case, that it is only in cases where the question comes before this court as matter of law that its appellate jurisdiction may be invoked; and, where the question presented is one of fact, the trial court is the final arbiter. We are clear that the question as presented by this record is not one of law, but of fact. In speaking to a similar question in the *Fredericks* Case, the court said: "But the evidence of these various jurors, taken upon their voir dire, is not at all conclusive that they were disqualified from acting in the case. When the matter was submitted to the court for a decision upon the evidence taken, it can at least be said the question was an open one as to their disqualification. The evidence of each juror was contradictory in itself. It was subject to more than one construction. A finding by the court either way upon the challenge would have support in the evidence; and, under such circumstances, the trial court is the final arbiter of the question." The foregoing language of this court is entirely apropos to the case before us.

It appears by affidavits upon motion for a new trial that one Dahl, a juror who sat in the case, was not a citizen of the United States; and this fact is relied upon for a new trial. After verdict is rendered, it is too late to raise for the first time the question now presented. *People v. Chung Lit*, 17 Cal. 320; *Same v. Mortier*, 58 Cal. 267. Counsel admit the soundness of this doctrine as a general proposition, but insist that the present case is an exception to the rule. The general doctrine is based upon the proposition that the objection comes too late, inasmuch as counsel should examine the juror as to his general qualifications in the first instance. Here it is now claimed that the trial judge examined the jurors as to their general qualifications, and, therefore, counsel were not called upon to do it. The record does not bear out counsel's claims in this regard. The judge did not examine the jurors as to their general qualifications. He simply stated to them the general qualifications demanded of them by the law, and announced that they should answer as to those qualifications when interrogated by

counsel. It now appears that counsel failed to embrace the opportunity presented to him for their interrogation. Conceding exceptions may be found to the general principle of law here involved, it may be readily seen that this case does not come within such exceptions.

For the foregoing reasons the judgment and order are affirmed.

We concur: McFARLAND, J.; HARRISON, J.; HENSHAW, J.

TEMPLE, J. I dissent. The jury are specifically instructed that if the defendant inflicted a mortal wound with malice and without considerable provocation, and there was no justification, they must find him guilty of murder. This error is not cured by any number of other instructions defining murder. It is error to give contradictory instructions. The jury cannot determine between them, nor in this case can we tell which they accepted. Besides, it was telling the jury that they must find the defendant guilty if he inflicted the mortal wound, and there was no considerable provocation, notwithstanding these definitions; or, perhaps, it was an instruction to the effect that if there was no considerable provocation, as matter of law the killing was deemed to have been done with malice aforethought. This, I think, is the reasonable and natural construction of the instructions on this subject taken together. Of course the jury is bound to accept all as correct.

It has been held, and I think properly, that when some essential qualification is omitted from some particular instruction the case will not necessarily be reversed if the omitted qualification is supplied elsewhere, but, if essentially contradictory instructions are given, it must certainly be error. At best the jury were told that if defendant killed deceased he is guilty of murder or manslaughter, depending upon whether the provocation was considerable or not.

124 Cal. 212

MOYNIHAN et al. v. DROBAZ et al. (S. F. 962.)

(Supreme Court of California. April 7, 1899.)

SHIPPING—REPAIRS—EVIDENCE OF OWNERSHIP—  
CUSTOM-HOUSE REGISTER—ADMIRALTY DE-  
CREE—TRIAL—FINDINGS.

1. In an action for repairs of a steamboat, an entry of plaintiff's name in a custom-house book, showing the registry or transfer of the boat, is inadmissible to show that plaintiff was a part owner, in the absence of evidence that he authorized the making of the entry.

2. In such action a decree in admiralty against the boat and the papers in the proceeding are inadmissible to prove plaintiff's ownership, where he made no appearance in the proceeding.

3. Where defendant's corporate character was alleged and not denied, it was error to find that defendant was not a corporation, in view of Code Civ. Proc. § 462, declaring that non-controverted material allegations in the complaint must be taken as true, and section 590,

declaring that issues of fact arise only on allegations in the complaint controverted by the answer.

4. A firm may recover in full for repairing a steamboat, though one of the partners is a part owner of the boat.

5. It is error to find that plaintiff had no attachment lien because of the insufficiency of his bond, where its sufficiency was not questioned, and it was stipulated when the action commenced that an attachment had been made under Code Civ. Proc. § 813 et seq., and had been released on the giving of a bond by defendant.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by T. J. Moynihan and others against Matteo Drobaz and others. From an order denying a motion for new trial, plaintiffs appeal. Reversed.

Stanley, McKinstry, Bradley & McKinstry, for appellants. Andros & Frank, for respondents.

VAN DYKE, J. This action is to recover a balance due from defendant Matteo Drobaz on a contract to construct a boiler for the fishing steamer Golden Gate, and to enforce a lien on said steamer to satisfy said demand, under the provisions of the Code of Civil Procedure in reference to actions against steamers, vessels, and boats.

On the trial, the court admitted as evidence, over the objection of the plaintiffs, a copy of the register of the vessel Golden Gate, for the purpose of showing that the plaintiffs were part owners in the said vessel. The entry in the custom-house books of the registry or transfer of a vessel is not even prima facie evidence as against one not claiming to be an owner, unless such entry be shown to have been made by authority of the person named in it. In *Fraser v. Hopkins*, 2 Taunt. 5, Lord Mansfield said, in reference to the contention that the entry was evidence against such person: "To suppose the effect of the act to be such as is contended for would be to impute madness to the legislature." And Hunter, J., said: "Any bystander may put down a name in the register. You must connect the defendant with it." And Lawrence, J., adds: "Unless you show all this taken down by authority of the person who is to be charged, the register cannot be made evidence, even prima facie." See, also, *Tinkler v. Walpole*, 14 East, 226; *Hozey v. Buchanan*, 16 Pet. 215; *Steamboat Co. v. Van Pelt's Adm'r*, 2 Black, 388. And for like purpose the court also admitted as evidence, over the objection of the plaintiffs, a decree and copies of certain papers in the case of *Chandler*, as libellant, against the same steamer Golden Gate, in the United States district court. In admiralty, where the proceeding is in rem, the libel prays for process (that is, a warrant of arrest of the thing itself), and a monition to all persons interested to appear upon a certain day and intervene for their interests. The jurisdiction acquired by the seizure of property in such proceeding is to



pass upon the question of ownership of such property, after opportunity has been afforded to parties to appear and be heard; and the decree in such cases is conclusive upon all such parties. Every person interested in the vessel is warned to come in and assert his interest. Necessarily no one can be decreed to be a part owner who has not appeared and asserted part ownership or other interest. It was clearly error to admit a copy of said register and copies of said papers in admiralty for the purpose indicated. Ben. Adm. 410-434; *Windsor v. McVeigh*, 93 U. S. 274. But respondents' counsel say if the court erred either in admitting the ship's register, or in admitting the judgment in the United States district court, or in both respects, it is not such error as entitles the plaintiffs to a new trial, for the reason, it is claimed, that there is still sufficient independent proof of ownership to warrant the finding in favor of the defendants.

The only outside evidence bearing upon the question of the ownership of the plaintiffs in the vessel is the following: Defendant Drobaz says: "The vessel was built in Sausalito, and was to be a steamer for fishing purposes. He started to build her by my orders, Moynihan, Pearson, and several others." Moynihan testifies that he paid in \$500 to Drobaz for one share of stock, and took his receipt, which reads: "\$500. San Francisco, October 1, 1890. Received of T. J. Moynihan five hundred dollars for one share of M. Drobaz Steam and Sail Fishing Company.

his  
"Matteo X Drobaz."  
mark.

The complaint alleges that the plaintiffs were, at all the times therein mentioned, co-partners carrying on business under the firm name and style of Moynihan & Aitken, and it is also alleged in the complaint "that the defendant, the Matteo Drobaz Fishing Company, is, and for more than three months prior to the commencement of this action was, a corporation duly organized and existing under and by virtue of the laws of the state of California." The answer nowhere denies the allegation of partnership of the plaintiffs, or that they carried on business as such, and nowhere denies the allegation that the Matteo Drobaz Fishing Company is a corporation. Besides, the defendant Matteo Drobaz Fishing Company, as such, files a separate answer, in which it does not deny its alleged corporate existence, but does deny that the Matteo Drobaz Fishing Company was the owner of said steamer Golden Gate. By Drobaz's receipt and Moynihan's testimony, the latter had one share in said company. The court finds, however, that the Matteo Drobaz Fishing Company was not at any time a corporation, and did not own the steamer; hence Moynihan was not a part owner. Yet the court finds that the said steamer was owned by Matteo Drobaz and a number of other persons, including the plain-

tiffs herein, James Aitken and T. J. Moynihan, as part owners.

By the failure of the defendants to deny the allegation of the corporate existence of the Matteo Drobaz Fishing Company, that fact is deemed to be admitted (Code Civ. Proc. § 462), and the finding against such corporate existence is not only a finding against such admission, but also without any issue presented upon which to make a finding (Id. § 590). There is not a particle of testimony that the plaintiff James Aitken ever had any interest in the vessel or in the said company, or that the partnership firm of Moynihan & Aitken, or said James Aitken, were part owners in said vessel, or had any interest therein. The court also finds that at the time of the issuance of the writ of attachment (under section 813 et seq., Code Civ. Proc.) a written undertaking was received by the clerk, which was not to the effect that if a judgment was rendered in favor of the owner of the steamer the plaintiffs will pay all costs and damages that may be awarded against them, or all damages that may be sustained by the owners, not exceeding the sum specified in the undertaking. There is no issue presented in the case on which this finding is required. Besides, it is stipulated that at the commencement of the action the vessel was seized under the provisions of the Code referred to, and was released upon a bond being given on the part of the defendants, as therein required. From this the court erroneously finds, as a conclusion of law, that the plaintiffs at the time of the commencement of the action had no lien upon the said steamer Golden Gate, and are not entitled to recover anything in the action, but that the defendants are entitled to their costs.

The order denying a new trial is reversed, and a new trial ordered.

We concur: GAROUTTE, J.; HARRISON, J.

(124 Cal. 222)

RIVERSIDE COUNTY v. STOCKMAN et al.  
(L. A. 440.)<sup>1</sup>

(Supreme Court of California. April 11, 1899.)

APPEAL AND ERROR—PRESUMPTIONS.

If the judgment roll recites that defendants were regularly served with a complaint, it will be presumed on appeal that they were served with the amended complaint.

Commissioners' decision. Department 2. Appeal from superior court, Riverside county.

Action by Riverside county against P. J. Stockman and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. W. Stephenson and L. Gill, for appellants. G. A. Skinner, for respondent.

BRITT, C. Action to condemn lands for purposes of a highway, under the provisions of the Code of Civil Procedure relating to eminent domain. Ten defendants are named

<sup>1</sup> Rehearing denied May 11, 1899.

in the complaint, among them P. J. Stockman and another, who are alleged to be executors of the estate of one Mathew Byrne, deceased. Service of summons and copy of complaint was made on both of said executors in December, 1895. Afterwards plaintiff filed amendments to its complaint,—the first on February 24, 1896, and another on March 12, 1896. It may be conceded that both these amendments were of matter of substance. Said executors never answered either the original complaint or the same as amended; nor does the record, which consists of the judgment roll alone, contain any evidence, beyond the recitals presently to be mentioned, that said amendments were served on the executors. On April 14, 1896, the clerk entered the default of said executors, reciting that they had failed to answer the complaint on file within the time allowed by law. On the same day the action was tried on issues raised by answers of other defendants, and plaintiff obtained judgment. The judgment recites that said executors were "regularly served with summons and complaint," and that their defaults for not appearing were regularly had and taken. They have appealed from the judgment, and assign for error that they were not served with the amendments to plaintiff's complaint.

There is no doubt of the general proposition that an amendment to a complaint must be served on all the defendants to be affected thereby. *Linott v. Rowland*, 119 Cal. 452, 51 Pac. 687, and cases cited. But the question here is whether the record presented shows that such service was not made in this instance. The judgment recites that the executors were regularly served with the complaint, and that their defaults were regularly had and taken,—which could not be unless the amendments had been duly served on them. The statute concerning the contents of the judgment roll in such cases does not require the proof of service of amended pleadings to appear therein (Code Civ. Proc. § 670, subd. 2); and, in our opinion, it must be presumed, in the absence of affirmative showing to the contrary, that the amendments were regularly served, and that evidence thereof was before the court when it made its decree. Such, in effect, was the ruling in *Livermore v. Webb*,

33 Cal. 489, 492; and the case accords with the principle which ascribes verity to a judgment, and requires an appellant to make its error appear. In *Thompson v. Johnson*, 60 Cal. 292, a judgment was reversed because of failure to serve an amendment upon a defaulting defendant, and language was employed in the opinion of the court which seems, on cursory reading, to support the inference that the judgment roll must affirmatively show service of the amendment in such a case; but the opinion shows further that the court understood the order granting leave to amend as itself limiting the service to a single defendant,—one not in default. In that view, of course, no presumption ought to lie that serv-

ice had been made, when the trial court had decided that it need not be made. No such order appears in the record before us; and *Thompson v. Johnson*, exceptional in its circumstances, is not an obstacle to a decision of the present case in accordance with the broader analogies illustrated by *Livermore v. Webb*, supra.

Appellants say further that the complaint, either in its original form or as amended, stated no cause of action against them. We have examined the pleading with care. Against a demurrer for uncertainty it could not have stood; but, taken in connection with the exhibits annexed thereto, which include a map of the proposed highway, the amended complaint shows a cause of action sufficient to support the judgment. The objections to it are not of importance to require treatment at length. The judgment should be affirmed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

124 Cal. 216

SVETINICH v. SHEEAN et al. (S. F. 1142.)  
(Supreme Court of California. April 8, 1899.)

HUSBAND AND WIFE—COMMUNITY PROPERTY—  
OWNERSHIP—DECLARATIONS.

1. What the wife says about the ownership of realty, in the absence of her husband, does not bind him in a suit by another to quiet title to the property.

2. Where a husband alleges that he owns real estate standing in the name of himself and his wife, and has paid taxes thereon, tax receipts running to him are admissible in his favor.

3. Community property is not subject to execution on a judgment against the wife individually.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by P. Svetinich against Timothy Sheean and another. From a judgment for defendants and order denying a new trial plaintiff appeals. Affirmed.

Marcus Rosenthal, for appellant. John H. Durst and Jas. A. Stevens, for respondents.

VAN DYKE, J. This is an action to quiet title to a certain lot in the city of Vallejo, Solano county. The title claimed by the plaintiff is founded upon a sheriff's deed. The plaintiff, September 30, 1895, obtained a judgment against the defendant Eliza Sheean in the city and county of San Francisco, and upon this judgment levied upon the right, title, and interest of said defendant Eliza Sheean in and to said lot, and under said judgment and levy, March 2, 1896, a sale was made by the sheriff of Solano county of said interest to the plaintiff in said action, who is the plaintiff here. No redemption having been made, the deed in question was executed October 17, 1896. Defendants, answering de-



nied any title in the plaintiff, and alleged that the title and ownership of said property are in the defendant Timothy Sheean; and said Timothy Sheean, in a separate answer and by way of cross complaint, sets forth that said lot was purchased by his separate means, and, although the deed was taken in the name of himself and his wife, it was his separate property, and so understood at the time. The court finds that the said Timothy Sheean permitted said deed of conveyance to be made to said Timothy Sheean and Eliza Sheean jointly, solely in order to enable the better management and care thereof, and not as a gift, in whole or in part, to said Eliza Sheean; that the said Timothy Sheean was absent from home a great deal of the time in the service of the United States, as an officer in the navy; that the said Timothy Sheean is the owner of said property in fee simple, to his own separate use and benefit, and that the defendant Eliza Sheean has no interest or estate therein; that the plaintiff had notice and knowledge of the rights and estate of defendant Timothy Sheean in said property, and notice and knowledge that any title, estate, or interest therein or thereto held by said Eliza Sheean was held in trust for defendant Timothy Sheean. The evidence abundantly supports the findings.

The first error assigned by the appellant is the refusal by the court to allow the plaintiff to testify as to a conversation had with Mrs. Sheean, in the absence of her husband, as to the ownership of the property. What Mrs. Sheean may have said in the absence of her husband could not bind him, nor affect his title to the property. Besides, the plaintiff, on being recalled, was allowed, without objection, to state as follows: "I am the purchaser of said property under the execution sale. \* \* \* Down to the time of the sheriff's sale I did not know that the defendant Timothy Sheean claimed that the undivided one-half thereof standing in his wife's name was held by her in trust for him, or that he claimed said one-half to be his own property. I had no notice of that from any source. Nobody told me anything of the kind. The only information I had about it was from Mrs. Sheean, who told me that she owned the property; that it belonged to her." He was, however, notified at the time of the sale, as he inferentially admits, that the defendant Timothy Sheean claimed the property, and therefore he did purchase with notice. *Bank v. Baker*, 82 Cal. 114, 22 Pac. 1037. The record shows: "It was here admitted by plaintiff that it was a fact that at all times since said conveyance by Catherine Reynolds (the grantor of the defendants) the property had been assessed for state and county and town taxes to the defendant Timothy Sheean; that the tax receipts for said property ran to Mr. Sheean right along, but plaintiff objected to the admission of evidence of that fact on the ground that the same was irrelevant, incompetent, and immaterial." The appellant

makes the point that the court erred in admitting this evidence. It was admitted for the purpose of meeting an issue made by an affirmative allegation in the cross complaint, to wit: "This defendant further alleges that he is now, and for more than five years last past has been, the owner of said parcel of land, and has been in the open, notorious, and exclusive possession thereof, and adverse to all persons whatsoever, and has paid for more than five years last past all taxes, of every kind and description, levied thereon." The finding of the court supports this allegation.

The conveyance from Catherine Reynolds running to Timothy Sheean and his wife was dated February, 1886, and was at once put on record in Solano county. At that time, and up to the amendment of section 164 of the Civil Code, in March, 1889, it had been repeatedly held by this court that property conveyed for a money consideration to either or both of the spouses was deemed community property. *Ramsdell v. Fuller*, 28 Cal. 43; *Jordan v. Fay*, 98 Cal. 264, 33 Pac. 95; *Gwynn v. Dierssen* 101 Cal. 563, 36 Pac. 103.

Appellant makes the point that the notice at the sheriff's sale stated that the property was claimed as community property on the part of defendant Timothy Sheean, and also as a homestead, whereas there was no valid homestead. But, if it had been community, instead of separate, property of Timothy Sheean, as found by the court, still it would not be subject to execution and sale on a judgment obtained against Eliza Sheean individually. The judgment and order denying a new trial are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

124 Cal. 225

GOSLINER v. GRANGERS' BANK OF CALIFORNIA. (S. F. 988.)

(Supreme Court of California. April 11, 1899.)

OSTENSIBLE AGENT—EVIDENCE—MORTGAGE OF CROPS—SUPPLIES FURNISHED MORTGAGOR—LIABILITY OF MORTGAGEE.

1. Plaintiff furnished a farmer, doing business in his own name, with supplies, with knowledge that he had mortgaged his crop, teams, and implements to a bank for money to prosecute his business. The bank did not own any of the land on which the crop was raised, and plaintiff charged supplies to the farmer. *Held*, that the bank was not liable to plaintiff for the supplies, as having made the farmer its ostensible agent, defined by Civ. Code, § 2300 as one whom the principal negligently causes a third person to believe to be his agent, when such is not the fact.

2. A mortgagee of crops is not liable for supplies furnished the mortgagor to enable him to raise the crop, in the absence of any express agreement to pay therefor, though the crops are sold to pay the mortgage.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county.

Action by N. A. Gosliner against the Grangers' Bank of California. From a judgment

for defendant, and an order denying a motion for new trial, plaintiff appeals. Affirmed.

Horace Hawes, for appellant. E. S. Pillsbury and F. D. Madison, for respondent.

**GRAY, C.** This is an action for goods sold and delivered. The case was tried before the court without a jury. The defendant had judgment, and the plaintiff appeals therefrom, and from an order refusing to grant a new trial.

The defendant was a banking corporation, doing business as such in the state of California, with its principal place of business in the city of San Francisco. Its principal business seems to have been, so far as appears in this case, loaning money to farmers to carry on farming operations, taking mortgages on their crops planted and to be planted, teams, machinery, etc., to secure such loans. During the years 1893-94 and 1894-95, Thomas L. Reed, then farming from 15,000 to 25,000 acres of land under cropping contracts, made an agreement with the defendant bank to furnish him (Reed) with "the money to do the work with, and furnish the stuff to raise the crops." Defendant took mortgages upon Reed's crops, and also upon his mules, etc., as security. At this time Reed was largely indebted to the bank, and it was agreed that the mortgages taken should secure the payment of this past indebtedness as well as the advances to be made during the year. All of the crops, mules, and farming implements were turned over to the defendant, and it realized therefrom some \$56,000 or \$58,000. This action is brought to recover of defendant the price of the supplies furnished by plaintiff to Thomas L. Reed for these years,—1893-94 and 1894-95,—and which supplies have not been paid for. Substantially the same agreement was made by the defendant bank with John R. Reed for the year 1894-95, Mr. Gosliner being present at the time. It was agreed to pay plaintiff for the supplies so furnished, every three months, with checks drawn by John R. Reed on the bank. The supplies were purchased from plaintiff, and were used upon the ranches of John R. Reed for the purpose of putting in the crops which were mortgaged to defendant, all of which crops were delivered to defendant as agreed. The supplies furnished for the first nine months were paid for with checks drawn by Reed on the bank. For the last three months they were not paid. It is sought in this action to recover from defendant for the supplies furnished during the last three months. The Reeds received credit on the books of the bank for the amount secured by the mortgages, and drew checks against the account to defray their farming expenses. In this way they drew about \$80,000 from the bank. The bank received all the crops harvested, which, with the mules, etc., came to about \$58,000, leaving something upwards of \$20,000 owing from the Reeds to the bank, according to the testimony of the bank's officers.

There was no account between the plaintiff and defendant. The plaintiff charged the goods to the Reeds, which he now seeks to recover the price of from defendant. Plaintiff had full knowledge of the transactions between the bank and the Reeds, and thoroughly understood the relations existing between them; and though he frequently met the officers of the bank, and talked with them concerning the Reeds and their crop prospects, he never intimated to them that he intended to hold the bank for the claim sued on herein until the commencement of this suit. In the meantime he kept pressing the Reeds frequently for his claim. The Reeds carried on the farming business in their own names. They did not own all the land they farmed. Some of it belonged to others, and they were farming it on shares, under agreement with the owners of the land. There is no claim that the bank owned any of the land, nor does it appear that the bank was a party to any of the cropping contracts referred to.

The contention of appellant, on the foregoing facts, is that the "defendant held out the Reeds to be their agents, that plaintiff believed that to be the fact, and that this belief was based and founded upon the acts of defendant, either intentional or negligent." In support of this contention the appellant cites section 2300 of the Civil Code, which defines "ostensible agency" as follows: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." From this it appears that he who seeks to charge the principal with the act of an alleged ostensible agent must himself believe that the agent had authority as such from the alleged principal. *Harris v. Flume Co.*, 87 Cal. 526, 25 Pac. 758. The fact that plaintiff, knowing the relations that existed between the Reeds and the bank, yet charged the goods to the Reeds, and not to the bank, is strong evidence tending to show that plaintiff did not believe that the Reeds were purchasing these goods as the agents of the bank. A business man usually charges the price of goods to the party buying, and not to the agent of such party. The evidence seems amply sufficient to support the conclusion adverse to plaintiff reached by the trial court on the question of agency. The plaintiff's claim of an ostensible agency in the Reeds is the strongest ground he could base his claim to recovery on. The theory of an actual agency would find no support in the evidence, and the plaintiff advances no such claim. The cases of *Heald v. Hendy*, 89 Cal. 633, 27 Pac. 67, *Buckley v. Silverberg*, 113 Cal. 674, 45 Pac. 804, and the other cases cited by appellant, differ materially, as to their facts, from this case, and furnish no guide for the decision herein. The plaintiff cannot recover from defendant on any theory that his furnishing the goods to the Reeds enabled them to grow, mature, and harvest the crop that defendant was interested in as mortgagee.



and that thereby defendant received an incidental benefit from the goods furnished. To obtain judgment against defendant, it was necessary for plaintiff to show the existence of a contract and promise, either express or implied, made in person or through an agent, on the part of defendant to pay for the goods. The incidental benefit to defendant might have had some weight as evidence, in connection with other circumstances, to show the existence of such a contract, but was not sufficient, standing alone, to base a right of action on for goods sold and delivered. *Clay v. Walton*, 9 Cal. 328; *Harris v. Flume Co.*, 87 Cal. 529, 25 Pac. 758. The findings of the court have ample support in the evidence produced at the trial.

We see no error prejudicial to plaintiff in the rulings of the court on the introduction of the evidence. We advise that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; BRITT, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

6 Cal. Unrep. 279

ASHTON et al. v. HEYDENFELDT et al.  
(S. F. 1,266.)

(Supreme Court of California. April 10, 1899.)

APPEAL AND ERROR—REVERSAL—AMENDMENT OF JUDGMENT.

The supreme court will not amend its judgment directing a demurrer to the complaint to be overruled, by adding thereto a direction that respondents be allowed to answer, as application for leave to answer can be made to the trial court.

Motion to amend the judgment of the supreme court. Motion denied.

For former opinion, see 56 Pac. 624.

PER CURIAM. Respondents move to amend the judgment hereinbefore rendered, which directs that the demurrer to the complaint be overruled, by adding thereto a direction that respondents be allowed to answer; but this direction is not necessary, because the court below, if a proper showing be made, will undoubtedly allow the respondents to answer.

124 Cal. 219

VANCE v. SMITH. (S. F. 1,469.)

(Supreme Court of California. April 11, 1899.)

ASSIGNMENT—PLEADING—SURPLUSAGE—JUDGMENT AGAINST ESTATE—APPEAL.

1. Shortly before her death, a wife executed the following order, directed to a building association: "Please pay to my husband, S. L. V., the stock that is to my credit in your hands, after its maturity, and oblige E. M. V." Held, that this was an order for the payment of the stock to the husband for the benefit of the wife's estate, and not an assignment of it to him individually.

2. Where the court and counsel tried the case on the complaint and answer without regard to a cross complaint, and the allegations of the

answer suffice to justify the findings, the cross complaint will be rejected as surplusage, and error in overruling a demurrer thereto will be disregarded.

3. Where, in an action to settle the account of a deceased administrator, the judgment rendered against his estate failed to provide that his administratrix should pay it in the due course of administration, as required by Code Civ. Proc. § 1504, the cause will be remanded, on appeal, with instruction to modify the judgment in accordance with the statute.

Department 1. Appeal from superior court, Fresno county.

Action by Clara M. Vance, as administratrix of the estate of S. L. Vance, deceased, against Bertha A. Smith, as administratrix of the estate of Eliza M. Vance, deceased. There was a judgment for defendant, and plaintiff appeals. Affirmed.

E. E. Shepard and L. L. Cory, for appellant. Geo. B. Graham, for respondent.

VAN DYKE, J. Eliza M. Vance died intestate in Fresno county October 31, 1894, leaving S. L. Vance, her husband, surviving her. On February 9, 1895, said surviving husband was appointed administrator of her estate, and during the course of administration, before any accounting had been had, he died. His daughter by a former marriage, the plaintiff in the action, was thereupon duly appointed the administratrix of his estate, and has brought this suit against the defendant, Bertha A. Smith, the daughter of his deceased wife, Eliza M. Vance, by a former marriage, who has been duly appointed administratrix of her said mother's estate, for the purpose of having a court of equity settle the account of said S. L. Vance while acting as such administrator prior to his death. In settling the accounts, the court found that said S. L. Vance, deceased, in his lifetime, as administrator of the estate of Eliza M. Vance, deceased, had in his hands as such administrator, and belonging to said estate, a balance due, of money on hand, \$1,093; personal property (watch and chain, \$10; trinkets, \$1.50), making \$11.50,—in all, \$1,104.50; and thereupon judgment was rendered "that the defendant, Bertha A. Smith, as administratrix of the said estate of Eliza M. Vance, deceased, have judgment against the plaintiff, Clara M. Vance, as administratrix of the estate of S. L. Vance, deceased, for the sum of \$1,093," and also that the said defendant have judgment against the said plaintiff that said plaintiff deliver to the defendant said personal property and trinkets, or their value in the sum of \$11.50.

The appellant makes the point that the evidence is insufficient to justify the decision of the court in finding the amount on hand by S. L. Vance at the time of his death, and especially as to \$1,000 collected by him from the Tuscola Benefit & Building Association, in Illinois. That money was collected on the following order:

"Selma, Cal., Sept. 13, 1894. Tuscola Benefit & Building Association: Please pay my

husband, S. L. Vance, the stock that is to my credit in your hands, after its maturity, and oblige. Yours, E. M. Vance."

It is claimed on the part of appellant that this is an assignment of that stock, and that it and the proceeds thereof belonged to the said S. L. Vance thereafter as his property. Said Eliza M. Vance, as already stated, died the following month, and before said order was presented said S. L. Vance was appointed her administrator. The officers of the bank, it appears, refused to treat the said Vance as the owner of said stock, and refused to pay over the said proceeds, to wit, \$1,000, to him individually, and only paid it over when he presented a certified copy of his letters of administration on his wife's estate; and he received the money from the association, and gave a receipt, as such administrator of the estate of Eliza M. Vance, deceased. The court below evidently, as it should, treated the paper as not an assignment, but simply an order. Without considering the evidence in detail, it is enough to say that, as shown by the record, there is sufficient to support the findings of the court.

It is also objected by the appellant that the court erred in overruling plaintiff's demurrer to the so-called cross complaint of the defendant. The minute order of the court, as shown by the record, September 23, 1896, reads: "It is ordered that the demurrer of the plaintiff to the cross complaint of the defendant be, and it is hereby, sustained, and said defendant is hereby granted ten days in which to amend." Upon November 17, 1896, another minute order shows that the demurrer of the plaintiff to the amended cross complaint of defendant was overruled, but there nowhere appears in the record any amended cross complaint. It seems, however, that counsel and the court below tried the case upon the complaint and answer, without regard to the so-called cross complaint; and the denials in the answer, and the affirmative matters set up therein, are sufficient to justify and support the findings of the court in reference to the account; and therefore the said so-called cross complaint may be rejected as mere surplusage.

The appellant makes the further point that the judgment is erroneous in that it does not provide that it should be paid in due course of administration. As S. L. Vance, who in his lifetime was administrator of the estate of Eliza M. Vance, died without having made any accounting in the probate court, this action was brought to have his said account settled; and, as the result of settling said account, the court rendered judgment against the plaintiff, as his administratrix, for the amount ascertained to be due, but failed to direct how or by whom such judgment should be paid. By section 1504 of the Code of Civil Procedure it is provided: "A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes

the claim in the same manner as if it had been allowed by the executor or administrator and a judge; and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due." We think the point made by appellant in this respect is well taken.

In this case, it will not be necessary to order a new trial. The cause is remanded to the court below with instructions to modify the judgment by adding thereto the following: "And that said judgment be paid in due course of administration." And, as so modified, the judgment is affirmed; appellant to have costs on this appeal.

We concur: HARRISON, J., GAROUTTE, J.

(124 Cal. 244)

JOURNE et al. v. HEWES. (S. F. 1,088.)<sup>1</sup>

(Supreme Court of California. April 12, 1899.)

LANDLORD AND TENANT—OPTION TO PURCHASE—LIABILITY FOR RENT—DECREE—RES JUDICATA.

1. A 20-year lease, at a stipulated monthly rental, expiring in November, 1893, gave the lessee the option to purchase at a fixed price at its expiration. The last day of the lease, the lessee wrote to the son of the deceased lessor, and to the former agent of the deceased, that he elected to purchase and to pay for the property when the probate proceedings were fully completed, and the owners could give title. An administrator was appointed in December, 1893, but the lessee did nothing further until April, 1894, when he notified the administrator that he would take the property, but could not then pay for it. He made no tender until December, 1894. Meanwhile he paid rent for the time before the administrator was appointed, and for three months thereafter. In December, 1894, through proceedings in the probate court, the lessee was decreed the property pursuant to the lease provision, on the payment of the price, but such decree established only that when it was entered the heirs and the administrator consented to the purchase, but did not establish the fact—and there was nothing in the petition or decree calling for an adjudication thereof—that the lessee had become the equitable owner, or stood in the relation of a purchaser of the land at the termination of the lease. *Held*, that the lessee was liable for rent as a tenant from month to month up to December, 1894.

2. A petition in the probate court by the heirs at law and the administrator of the deceased to direct a conveyance of property leased by the deceased, pursuant to the terms of the lease, on the payment of the consideration, where so decreed, and where the question of back rent was not raised or considered therein, or necessarily involved, does not bar a subsequent action by the heirs against the purchaser to recover such rent, where it had been set over to them in the decree of distribution.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Charles Journe and others against David Hewes. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

William B. Sharp, for appellant. G. W. McEnerney and Stanley, Hayes & Bradley, for respondents.

<sup>1</sup> Rehearing denied May 13, 1899.



CHIPMAN, C. Action for rents for certain premises situated in the city of San Francisco. The trial was by the court, a jury having been waived; and plaintiffs had judgment, from which, and from the order denying his motion for a new trial, defendant appeals. The pleadings are verified.

The facts appear from the findings to be as follows: Plaintiffs' intestate was the owner of the premises, and on November 1, 1873, by an agreement in writing, leased them to defendant for the period of 20 years (i. e. to November 1, 1893) at the monthly rental of \$140, payable the 1st day of each month in advance. Defendant entered into possession under the lease, and continued in possession until December 22, 1894. Plaintiffs' intestate died February 16, 1893, and on December 27, 1893, A. C. Freese duly qualified and became administrator of the estate of deceased, and so continued until January 7, 1895, when all of the estate, including all claims against defendant, was distributed to plaintiffs. Defendant occupied the premises to November 1, 1893, under the lease; and thereafter, and until December 22, 1894, he occupied the premises "under an agreement made between these plaintiffs, the said A. C. Freese, as administrator as aforesaid, and the said defendant, under the terms whereof the said defendant agreed to hold said premises as a tenant from month to month, upon the same terms and conditions as those contained in said lease aforesaid." The agreement upon the part of plaintiffs covered the period from November 1, 1893, to December 22, 1894; "and on the part of Freese, from the issuance of letters to him and to December 22, 1894." Defendant became liable for 13.7 months rent, at \$140 per month, "commencing November 1, 1893, and ending on the 1st day of January, 1895." (In a subsequent finding the expiration date is December 21, 1894, inclusive, and rent is computed to include that date, and no further.) The rent amounted to \$1,918, "on account whereof, and of his occupation \* \* \* during said period, defendant has paid the sum of seven hundred dollars, and no more." Said seven hundred dollars was for rent from November 1, 1893, to March 31, 1894, inclusive. At this point it should be stated that the lease contained an option to defendant to purchase. That part drawn in question reads: "At the expiration of the term of this lease the said party of the second part [defendant] shall have the privilege of purchasing, if he desires so to do, the premises above described, for the sum of thirty-five thousand dollars; \* \* \* and upon the payment or tender thereof the said party of the first part shall and will execute, acknowledge, and deliver a good and sufficient bargain and sale deed \* \* \* to the said party of the second part." It is then provided that, if defendant "decline to purchase, \* \* \* then the buildings which have been erected upon said premises by said party of the second part \* \* \* shall be appraised

[the method is provided for], \* \* \* and first party agrees to pay second party the appraised value thereof." The lease, by its terms, binds the heirs, executors, administrators, and assigns of the respective parties. Bearing upon this option to purchase, the court finds as follows: Defendant became the owner of the premises December 22, 1894. He never held possession as owner prior to that date, but "was in possession thereof solely as tenant." No part of the \$700 above mentioned was paid as compensation for defendant's delay in completing the purchase under his privilege to do so. Defendant was neither ready nor able to complete the purchase of the premises until December 22, 1894, "and neither paid nor tendered the purchase price, nor any part thereof, before that date." "Defendant did not become the owner of the premises November 1, 1893, but became the purchaser thereof as of and on the day of the delivery of the deed to him, and the payment by him of the purchase price, which was the 22d day of December, 1894."

1. Appellant's principal contention is that the court erred in finding that defendant was a tenant of Freese or the plaintiffs, after the expiration of the lease, under an agreement to pay rent.

On October 31, 1893 (the lease expired that day), defendant wrote two letters,—one to plaintiff Charles Journe, son of plaintiff's intestate, and one to the London, Paris & American Bank, agent of deceased in his lifetime,—in the first of which he said: "I write to express my desire and election to purchase the lot of land described in the lease now existing between your father, Jean Marie Journe, and myself, \* \* \* and to pay for the same when the probate proceedings are fully completed, and the owners can give title to the same." In the other he expresses his desire in about the same terms, concluding: "I pay for the same when the owners can give title." The evidence shows that defendant remained in possession of the premises after the lease had expired, and until December 22, 1894, when he received a deed from Administrator Freese through proceedings instituted October 27, 1894, in the probate court, on petition of defendant, under section 1598 et seq., Code Civ. Proc. Defendant claims that on and after November 1, 1893, the relation of vendor and purchaser existed between the parties, and not that of landlord and tenant, because, as he claims, he exercised his privilege of purchasing under the agreement. Plaintiffs' contention is that there was no legal duty put upon the administrator to take any steps towards passing title to defendant until he had notified the administrator that he was ready, able, and willing to consummate the purchase, and that no valid tender was made by defendant until December 22, 1894, to which time he was tenant. There is but little oral evidence bearing upon the fact as to the actual relation of defendant to the property after the lease expired. The court found, and I think

there was evidence to sustain the finding, that defendant paid as rents, at the leasehold rate, for five months, \$140 per month, to April 1, 1894. Defendant testified, but he made no explanation of his payment of the sum of \$700 to the administrator, which the court finds was for rents. His oral explanation of his verbal offer to take the property, stated to the administrator after the latter received his letters, shows that when he gave the notice it was coupled with the statement that he was not then prepared to make payment. In addition to the oral proofs, plaintiffs rely upon the presumption supplied by sections 1945 and 1946, Civ. Code. The only witness called by defendant was Administrator Freese. From his testimony it is plain enough that the delay on the part of defendant in completing the purchase arose from stringency in the money market, and defendant's inability to raise the amount required. He testified as follows: "I am the public administrator. I had charge of the Journe estate as public administrator. I collected the rents. Q. I am not asking you about that, but whether he [defendant] elected to purchase under that lease? A. Not immediately, when I took charge of the property. Q. Well, at any time? A. Yes, sir; many times I have had conversations with Mr. Hewes with regard to it. Q. And do you remember that I [Hewes' attorney] came to you, stating that I had come from Mr. Hewes, and at his request, in regard to the matter? A. I remember you coming there; yes, sir. Q. Do you remember my stating to you on or about the 1st day of April that he elected to purchase under that lease? A. I think somewhere thereabouts. I think you came there, and stated that you were willing to take the property, and wanted to take it, and would take it, but that you were retarded on account of finances, and had to make arrangements to get the money to pay for it; and, of course, the money was not turned over until a long time afterwards." He was asked if anything was said as to taking steps to apply to the probate court for authorization to convey, to which he answered: "No, sir; I do not think so, because Mr. Hewes repeatedly spoke to me, and was negotiating for a loan, and was trying to get the money." Witness was asked: "Q. Was there anything said at that time, at that conversation, about Mr. Hewes becoming a tenant of the estate of Mr. Journe? A. Oh, I do not think so. I think the whole conversation was that Mr. Hewes would take the property, and, as soon as it would be convenient for him to take it, that he would take it." He was asked if anything was said about the delay in completing the purchase, and answered: "Well, it seemed it was hardness of times, and one thing and another." There is no evidence of an express agreement to pay rent at the old rate pending the time when defendant would be able to pay for the property, and the court did not find that there was such an agreement. Defendant paid rent at the leasehold rate for five months, to March

1, 1894. The rent for February, 1894, was paid May 23, and the last payment of rent was made as late as July 19, 1894, for one month, to April 1, 1894. There is no explanation of the failure to pay rent after April 1st, and there is not the slightest evidence that payments were made other than for rent, and at the former rate. It seems to us that the evidence fully justifies the implied agreement found by the court.

Defendant contends that the presumption raised by the statute above referred to is not conclusive (citing *Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570), and that the presumption in the present case is overcome by the privilege of purchase given in the lease, which privilege defendant claims to have promptly exercised, and in doing so established the relation of vendor and purchaser. Furthermore, it is claimed that defendant filed his petition in the probate court for specific performance, in which proceeding plaintiffs and the administrator appeared; that the court decreed the performance of the contract, and "this decree was complied with by the execution of the conveyance, and the payment by defendant of the amount ordered to be paid by him." It is claimed that "this decree conclusively established the fact that subsequent to November 1, 1893, the relation between the parties was that of vendor and purchaser, and not that of landlord and tenant," and "that from these facts the law cannot imply an agreement on the part of defendant to pay rent,"—citing *Wood, Landl. & Ten.* § 16. The petition referred to was filed by defendant October 27, 1894, and is set forth in the transcript as part of plaintiffs' evidence, as is also the decree of the court, and it was admitted "that under said petition said deed was executed." The petition stated "that petitioner desires to purchase said property in said agreement [the lease] described, according to the terms of said agreement, and he hereby tenders and offers to pay therefor the sum of thirty-five thousand dollars; \* \* \* and by reason of the premises petitioner is entitled to a specific performance, \* \* \* to wit, a grant, bargain, and sale deed conveying the fee of the said premises \* \* \* to petitioner upon the payment by him of the said sum of thirty-five thousand dollars." The decree directed conveyance to be made upon the payment of the sum above mentioned. These proceedings by no means established the fact that on November 1, 1893, defendant fully exercised his option, and put himself in the relation of a purchaser. Neither the petition nor the decree had any such retroactive effect. The decree established only the fact that at the time it was entered the heirs at law of deceased and the administrator consented that defendant might become the purchaser upon the payment of \$35,000, but it did not establish the fact, and there was nothing in the petition nor in the decree calling for an adjudication of the fact, that defendant had on November 1, 1893, become the equitable owner, or stood



in the relation of a purchaser, of the land. The owners of the property, by submitting to the proceedings, merely consented that the option to purchase might be treated as still available to defendant. It was clearly a condition of the option that it should be exercised at the expiration of the lease; for, aside from the express conditions of the option, it was provided that, should defendant decline to purchase, the buildings erected by him should belong to the lessor. But this condition might be, and was, waived by plaintiffs, when finally defendant became, not only willing, but able, to purchase, and so notified the administrator.

Defendant stoutly contends, however, that the written notices he served October 31, 1893, and the verbal notice to the administrator about April 1, 1894, in themselves established the relation of vendor and purchaser, and were conclusive of the fact. The point is pressed with much zeal and ability, and is contested with equal earnestness and force. We do not think it necessary to follow respective counsel throughout the argument. Among other cases, appellant relies upon *Carpenter v. U. S.*, 17 Wall. 489. The opinion is by Mr. Justice Strong. I quote sufficiently to state appellant's position clearly: "Privity of contract is doubtless essential in all cases. But when the defendant has entered and occupied by permission of the plaintiff, without any express contract, the law implies a promise on his part to make compensation or pay a reasonable rent for his occupation. In such case the consent of the owner to defendant's entry, followed by such entry and by subsequent occupation, may be considered equivalent to a demise, or at least prima facie evidence of a demise. This is because a demise, with a corresponding agreement to pay rent or make compensation for the use of the property, is consistent with an unexplained entry by the owner's consent, and because it is a reasonable presumption that occupation thus taken was intended to be paid for." After thus lucidly stating the rule under which an implied promise will arise, the learned justice proceeds: "No reason, however, for such an implication exists when an express contract or an agreement between the parties shows that it was not intended by them to constitute the relation of landlord and tenant, but that the occupation was taken and held for another purpose. And this is shown when the entry has been made in pursuance of an agreement to purchase, whether that agreement is in writing or parol. Such an agreement sufficiently explains the allowed entry, without the necessity of resorting to any implication of a contract other than actually made." It was held in the case that, if the plaintiff was entitled to anything beyond what he received, it was interest on the purchase money from the time possession was taken until the price of the sale was paid. The facts were that on July, 1863, an army officer, on behalf of the United States, entered into a

parol agreement with Carpenter for the purchase and sale of an island in Narragansett Bay. In August following, the government officers, with the consent of Carpenter, entered into possession of the island, and continued in possession until 1866, when the sale was consummated and the consideration paid. Carpenter afterwards brought suit in the court of claims for use and occupation of the island, and it was held that he could not recover, because the entry was as by a purchaser, and not as tenant. The present case differs widely from the *Carpenter Case*. Here the entry was under an agreement to pay rent, and the relation of the parties was unquestionably that of landlord and tenant for 20 years, up to the 31st day of October, 1893; and, unless the notice of defendant that he desired to avail himself of the option to purchase had the conclusive effect claimed for it, which we do not think it had, the relation of landlord and tenant is shown, by the evidence, aided by the statutory presumption, to have continued until he completed the purchase. If he had tendered the money, or had announced his ability and willingness to take the property so soon as title could be made, and nothing remained to be done but obtain the order of the court, I can see how it might be claimed with reason that he held over as purchaser pending such action. But no such state of facts existed. His notice fails to show a "payment or tender thereof" of the money which the agreement required should be made "at the expiration of the term of the lease." The offer was to purchase the property, "and to pay for the same when the probate proceedings are fully completed, and the owners can give title to the same." When this notice was given there was as yet no administrator, and no one authorized to act for the heirs at law of deceased; but an administrator was appointed two months later,—December 27, 1893. If it may be said that defendant did all that he could reasonably be asked to do before an administrator was appointed, it was incumbent upon him, as soon as that officer had qualified, to make "payment or tender thereof," and demand his deed. He, however, took no further action until about April 1, 1894, when he notified the administrator that he desired to avail himself of the option, but at the time, for reasons personal to himself, and in fact because he could not then pay for the property, took no steps to purchase; and not until December, 1894, did he make tender of payment, and put himself in readiness to pay. Meanwhile he paid rent for the time before the administrator was appointed, and for three months thereafter. Appellant asserts that it is immaterial what the relation of defendant was prior to April 1, 1894, and, seemingly inconsistent with his contention as to the conclusiveness of the written notice, is willing to concede that payment of rents was made to that date, but that thereafter the relation was that of purchaser, by virtue of the verbal notice to the adminis-

trator. An examination of the evidence, some of which is given above, will show that defendant only expressed a desire and intention to exercise his option, but at the same time said he was not yet prepared to make payment; i. e. to comply with the conditions of the option. The verbal notice to the administrator was even less conclusive than the written notice served upon persons unauthorized to deal finally with the matter.

Respondent claims that the statute (Code Civ. Proc. § 1598) does not give the administrator authority to file the petition, but that it expressly gives the right only to "any person claiming to be entitled to such conveyance from an executor or administrator"; and it is hence argued that it was defendant's duty to commence proceedings under that section. The language used might be construed to limit this right as claimed, but it is not necessary to so hold in the present case. The administrator certainly was not required to take any steps to make the conveyance until defendant had made demand and tender of payment, or at least shown ability and willingness to pay. He did not do this at any time until he filed his petition, and obtained the order of the court. We do not see that the doctrine as to when time is of the essence of the contract, and some other doctrines made the subject of discussion, need be particularly examined. Here there was no obligation on defendant to purchase. He reserved only the right to purchase, but the decision to do so rested wholly with him. This right was absolute, provided he complied with the conditions imposed. Whether he was in default or not was a question not raised against his right to purchase when he finally, after much delay, came forward with the money. But this complaisance in December, 1894, on the part of the owners and the administrator, in itself casts no light upon the relation defendant bore to the property during the preceding 12 months. We are constrained to hold that the evidence satisfactorily shows the relation to have been that of tenant.

2. Appellant claims that not only are plaintiffs barred by their appearance in the proceeding in the probate court, and its decree, but by the acceptance of the purchase price without claiming anything further; that the court had jurisdiction to afford complete relief, and to order payment of interest, or rent in lieu thereof, or neither. Whether, in this statutory proceeding, under section 1598, Code Civ. Proc., the court could go beyond the power expressly given by the statute we do not think it necessary to decide. It is sufficient answer to defendant's contention that the claim for rent presented in this action was not litigated in that proceeding, so far as the petition and decree disclose what was done, and the question of defendant's liability for rent was not necessarily involved. The probate court seems not to have considered this claim as then litigated; for it is alleged in plaintiffs' complaint, and not denied, that in

its decree of distribution the court set over to plaintiffs the claims arising out of the matters set forth in the complaint. Nor was it necessary for the court to find the value of the use and occupation. Having found the implied contract to pay the rent stipulated in the lease, the value of the use of the premises became immaterial. No findings are required on immaterial issues.

3. Defendant made a motion to strike out certain parts of the complaint on the ground of the matter designated being irrelevant and redundant. There is also a demurrer to the complaint on general and special grounds. We have examined the alleged irrelevant and redundant matter, and, while we think some of it might, without harm to the complaint, have been dispensed with, we cannot see that defendant was injured by its retention. The demurrer is not urged further than by expressing the opinion of counsel that it should have been sustained. Indeed, the motion and demurrer depend principally for support upon the questions already considered, and need not be further noticed. Our conclusion on the whole case is that the judgment and order should be affirmed, and we so advise.

We concur: HAYNES, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

124 Cal. 259

RAMSBOTTOM v. BAILEY et al. (Sac. 471.)  
(Supreme Court of California. April 12, 1898.)  
PARTNERSHIP—MORTGAGE—MISJOINDER—ESTOPPEL  
—DECREE.

1. Where a surviving partner mortgages the partnership property to secure his individual debt, the mortgagee in foreclosure acquires whatever interest in the property the mortgagor had.

2. In foreclosure of a mortgage on partnership property given by the surviving partner to secure his individual debt, the right of precedence of a partnership judgment payable out of the partnership property cannot be litigated, this being a title adverse to the mortgagor.

3. The judgment creditor was not precluded, by setting up his claim to a lien on the partnership interest, from afterwards litigating the question.

4. A decree foreclosing a mortgage given by a surviving partner for his individual debt will be modified so as to show that it was without prejudice to the adverse claim of the judgment creditor of the firm.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county.

Suit by R. Ramsbottom against C. K. Bailey and others. From a decree for plaintiff and an order denying a new trial, defendant L. W. Goodwin appeals. Affirmed.

W. W. Middlecoff, for appellant. Elliott & Elliott, for respondent Ramsbottom. Jas. A. Louttit, for respondent Bailey.

PRINGLE, C. Action to foreclose a mortgage dated March 5, 1894, made by Bailey to



Ramsbottom, to secure promissory notes of mortgagor to mortgagee. Goodwin is made a party defendant, as a subsequent incumbrancer. The complaint alleges that the mortgaged premises are the partnership property of the firm of Bailey & Carpenter; that Carpenter was dead at the time of the execution of note and mortgage; that Bailey contracted the indebtedness and made the notes and mortgage in his capacity of surviving member of the firm. The answer of Goodwin alleges that the notes and mortgage were executed by Bailey individually, and for his own use and benefit, and not as surviving partner. The answer then sets up a judgment recovered on the 23d day of May, 1895, in the superior court of San Joaquin county, in favor of Goodwin against Bailey, individually and as surviving partner, whereby it was adjudged that the amount of the judgment be paid out of the partnership assets, and in which action there was filed with the clerk a copy of an order made by the court requiring Oscar F. Atwood, previously appointed receiver of the partnership, to be made a party to the action, with proof of service upon the receiver of a copy of the order and of a copy of the complaint, and a memorandum showing that the default of the receiver for not answering was entered. The court finds that the notes made by Bailey to the mortgagee were made individually, and not for the benefit of the partnership; that judgment was entered in favor of Goodwin in an action on a promissory note made by Bailey to Goodwin; that the judgment was rendered against Bailey personally and against him as surviving partner of Bailey & Carpenter, and that it was ordered by the judgment that the same should be paid out of the funds of the partnership; that no summons was ever served on the receiver, nor did he ever appear in the action; that the court had no jurisdiction to render any judgment except the money judgment against Bailey; that the claim of Goodwin is subsequent and subordinate to the claim of plaintiff as mortgagee. Goodwin appeals from the judgment and from the order denying motion for new trial.

Upon this record several questions arise. First, what does the mortgagee get? Where a surviving partner makes a mortgage upon the partnership property to secure his individual debt, the extent of the interest covered by the mortgage is uncertain, but the mortgagee is entitled to foreclose the mortgage, and acquire under foreclosure all the interest of the mortgagor, whatever it may be, in the property mortgaged.

Two other questions were involved as presented at the trial in the court below: First. If a judgment creditor, who is made a party defendant, sets up, as against such a mortgage, a judgment adjudging that his debt is a partnership debt, and should be paid out of the partnership funds, is such a judgment evidence against the mortgagee of the character of the indebtedness, or only of the fact of the

indebtedness? Second. Can the mortgagee attack the judgment collaterally? These questions were considered by the court below. The court held that the judgment was void as against the receiver, and that it determined nothing but the existence of the debt, and, as the money judgment was subsequent in time to the mortgage, it was held to be subordinate to it. We are invited in this appeal to review the action of the court below in declaring that in this judgment the court had not acquired jurisdiction to determine the character of the debt which it established. But that matter is immaterial, for it cannot be litigated in this action. To allege that the judgment debt is a partnership debt payable out of the partnership property, and therefore entitled to precedence over the mortgage given for the individual debt of the mortgagor, is to present a title adverse to the mortgage, and such title cannot be adjudicated in this action. The "mortgaged premises" means the interest of the mortgagor in these lands. The attempt of the defendant is not to contest or to claim priority over the mortgage made upon this interest of the mortgagor, but it is to assert a lien claimed to be superior to the lien of the mortgage, because it attaches to a title adverse to the mortgagor's. It does not deny that the mortgage is prior in point of time as a lien upon the interest of the mortgagor in these lands, but it avers that these lands belong, not to the mortgagor, but to the partnership, and that the judgment is a superior claim against the partnership. The position may be tested by supposing that the receiver, as representing the partnership, had been made a party defendant. He was not a proper party defendant, because the complaint admitted that the lands were partnership property, and the findings determined that the mortgagee's debt was not a partnership debt; hence there was no necessity for his presence. But, if he had been made a party defendant, he could have interposed no defense to the mortgage. The foreclosure would not have affected him. It would merely have the effect of transferring the interest of mortgagor to mortgagee,—a transfer with which he was not concerned. And the judgment creditor who claims a lien upon the partnership interest has manifestly no better position to resist the foreclosure than the partnership or its representative. As against the judgment creditor, the effect of the foreclosure will be simply to transfer the title of mortgagor to mortgagee, as of a date long prior to the rendering of the judgment. This is all that the court could properly determine in this action. This is no occasion to determine the extent of the mortgagor's interest in the partnership property. "All the title the mortgagee can obtain by a foreclosure is the title of the mortgagor." When he acquires that title, the judgment creditor may contest with him the extent of the title he has acquired. Then new questions must arise to which these are not the only necessary parties. A partnership account-

ing, in which the receiver and other creditors must be represented, will be necessary to establish the extent of the mortgagor's interest. It may be that the firm is indebted to one partner or the other to such a degree as to affect materially the apparent title of the mortgagor in the lands mortgaged. This is a possibility tending to show the reason of the rule that titles or claims adverse to the mortgagor cannot be litigated in a foreclosure suit. This case, from its double aspect, bears strong analogy to the case of *San Francisco v. Lawton*, 18 Cal. 465. In that case parties defendant held a title derived from the mortgagor subsequent to the mortgage, which was held to be barred by the foreclosure, but they held also titles adverse to the mortgagor, which it was held could not be affected by the foreclosure. In the present case the judgment against Bailey, the mortgagor, bears date long subsequent to the mortgage, and, so far as it is a lien upon the interest of the mortgagor in the lands mortgaged, it is properly held to be subordinate to the rights of the plaintiff as mortgagee. But the right which the judgment creditor claims—the right to show that the partnership interest may, upon an accounting, absorb the interest covered by this mortgage, and that he has a lien upon such partnership interest—is a claim which cannot be litigated in this action. The fact that it was set up in the answer need not preclude the defendant from an adjudication hereafter. In *San Francisco v. Lawton*, supra, the case was reversed because the adverse rights of the defendants were not saved in the decree. But in the present case the decree may be modified, in accordance with the practice suggested in *Ord v. Bartlett*, 83 Cal. 428, 23 Pac. 705, by providing that the decree is without prejudice to the adverse claim of the defendant Goodwin. Under a correct interpretation of this decree, such a saving clause is perhaps not necessary; for by the decree the defendants are barred and foreclosed only of and from all equity of redemption of said "mortgaged premises," which means only the interest of the mortgagor in the property. But the practice suggested will prevent further controversy, and define accurately the right reserved.

I advise that the decree be modified by inserting the clause, "without prejudice to the right of the defendant Goodwin to assert, in some other action or proceeding, the claim that his judgment was rendered for a partnership debt of Bailey and Carpenter, and is, by reason thereof, a lien upon the lands described in plaintiff's mortgage superior to the lien of the said mortgage," and that as so modified the judgment be affirmed, and that the order denying motion for new trial be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is modified as stated in the opinion.

(124 Cal. 229)

MORTON v. ADAMS et al. (S. F. 1,499.)<sup>1</sup>  
(Supreme Court of California. April 11, 1899.)

LIENS—DEATH OF JUDGMENT DEBTOR—ADMINISTRATION—ALLOWANCE OF JUDGMENT AS CLAIM—EFFECT.

1. The lien secured on the property of a judgment debtor in his life by docketing the judgment, as provided by Code Civ. Proc. § 671, is not affected by his death.

2. The presentation and allowance by an administrator of a judgment, which is a lien on the judgment debtor's property, as a claim against his estate, does not destroy the lien.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Cora A. Morton against W. J. Adams and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

J. C. Bates, for appellant. Van Ness & Redman, for respondents.

PRINGLE, C. Suit to quiet title. Plaintiff is owner of the land. Defendant London & Lancashire Insurance Company claims a lien by judgment upon it. The following are the facts: The said defendant recovered a judgment against Emeline Wallace on March 13, 1896. She was then the owner of the land, and the judgment was duly docketed, and became a lien upon it. Emeline Wallace conveyed the land to plaintiff, subject to the lien of the judgment, and died on May 26, 1896. Administration was taken out, and the judgment was presented as a claim against her estate, and the claim allowed on September 24, 1896. The defendant, in its answer, sets up the lien of the judgment, and in a cross complaint prays a foreclosure of the lien. The court finds that the lien is a valid and existing lien upon the property, but grants no other relief to the defendant. Thus no question of procedure is involved, only the existence of the lien. The plaintiff appeals, and contends: First, that the judgment ceased to be a lien on the death of Emeline Wallace, the judgment debtor; second, that the presentation of the claim against her estate destroyed the lien, if any existed.

1. Is the lien released by the death of the judgment debtor? The burden is on the appellant to overcome the express provision of Code Civ. Proc. § 671: "The lien continues for five years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this Code, in which case the lien of the judgment and any lien by virtue of an attachment that has been issued and levied in the action ceases." But other sections of the Code confirm, rather than negative, the continuance of the lien after the death of the debtor. Id. § 669, in making provision for the entry of a judgment, says: "If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such

<sup>1</sup> Rehearing denied May 11, 1899.



judgment is not a lien upon the real property of the deceased party, but is payable in the course of administration on his estate." And in the title devoted to estates of deceased persons the same provision is re-enacted. Id. § 1506. It is impossible to resist the effect of this express provision as implying that the judgment in other cases is a lien. If every judgment ceased to be a lien upon the death of a debtor, why make special provision that this judgment, rendered upon a decision made before the death, should not be a lien? There is also an apparent recognition of the continuing lien of judgments in section 1643, Id. In that section, in making provision for the payment of debts, there is given to "judgments rendered against the decedent in his lifetime" the same preference against the general assets which is given to mortgages against the particular property covered by the lien of the mortgage. The payment of judgments "in the order of their dates" is the enforcement of their liens. And, what is more persuasive still, to the same end is the following provision of section 1505: "A judgment creditor, having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution in like manner and with like effect as if the judgment debtor were still living." This provision, read in connection with the definition of a redemptioner (Id. § 701, subd. 2), is a recognition of the existence of the posthumous judgment lien. It might be argued that such a provision is unnecessary if the continuance of the judgment lien were an admitted and recognized fact. But the provision is a part of the section which provides that no execution shall issue upon the ordinary money judgment, but that the judgment must be presented as a claim against the estate; and then, as if to give assurance that the judgment loses no other attribute, comes this provision that the right to make redemption (to which the existence of a lien is essential) remains unimpaired. The concurrent provisions of the general practice and of the probate procedure seem to leave no doubt of the intention of the Code not to extinguish the lien upon the death of the debtor. The only apparent uncertainty arises from the fact that the judgment is required to be paid by the executor or administrator in the course of administration, and is not enforceable by execution. But this provision is not inconsistent with the continuance of the lien; and within the provision itself lies, as we have seen, a quasi recognition of the lien in ranking it with the recognized lien of the mortgage. To look at the consequences of any other conclusion than the above is to find additional confirmation for that conclusion. If the judgment debtor could transfer his property, and then die, leaving to his creditor the barren remedy of a claim against a depleted estate, judgment liens, which have been so much favored by

the enactment of 1895, would lose nearly all their value. A judgment lien has always been regarded as the highest form of security to a creditor. But if its vitality is to depend upon the life of the debtor, whose death could thus be turned to profit, the judgment security must be remodeled. As an argument against the existence of a lien, the appellant invokes the alleged absence of any provision for its enforcement, insisting that it is not embraced within the intent of section 1500. The construction of that section is not involved in this appeal, nor is the method of enforcement. But the continuance of the lien is too clearly within the intent of the other sections reviewed to be affected, in any aspect of this question, by this negative argument of the appellant.

2. Do the presentation and allowance of the judgment as a claim against the estate destroy its lien? This question is substantially answered by the above, especially by the strong implication of section 1506. Every judgment must be presented as a claim. If the presentation and allowance destroy the lien of the judgment, why does section 1506 make provision that judgments rendered after the death shall not be liens? The necessity of presentation applies to judgments rendered before as well as after the death. If the presentation is to destroy all liens, why say industriously in either case that there is no lien? The learned counsel for the appellant contends that the judgment is merged in the allowance of the claim, and therefore its lien destroyed. He cites the familiar cases which have held that for some purposes—such as bearing interest—the allowance of a claim is equivalent to a judgment, and from that contends that one judgment is merged in the other. The argument is not technically correct, for the allowance of a claim is not in any true sense a judgment. The first case cited by appellant is *In re Glenn's Estate*, 74 Cal. 568, 16 Pac. 396. That case refers to and cites "numerous decisions which hold that for some purposes the allowance of a claim is a judgment," admits that "the allowance is not conclusive upon the heirs," and cites *Magraw v. McGlynn*, 26 Cal. 420, to the effect that "claims so allowed and approved pass into judgments of a qualified character only." In the next case cited by appellant—*Walkerly v. Bacon*, 85 Cal. 140, 24 Pac. 638—a claim was allowed for only half of the amount for which it was presented. The court below held that the acceptance by the plaintiff of the partial allowance of the claim prevented his recovery of the balance. This might have given countenance to appellant's theory that the allowance had the effect of a judgment in which the claim was merged. But on appeal the ruling of the court was reversed. In no sound or reasonable sense could it be held that under our probate procedure there is such a merger of the judgment in the allowed claim as would destroy the lien of the judgment. That would make the creditor's se-

curity retrograde, rather than advance, by the merger. The essential idea of the merger is a benefit to the creditor, to give him a stronger and better position. The usual examples of merger are the absorption of a lesser estate in a larger one, and, as applied to demands, the absorption of the lower security in the higher,—a promissory note, for instance, in a judgment. This original idea of the merger was at first rigidly adhered to, and many courts refused to recognize the merger between securities of equal degree. On that account one judgment was held not to be merged in another judgment based upon it. But many later cases have held that, where one judgment is the cause of action on which another judgment is based, the first judgment is merged in the second, upon the ground that it would harass the defendant unnecessarily to allow two judgments to stand against him with the same remedies; that is, as has been said, would be to injure the defendant without benefit to the plaintiff. It has been held, however, that this merger would not be allowed to have the effect of extinguishing the lien of the first judgment when it is necessary to preserve priorities. *Hay v. Railroad Co.*, 20 Fed. 15. It is plain that none of the grounds upon which one judgment has been held to be merged in another apply to the case of the allowance of a claim under our probate procedure. A case in very close analogy to the present one is *Hardin v. Melton*, 28 S. C. 38, 4 S. E. 805, and 9 S. E. 423. In that case Mrs. Wright, a judgment creditor, had presented her judgment to the administrator of the estate of the debtor upon a call made by him for the creditors to establish their demands. Other junior judgments, sufficient, with the judgment of Mrs. Wright, to exhaust the assets of the estate, were presented to the administrator. After this presentation, Mrs. Wright caused execution to be levied upon property which had been owned by the judgment debtor at the time of the entry of the judgment, but which, as in this case, had been afterwards sold by him subject to the lien of the judgment. The court says: "The respondent contends, secondly, that if the judgment ever had lien it was lost when it was established against the estate of the deceased debtor under the call for creditors by the doctrine of merger. It may be true, when a judgment creditor comes in under such a call, that his lien on the assets being administered, the proceeds of property over which he may have a lien or otherwise, may be regarded as abandoned, but he is compensated by being entitled to be paid according to the date of his judgment, and therefore is no way injured. But to say that his lien over all of the property of the debtor, real and personal, whether the subject of administration or not, is also lost, is a startling proposition, and one which we think is without support in the decided cases." An injunction at the suit of the purchaser to restrain the sale by Mrs.

Wright under her judgment was dissolved. The circumstances of the present case are the *reductio ad absurdum* of the appellant's argument of her contention that the presentation of a judgment to the estate of the judgment debtor, who has conveyed the property in his lifetime, and whose estate is not shown to have any other asset, destroys, under the guise of the equitable doctrine of merger, the only security which the creditor had for his debt. I advise that the judgment be affirmed.

We concur: BRITT, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

124 Cal. 239

BUTLER et al. v. ESTRELLA RAISIN VINEYARD CO. et al. (S. F. 830.)

(Supreme Court of California. April 12, 1899.)

VERDICT—JUDGMENT—EVIDENCE—INSTRUCTIONS—REPLEVIN—NEWLY-DISCOVERED EVIDENCE.

1. Where there were two defendants, and they sought no affirmative relief, a verdict for "the defendant" supports a judgment that plaintiffs take nothing, and that defendants (naming them) recover of plaintiffs their costs.

2. The issue being whether goods were sold to A. on B.'s credit, or sold to B., and by his order delivered to A., the seller's books showing they were shipped to A., and charged to B., were not competent; the bookkeeper who made the entry having no knowledge of the facts, and the one directing the form of the entry being accessible.

3. Requested instructions substantially covered by the court's charge were properly refused.

4. In replevin, where the right to recover is predicated on plaintiff's purchase of the goods and delivery to defendant, a charge is erroneous which places on defendant the burden of showing that he purchased the goods.

5. Where an answer in replevin denied that plaintiff ever owned the property, and alleged that defendant bought it at a certain date, the evidence of the seller is not "newly-discovered evidence" for plaintiff, warranting a new trial, on the ground that plaintiff was "unadvised as to what contention defendant would make," he knowing who the seller was.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county.

Action by A. B. Butler and William Forsyth, co-partners under the name and style of the Raisin Growers' Packing Association, against the Estrella Raisin Vineyard Company and G. W. Taft. From a judgment for defendants and an order denying a new trial, plaintiffs appeal. Affirmed.

L. L. Cory, for appellants. H. H. Welsh and Geo. E. Church, for respondents.

HAYNES, C. Action in claim and delivery to recover possession of 14,979 raisin trays, or their value, alleged to be \$1,500. A jury trial was had, and a verdict returned for defendants, and the plaintiffs appeal from the judgment entered thereon, and from an order denying their motion for a new trial.

The business of the plaintiffs is indicated by the name or style of the co-partnership.



The Estrella Raisin Vineyard Company is a corporation engaged in the cultivation of raisin grapes, and defendant Taft is its superintendent and manager. In 1894 the plaintiffs advanced money to the vineyard company on its crop, to be reimbursed out of the proceeds when sold by the plaintiffs. The vineyard company had 10,000 trays, and it was estimated that it would require 15,000 more to handle the crop. The claim on the part of the defendants was, in effect, that they applied to the Sanger Lumber Company for the purchase of the material for 15,000 trays, that a price was agreed upon, but the lumber company refused to sell unless defendants would give security for the purchase price, payable December 1st; that plaintiffs consented to stand as sureties for the payment of the material, and the lumber company shipped the material to defendants, at the vineyard, where they manufactured the trays.

Plaintiffs claimed that they purchased the trays from the lumber company; that they were to be used by the vineyard company, but to remain the property of the plaintiffs until paid for out of the proceeds of the crop. Appellants rely, for reversal, upon four points, which will be considered in their order.

1. That the verdict was uncertain and informal, and could not form a basis for the judgment. There were two defendants,—the vineyard company and G. W. Taft. The verdict was: "We, the jury, find for the defendant." The questions at issue were whether the plaintiffs were the owners and entitled to the possession of the trays. No affirmative relief was sought by the defendants. The judgment was that plaintiffs take nothing, and that said defendants (naming them) recover from the plaintiffs their costs. The precise question here made was decided adversely to appellants' contention in *Willard v. Archer*, 63 Cal. 33. See, also, *Daft v. Drew*, 40 Ill. App. 266; *Exploring Co. v. Painter*, 1 Ind. App. 587, 28 N. E. 113; *Fries v. Mack*, 33 Ohio St. 52.

2. It is contended that the court erred in refusing to allow the plaintiffs to introduce in evidence the trade books of the Sanger Lumber Company, showing the account of the sale of the trays. The entries offered in evidence show that the trays were charged to the plaintiffs and shipped to the defendants. The witness by whom the entries were made testified that he made the entries by direction of the shipping clerk, and in accordance with instructions from Mr. Smith, the manager of the lumber company. These entries were properly excluded. Upon their face they showed only that the trays had been shipped to one party and charged to another. This, upon its face, was consistent with a sale to defendants, to be paid for by plaintiffs out of the proceeds of defendants' crop of raisins. The witness who made the entries had no knowledge of the facts. True, he was instructed by the manager to keep the account in that way. But why? He could not be per-

mitted to testify that the manager said he sold the trays to plaintiffs. That would be hearsay; and, if so, any inference that might be drawn from the instruction to keep the account in a particular way must also be inadmissible. Smith, the manager, who made the sale, would be competent to testify to the facts of the transaction; and the court could then instruct the jury whether those facts constituted a sale to the one party or the other. Our conclusion upon this point is directly sustained by the case of *Watrous v. Cunningham*, 65 Cal. 410, 4 Pac. 408. In *Greenleaf on Evidence* it is said books of account are admissible when the nature of the subject is such as not to render better evidence attainable. In *Kerns v. McKean*, 76 Cal. 89, 18 Pac. 124, it was said: "The offer of the book was an attempt to establish a negative, favorable to the cause of the plaintiff, by affirmative declarations of a third person, when it appears such third person was within the jurisdiction and actually present at the trial."

3. It is claimed the court erred in refusing to give certain instructions requested on behalf of the plaintiffs. Three of these instructions were refused. All that was material in the fourteenth and sixteenth was covered by the second and third instructions given at plaintiffs' request. The fifteenth was properly refused because it placed upon the defendants the burden of proving by a preponderance of evidence that the trays were purchased by them.

4. It is further contended by appellants that the court erred in not granting their motion for a new trial "on the ground of newly-discovered evidence." The witness by whom the alleged newly-discovered evidence could be given is Mr. Smith, the manager of the lumber company that furnished the trays, and by whom the sale was made, as shown by the testimony of the plaintiffs. If, as they testified, they purchased the trays from Mr. Smith, as the manager of the lumber company, they certainly knew that he had personal knowledge of the transaction. The real question presented, however, is somewhat different. Mr. Smith was not subpoenaed as a witness, nor even notified that his presence at the trial was desired. At the conclusion of the defendants' evidence, plaintiffs informed the court that they desired to secure the testimony of Mr. Smith, who was then in San Francisco, but was expected to return that night, and asked a continuance until the next day; and that request was granted. He did not return, and the trial proceeded. Upon the hearing of the motion for a new trial, the affidavit of Mr. Smith was read, together with an affidavit made by one of the plaintiffs to the effect that plaintiffs knew of their own knowledge that the purchase had been made of the trays from the lumber company through Smith as its general manager, but that, until the opening of defendants' case, plaintiffs were "unadvised

as to what contention defendants would make as to their title or right to the possession of the trays, or what their evidence would be." The answer of defendants was full notice of their claim. It denied that plaintiffs were or ever had been the owners of the trays; and, for a separate defense, alleged that the vineyard company "bought the trays" in September, 1894. It was not newly-discovered evidence, nor was any diligence shown to procure it. It is not necessary to comment upon the contents of the affidavit of Mr. Smith, nor upon the counter affidavits filed by defendants as to contradictory statements made by the proposed witness. Even if the court had not considered those affidavits, its refusal to grant a new trial upon the ground last considered was right.

I advise that the judgment and order appealed from be affirmed.

We concur: GRAY, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

124 Cal. 269

LABOURDETTE v. LABOURDETTE. (S. F. 1,424.)

(Supreme Court of California. April 13, 1899.)

APPEAL—FINDINGS—CONFLICTING EVIDENCE.

Where the findings were that the allegations of the complaint were "not true, and they were not corroborated by plaintiff," they cannot be set aside on appeal by a showing that they were corroborated; the evidence being conflicting, and sufficient to sustain the findings that they were untrue.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Theresa Labourdette against Joseph Labourdette. There was a decree for defendant, and plaintiff appeals. Affirmed.

Wm. J. Herrin, for appellant. P. A. Bergerot, for respondent.

BRITT, C. Action for divorce. The grounds alleged are cruelty and failure to provide the common necessities of life. The court found the facts in defendant's favor, and rendered judgment denying a divorce. The findings respond to the charges of the complaint in the manner following: "It is not true, and the allegation of such fact has not been corroborated by the plaintiff, or by any competent evidence adduced by the plaintiff, that defendant stated in the presence of third parties, or at all, that plaintiff was a 'street walker,'" and so forth; negativating in like manner each material averment of wrong contained in the complaint. The argument for appellant is directed mainly to showing that there was some corroboration of her own testimony by other witnesses at the trial. While this is one question, it is not the sole or the most serious question which confronts the plaintiff on appeal. The court

found not only that plaintiff's allegations failed of corroboration, but that they are untrue; and it is unnecessary to inquire how far her testimony was corroborated, for the evidence upon all the material issues was conflicting, and quite enough appears in the record to sustain the findings.

The judgment should be affirmed.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

124 Cal. 264

WOLFE v. TITUS et al. (S. F. 1,047.)

(Supreme Court of California. April 13, 1899.)

MORTGAGES—FORECLOSURE—INJUNCTION—PLEADING—DEMURRER.

A complaint to cancel a note, and restrain foreclosure of a mortgage securing it, stated that the note was given to defendant in consideration of his purchasing for complainant the mortgaged premises under foreclosure of former mortgages, but that defendant, to defraud complainant and acquire the title free from his claim, purchased the mortgages before sale, foreclosed them, bought the property, and took a sheriff's deed thereto, and thereafter proceeded to foreclose the mortgage sought to be restrained. Held not to state a cause of action, since it showed that defendant still recognized the property as belonging to complainant, and did not show that complainant had been damaged; and that any relief to which complainant was entitled could be secured in the foreclosure proceedings.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by George H. Wolfe against F. F. Titus, substituted for Daniel Titus, deceased, and others, to restrain foreclosure of a mortgage. There was a decree for defendants, and complainant appeals. Affirmed.

Henry Sears, for appellant. Daniel Titus, for respondents.

VAN DYKE, J. The court below sustained the demurrers of the defendants, without leave to amend the complaint, and thereupon entered judgment dismissing the action, with costs to the defendants. From this judgment, the appeal is taken. Appellant's counsel states the object of the action as follows: "This action was commenced for the cancellation of an alleged promissory note in the principal sum of six thousand (\$6,000) dollars, and mortgages to secure the same upon certain real estate, described in the complaint; and for an injunction against an action pending for the foreclosure of the note and mortgage at the commencement of the action; also to restrain the enforcement of certain deficiency judgments docketed in favor of respondents and against appellant in a prior action of foreclosure of the premises, pending at the time of the making of the note and mortgage for six thousand dollars, to wit, October 1, 1891, and commenced by the Mutual Savings Fund & Building Association against this ap-



pellant and others; and to enjoin all further proceedings upon the sheriff's deed in the last-named action; for a reconveyance of the premises; and general equitable relief." The complaint alleges: That, on or about the 1st day of October, 1891, plaintiff made and delivered to said defendant, Samuel Sussman, his certain promissory note, in the words and figures following, to wit: "\$6,000. San Francisco, Cal., Oct. 1, 1891. On or before October 1, 1892, for value received, I promise to pay to the order of Samuel Sussman, in San Francisco, six thousand (\$6,000) dollars, in gold coin of the United States, with interest from date at the rate of one per cent. per month until paid, payable monthly, in like gold coin. George H. Wolfe." That at that time plaintiff and said defendant Daniel Titus made and executed to the said defendant Samuel Sussman a deed of conveyance, in due form, of a certain lot and parcel of land in the city and county of San Francisco (describing the same). "That, on or about said first day of October, 1891, said defendant, Samuel Sussman, made and delivered to plaintiff his certain memorandum of agreement in writing; and it was then and thereby understood and agreed by and between plaintiff and said defendant Sussman that said deed of conveyance, though absolute in form, was made as security for the payment of said promissory note, and interest thereon, according to the tenor thereof. That no part of said sum of six thousand dollars, named in said promissory note, was ever paid over or received by plaintiff; but, by the terms and conditions of said agreement, said sum of six thousand dollars was retained in trust for plaintiff by defendant herein, Samuel Sussman, and was to be used and applied by said Sussman in the purchase of the above-described premises at a foreclosure sale thereof, to be had in an action then pending in the superior court of the city and county of San Francisco, California, wherein the Mutual Savings Fund & Building Association, a corporation, was plaintiff, and this plaintiff and other persons therein named were defendants; and said Sussman was to buy in said premises at the foreclosure sale thereof, at the expense of and for plaintiff, and the amount paid therefor was to be paid out of said fund of six thousand (\$6,000) dollars. That the costs of said foreclosure and sale, attorney's fees therein, street assessments, taxes, and insurance, and any and all other expenses incurred in the premises, at the time of said purchase, were likewise to be paid out of said trust fund of six thousand (\$6,000) dollars. That said action was brought to foreclose a certain mortgage on the premises above described, and to obtain judgment for the debt thereby secured and owing by plaintiff herein to said Mutual Savings Fund & Building Association, and to subject to the lien of said mortgage certain other mortgage liens subsequently executed by plaintiff herein to certain persons named and made defendants in said action, to wit" (giving the names

of said parties, including the defendant Daniel Titus, but without giving the amounts of their said mortgage liens). The complaint then proceeds to state: That the defendants Titus and Sussman, for the purpose of acquiring title to the premises clear of all claims or interest of the plaintiff, and thereby to defraud him, gained control and purchased all the mortgages held by both plaintiff and defendants in said action, and the debts thereby secured, and thereafter obtained judgment and procured a decree of foreclosure and order of sale to be made, foreclosing all of said mortgages and directing the sale of said premises. Thereafter said premises were sold by the sheriff of the city and county of San Francisco, on said foreclosure, to said defendant Samuel Sussman; and, there being no redemption therefrom, a sheriff's deed was issued to him, and recorded on the 8th day of July, 1892, in the office of the county recorder of the city and county of San Francisco. That said Sussman paid nothing in consideration of his pretended purchase of said property at said sheriff's sale, but that a portion of said fund of \$6,000 was used to purchase all the said mortgages and debts thereby secured, set up in said suit, and to pay the expenses and costs of said proceedings. And it is alleged, upon information and belief, that the remaining portion of said fund of \$6,000 has been kept and retained by said defendants for their own use and benefit, and that the amount thereof so retained exceeds the sum of \$1,000. And it is charged that there was a conspiracy between the defendants Sussman and Titus, and fraud on their part in the transactions stated, and that the said defendant Sussman, by virtue of the purchase and foreclosure referred to, claims title to the premises, as against the plaintiff. It is also alleged that, "on or about the 9th day of July, 1896, Samuel Sussman, the defendant herein, commenced an action in the superior court of the city and county of San Francisco to foreclose the said mortgage of October 1, 1891, and to recover the amount of said note, of even date, with accrued interest and alleged expenditures; that said action is now pending and at issue." Simmered down, the substance of the complaint is that, instead of using the trust fund mentioned in the note and mortgage to Sussman of October 1, 1891, to buy in the property at sheriff's sale under the foreclosure proceeding then pending, the defendants Sussman and Titus bought up those claims before the same were reduced to judgment; and that, instead of using the whole \$6,000, plaintiff avers that not quite \$5,000 was used.

On well-established principles of law, the appellant must fail. It is elementary that no one may go into court without having some right to enforce or wrong to redress; and that facts must be stated showing such right or wrong to exist; and that mere epithets, however profusely used or vehemently expressed, will not supply the place of facts in a pleading. It is not averred in the complaint that the

plaintiff has been damaged in the least, nor are there facts stated from which such a conclusion could be drawn. According to the plaintiff's own admission, the defendant Sussman has paid out about \$5,000 in removing mortgages and incumbrances upon the property; and the very fact that he brings the suit now pending to foreclose his mortgage or trust deed of October 1, 1891, shows that he treats the property as still belonging to the plaintiff, subject to his claim for moneys advanced under the agreement set out in the complaint. In the face of these facts shown by the complaint, the plaintiff, without paying or offering to pay any of the money advanced for his benefit by defendant Sussman, asks that the promissory note and mortgage made and executed October 1, 1891, be delivered up and canceled, and that the defendant execute a good and sufficient deed of conveyance of said premises. As stated in *Vineyard Co. v. Tuohy*, 107 Cal. 243, 40 Pac. 386: "The first suggestion which presents itself to the mind, upon a perusal of the complaint, is that the plaintiff is seeking equity without doing equity." In that case, the plaintiff had received a conveyance of property of the value of about \$36,000, on account of which it had paid \$10,000, and given its note and mortgage as security for the balance of the purchase price, and brought an action to have the notes and mortgage canceled, without paying or offering to pay the balance of the purchase price of the property which it had received. See, also, Civ. Code, §§ 1691, 3407; *Maddock v. Russell*, 109 Cal. 417, 42 Pac. 139. If the plaintiff should be entitled to any relief growing out of the transactions mentioned in the complaint, there is no reason why it could not be amply afforded in the action now pending by defendant Sussman to foreclose the mortgage. The action of *Waymire v. Railway Co.*, 112 Cal. 646, 44 Pac. 1086, is similar to this, and in the opinion of the court there it is observed: "It seems unaccountable that plaintiffs were advised that facts which would entitle them to a judgment nullifying the sale and transfer of the bonds, and perpetually enjoining the further prosecution of the action to foreclose the deed of trust, could not be made available as a defense to the foreclosure action. \* \* \* The corporation was not at liberty to institute an action in another court, nor in the same court, to enjoin further proceedings in the foreclosure action, but was bound to plead the facts alleged in plaintiff's complaint herein by answer, or, if necessary to aid the defense, by cross complaint in the foreclosure action,"—citing *Pom. Eq. Jur.* §§ 1371, 1372; *High, Inj.* § 52; *Railway Co. v. Ramsey*, 45 N. Y. 637; *Graham v. Railroad Co.*, 118 U. S. 161, 6 Sup. Ct. 1009; *Crowley v. Davis*, 37 Cal. 268; *Judson v. Porter*, 51 Cal. 562; *Wilson v. Baker*, 64 Cal. 475, 2 Pac. 253; *Spell. Priv. Corp.* § 612. Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.



Penfield and others. Judgment for defendants, and plaintiff appeals from an order denying a motion for new trial. Affirmed.

Edward M. Selby, for appellant. Richards & Carrier, for respondents.

CHIPMAN, C. Action to have a trust declared in favor of plaintiff as to certain lots situated in Santa Barbara, and that defendants E. H. and W. H. Penfield convey said lots to plaintiff. They denied the alleged trust, and averred that defendant E. H. Penfield took a conveyance from plaintiff of the lots in question and holds the title in trust, as he alleges it to be. Defendant W. H. Penfield filed a cross complaint asking foreclosure of a deed held by him, as a mortgage, to one of the lots, the subject of the alleged trust. J. C. Gilbert is husband of plaintiff, and is made defendant in the cross complaint. The court, as conclusions of law, found plaintiff not entitled to the relief asked by her; that the legal title to the lots in question is vested in defendant E. H. Penfield, subject to certain trusts set forth in the findings; that defendant W. H. Penfield has a valid, subsisting mortgage on certain of the property, and is entitled to foreclosure thereof; and that the rights of plaintiff and said J. C. Gilbert are subordinate to the lien of said W. H. Penfield. Plaintiff appeals from an order denying her motion for a new trial, but does not appeal from the judgment. The only question presented by counsel for appellant is, does the evidence support the findings?

Plaintiff and defendants, the Penfields, are cousins. Plaintiff came to California in August, 1887, and was then unmarried, and made her home with defendant E. H. Penfield, at Santa Barbara. Upon the recommendation of her cousin, E. H., she purchased certain Santa Barbara city lots in block 80 and in block 147, and a certain other lot she purchased contrary to his advice. E. H. testified, and the court found, that before she made any purchases he verbally promised, as to those made upon his approval, "that he would stand between her and loss, but \* \* \* he received no consideration for or by reason of, and reaped no benefit from, said purchases, or any of them, and had no interest in them." The purchases in block 80 and block 147, recommended by E. H., were made in December, 1887; the lots in block 80 being subject to two mortgages held by one Hassinger, and the lot in block 147 being under mortgage to one Pilcher. On March 27, 1888, plaintiff borrowed \$600 on her note, signed also by E. H., to raise money for her own uses, and which was used by her. This note E. H. afterwards paid, and "plaintiff has never repaid him the whole or any part of the sum so paid by him on said note." In 1889 plaintiff paid the Pilcher mortgage, and the spring of 1890 found her the owner of the lots in blocks 80 and 147, subject to the Hassinger mortgages. Payment was pressed by Hassinger, "and, plain-

124 Cal. 234

GILBERT v. PENFIELD et al. (L. A. 447.)

(Supreme Court of California. April 12, 1899.)

APPEAL—REVIEW—TRUSTS—POWER OF TRUSTEE—MORTGAGES.

1. A finding on conflicting evidence is conclusive.

2. Where the grantee in a trust deed was authorized to take up two mortgages, foreclosure of which was threatened, and to hold the property until a favorable time for its sale, and an advantageous sale was not possible, he had implied power to mortgage the property to pay the two mortgages.

3. Where the grantee in a trust deed is authorized to mortgage the premises for the purpose of taking up two overdue mortgages and holding the property until a favorable time for its sale, the giving of a mortgage will not prevent the execution of the trust.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county.

Action by Adah H. Gilbert against E. H.

tiff being unable to meet the indebtedness, the defendant E. H. Penfield offered to take the property from plaintiff for the purpose of handling the indebtedness for her and carrying the property until an advantageous sale could be effected. Accordingly plaintiff conveyed to him all the property described in the complaint upon the following trusts, and no others: To provide for taking up the two Hassinger mortgages, and to hold the property until a favorable time to sell the same should come, at which time he should sell the same, and apply the proceeds of sale first to the payment of the sum due upon the indebtedness represented by the Hassinger mortgages, and to reimburse himself for the payment of the six hundred dollar note, and then to apply the surplus to repaying plaintiff her outlay on said lots, and then to divide any excess between plaintiff and himself." Plaintiff conveyed to E. H., upon the trusts above stated, April 30, 1890; and on the same day E. H. procured his brother, defendant W. H., to purchase the two Hassinger mortgages for the sum of \$999, the amount then due thereon. On November 12, 1891, E. H. mortgaged the lots in block 80 to W. H. for the amount of principal and accrued interest of the Hassinger mortgages, and these latter mortgages were satisfied of record. On August 30, 1895, E. H. delivered to W. H. a deed conveying these lots to W. H., which bore date May 1, and was acknowledged May 2, 1895. This deed was intended as a mortgage, and upon its delivery W. H. canceled and surrendered to E. H. the mortgage of November 12, 1891, and the note secured by it. The indebtedness represented by both the mortgage and the deed "is the same indebtedness secured by the two said Hassinger mortgages." There is no finding and no evidence explaining the reason for substituting first the mortgage and next the deed for the Hassinger mortgages held by W. H. But the court finds that E. H. executed these instruments without any intention to defraud plaintiff, and that when he received the deed he (W. H.) had no notice of any rights of plaintiff, except that E. H. held the title upon the trusts as found by the court above stated.

While claiming that the evidence does not support the findings, appellant makes the case really to turn upon the question, had E. H., as trustee, the power to mortgage? The evidence is conflicting in many particulars,—especially as to the trust alleged in the complaint, and the trust as found. There is evidence tending to show that the trust as found by the trial court correctly states the understanding of the parties; and, as the evidence is conflicting, the finding is conclusive upon this court. Turning to the language of the trust, and interpreting it in the light of the then existing circumstances, and the purpose for making the conveyance, we think the trust carried with it the power to remortgage the property to take up the Hassinger mortgages, foreclosure of which was threatened. The

court found, on sufficient evidence, that market values had greatly fallen, and sale could not be made to any advantage. The only practical way out of the danger which lay in foreclosure by Hassinger was to find some one who would carry the Hassinger mortgages. It was not of any importance to plaintiff whether the one who came to her relief should do so by taking an assignment of those mortgages, and holding them, or whether he should require a new mortgage to take their place. The Hassinger mortgages were past due, and would in course of time be barred by limitation. The statute had run against the Hassinger notes before this action was brought; and in point of fact W. H. did not ask foreclosure until five years after he took his mortgage, and not then, as he testified, until plaintiff had forced him to it, for his own protection, by this action. The power given by the trust was "to provide for taking up the two Hassinger mortgages, and to hold the property until a favorable time for the sale of the same should come." The evidence was that a sale could at no time, after plaintiff conveyed to E. H., have been made for enough to pay the indebtedness secured to be first paid by it. That this contingency of remortgaging must have been contemplated is, it seems to me, obvious from the clause authorizing E. H. "to provide for taking up the two Hassinger mortgages," followed by the clause, "and to hold the property until a favorable time for the sale," etc. How else could he provide for taking up these mortgages, if the sale of the property was to be postponed indefinitely? It is true, as claimed by appellant, that every act of the trustee not authorized by, or which is in contravention of, the trust, is void; but a trustee has "authority to adopt measures and to do acts which, though not specified in the instrument, are implied in its general directions, and are reasonable and proper means for making it effectual." 2 Pom. Eq. Jur. § 1062. I think the power to mortgage is not only clearly implied in the directions given, but that the natural reading of the trust gives the authority. It is not necessary, therefore, to fall back upon the alternative proposition of defendants in support of the decree of foreclosure, to wit, that W. H. was subrogated to the rights of Hassinger, and that the lien of the latter was preserved, although the evidence of the debt was extinguished, and that, even if the new mortgage made by E. H. to W. H. was void, the original or Hassinger mortgages were revived for the protection of W. H., who advanced the money. These are well-recognized and just principles of equity jurisprudence; and, if the exigencies of the case demanded, it might be applied here, but we find no occasion for doing so.

Appellant points out several alleged contradictions in the findings. For example, the court finds that the execution of the trust has not become impossible on account of the conveyance alleged (i. e. the mortgage to W. H.). Another example: The court finds that this conveyance (mortgage) was not fraudulent.



The contention is that, because the conveyance was unauthorized and void, it must be treated as a fraud upon plaintiff's rights, and that, if allowed to be foreclosed, it would make the trust impossible; hence the findings are contradictory of, and inconsistent with, each other. These alleged consequences flow from the erroneous assumption that the mortgage to W. H. was unauthorized. And so of the other assignments of error. They all find their origin in the same unwarranted assumption.

The foregoing disposes of the points made by appellant's brief; and, as we discover no error in the conclusions of the court, it is advised that the order denying the motion for a new trial be affirmed.

We concur: HAYNES, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying the motion for a new trial is affirmed.

124 Cal. 255

ODD FELLOWS' SAV. BANK v. BRANDER  
et al. (Sac. 454.)

(Supreme Court of California. April 12, 1899.)

VENDOR AND PURCHASER—ASSIGNMENT OF CONTRACT—FORECLOSURE OF RIGHTS—DECREE  
—ATTORNEYS—RATIFICATION.

1. Assignees of a purchaser, who were made parties to a suit to foreclose all rights under the contract, cannot complain that the privilege given the purchaser, of time in which to perform the contract, did not, in terms, include them, where they did not seek to perform as his assignees.

2. In a suit to foreclose all rights under a land contract, the decree need not order the property to be sold in case the purchaser should not perform the contract within the additional time given him by the decree.

3. Where a purchaser has received the rents and profits, and has defaulted in payment of taxes and rent due from him to the vendor to a greater amount than payments made on the price, he cannot, on a decree foreclosing his rights, recover back the payments on the price.

4. Where a co-defendant in a suit to foreclose a purchaser's rights under a land contract appeared as attorney for all the defendants, the trial judge had a right to presume authority in him to acknowledge, on behalf of all, service of demand of payment, and tender of a deed.

5. A stipulation entered into by the attorney, reciting such service on him, was a ratification of his previous acknowledgment of service.

Commissioners' decision. Department 2. Appeal from superior court, Sutter county.

Action by the Odd Fellows' Savings Bank against George L. Brander and others. From a decree for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Henry Thompson, for appellants. Charles L. Tilden, for respondent.

CHIPMAN, C. Action to foreclose the rights of a vendee under a contract for the purchase and sale of land. Plaintiff had the decree, from which, and from an order deny-

ing defendants' motion for a new trial, defendants appeal.

Findings of fact were waived, and the cause was heard upon a "stipulated statement of facts," from which the following appear: "On June 10, 1892, plaintiff and defendant Brander entered into an agreement by which plaintiff agreed to sell, and Brander agreed to purchase, certain twenty-nine thousand acres of land, situated in the county of Sutter, for the sum of fifty thousand dollars, as follows: Five hundred dollars on executing the agreement, twenty-five hundred dollars thirty days from its date, three thousand dollars one year from its date, and the balance (forty-four thousand dollars) two years from date." Brander was given possession, with the right to rents and profits, and was to pay the taxes on the property, and \$500 a year as rental, but no interest on the deferred payments of the purchase price. The contract of sale also included certain levee district warrants, to go with the land. Brander made the cash payment of \$500, and the 30-day payment of \$2,500, and \$500 on account of rent, but no more. "Said agreement has not been performed by said Geo. L. Brander, or by any one else in his behalf." "Plaintiff has complied with and performed all the terms and conditions of said contract on its part to be performed, and plaintiff is ready and willing to, and has offered to, perform all the terms of said contract on its part to be performed; and the plaintiff has duly demanded of the defendants that they carry out the terms of said agreement on their part to be performed, and that they pay the balance due under said agreement, but defendants have not made such payments, and have made no payments under said agreement, other than those set forth in the complaint." Plaintiff paid all taxes after the first installment for 1893-94. Brander assigned his interest in the contract to the other defendants. On July 2, 1894, "C. L. Tilden, as attorney for the plaintiff, and in its behalf, served on said defendant Henry Thompson a written demand," directed to each of the defendants, requiring them to comply with the terms of said agreement; "and the said Henry Thompson on said 2d day of July, 1894, as the attorney for said parties [defendants], did admit service of said demand on behalf of all the parties to whom it was addressed, by written indorsement thereon as follows: 'Service of the within demand and notice is hereby admitted on behalf of all the parties to whom it is addressed. [Signed] Henry Thompson, Attorney at Law.'" On February 21, 1895, said Tilden, as attorney for plaintiff, made a tender of deed to the defendants, through said Thompson, in manner similar to the service of notice last above mentioned. As conclusion of law the court found that "Brander should perform his contract within sixty days, or be foreclosed of his rights under the same. The plaintiff's title should be quieted against the other defendants." Decree was entered accordingly.

1. Appellants claim that, as the contract had passed to the defendants other than Brander, the 60-day limitation in which to make payment ought to have run to them, and not to Brander. The promise to pay was by Brander alone. The other defendants assumed no liability to plaintiff, and none was enforceable against them by plaintiff. They were made parties, and, as assignees of Brander, could have fully protected themselves by asking that they be permitted, as Brander's assignees, to bring the money into court, and make payment within the time fixed by the court. They made no such request, and no cause appears, either from the answer or the stipulated facts, entitling them to be treated as principal debtors or vendees. Brander's obligations to plaintiff remained undischarged after his assignment to the other defendants. Civ. Code, § 1457. These latter defendants have no cause for complaint that the 60-day privilege to pay for the property and take a deed did not, in terms, include them. *Truebody v. Jacobson*, 2 Cal. 269.

2. Appellants contend that the decree should have ordered the property sold in the event of failure to redeem within 60 days, as in the case of a mortgage. Appellants misconceive the purpose of the remedy. The course pursued in this case was in harmony with the well-settled practice in this state in like cases. *Sparks v. Hess*, 15 Cal. 186; *Keller v. Lewis*, 53 Cal. 113, 56 Cal. 466; *Fairchild v. Mullan*, 90 Cal. 190, 27 Pac. 201; *Railroad Co. v. Allen*, 112 Cal. 455, 44 Pac. 796; *Rayfield v. Van Meter*, 120 Cal. 416, 52 Pac. 666.

3. It is objected that the decree gives plaintiff the land, and allows it to retain the money paid on account of the price. This was not error. It is well settled that "a party who has advanced money or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done." *Hansbrough v. Peck*, 5 Wall. 497; *Ketchum v. Everston*, 13 Johns. 358; *Keller v. Lewis*, supra. This is true, whether or not the contract provides for a forfeiture of payments made in case of the vendee's failure to complete the purchase. *Glock v. Colony Co. (Cal.)* 55 Pac. 713. The present case is a striking illustration of the wisdom and justice lying at the root of this rule. Brander and his assigns have been in possession of this land since the purchase, presumably receiving its rents and profits, and have not only failed to make the payments due on the principal debt, but have defaulted in payment of rent and taxes to an amount greater than the payments made on the price. The contention of defendants has no merit. The law will not permit defendants to profit peculiarly by their own default.

4. Finally, it is urged that there was no tender of deed and demand of payment made by

plaintiff. The stipulated facts clearly show both tender and demand. Mr. Thompson, who acknowledged service of these notices, and entered into the stipulation of facts on behalf of defendants, is the same Mr. Thompson who appeared in the action as a co-defendant, and as attorney for all of them. We think the trial judge had the right to presume authority in Mr. Thompson to acknowledge service, and, furthermore, to hold that his stipulation as to the facts was a ratification of his previous acts. It is true that the answer denies a tender and demand, but the stipulation was entered into long after the answer was filed, and admits that in this particular the allegations of the complaint are true, and that the allegations of the answer are untrue. We discover no error, and advise that the judgment and order be affirmed.

We concur: HAYNES, C.; PRINGLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

6 Cal. Unrep. 279

MEHERIN v. SAUNDERS, Constable, et al.  
(S. F. 1,073.)

(Supreme Court of California. April 13, 1899.)

INSOLVENCY—CONSTABLE'S SALE—ENFORCEMENT OF BID—SET-OFF—ESTOPPEL.

1. In an action by an assignee in insolvency to enforce the payment of an amount bid for property of the insolvent at a constable's sale, defendant may set off his claim for money borrowed from him by the insolvent, which had been filed and proved against the insolvent's estate.

2. The fact that a creditor of an insolvent had filed and proved his claim against the estate, and accepted a dividend based on the entire amount, does not estop him from setting off such claim, in an action by the assignee to enforce payment of a bid for property of the insolvent sold at constable's sale.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Mark Meherin, assignee in insolvency of the California Steamship Company, against J. N. Saunders, constable, and another. Judgment for plaintiff, and defendant Thomas Ambrose appeals. Reversed.

A. Morganthal, for appellant. Grant Jackson and Mullany, Grant & Cushing, for respondent.

GAROUTTE, J. Defendant Ambrose bid \$10,000 for a piece of realty at an execution sale held by a constable. He paid the constable \$855 in money, and gave his check for the balance of the purchase price. The money paid covered the judgment and costs, and the execution was returned satisfied. Thereafter payment of the check was stopped by Ambrose, and no more money was ever received under the sale. Upon this state of facts the judgment debtor's assignee in insolvency, the plaintiff herein, brought an action



against the constable and his bondsmen, and recovered damages to the amount of the balance of the purchase price against the constable, and to the amount of \$1,000 against his bondsmen. Upon appeal that judgment was affirmed by this court. *Meherin v. Saunders*, 110 Cal. 463, 42 Pac. 966. Subsequent to the foregoing proceedings the assignee in insolvency brought this action against the constable and the defendant Ambrose, purchaser at the sale, for the balance of the purchase price. The constable defaulted, and Ambrose now appeals from the judgment rendered against him, and also from the order denying his motion for a new trial.

There are a great number of interesting questions raised by the appeal in this case, but we refrain from discussing them, in view of another proposition urged, the disposition of which seems to finally end this litigation. By the answer of defendant Ambrose, he alleged that the insolvent debtor, represented by the plaintiff in this action, was, at the time of the constable's sale, and also at the time this action was brought, indebted to him in the sum of \$80,000, and the evidence at the trial admits the existence of a large indebtedness. In substance, the trial court found that plaintiff's insolvent was indebted to defendant at the time of the constable's sale, to wit, October 24, 1891, in the sum of \$28,604, and that upon January 5, 1892, defendant proved, presented, and filed his verified claim as a creditor of the insolvent's estate for said indebtedness. The court also found that subsequently defendant claimed and received a dividend based upon the amount of such indebtedness from the plaintiff as assignee in insolvency of the judgment debtor. The court then made the following finding: "That the said sum for and on which the said California Steamship Company was on the said 24th day of October, 1891, indebted to the defendant Thomas Ambrose, and the said balance of said purchase price of and for said real property, so bid in and purchased by said defendant Thomas Ambrose at said constable's sale, on said 24th day of October, 1891, was not and are not mutual debts and credits or mutual debts or credits, and defendant Thomas Ambrose did not become, or intend to become, a debtor of said California Steamship Company by reason of such purchase by him of said property, or for any part of the purchase price at which he purchased the same; that the said defendant Thomas Ambrose, when he presented, proved, and filed his said claim against said insolvent corporation, said California Steamship Company, on or about the 6th day of January, 1892, did not claim that the balance of his said bid, to wit, said sum of nine thousand one hundred and forty-five dollars, for and on account of which this action was brought, or any part thereof, was a credit upon the said sum of \$28,604.47, so owing by said California Steamship Company to him, and he did not allow or give or permit any

credit for said purchase price so bid by him for said property, or for any part thereof." As to that portion of this finding bearing upon defendant's intention to become a debtor of the judgment debtor, we do not see its materiality. We are unable to see how it affects this case, even if it be conceded that Ambrose did not intend to become a debtor of the judgment debtor when he made the purchase at the constable's sale. Again, it is difficult to see how any assistance to support the judgment in this case is given by a finding which declares as a fact that Ambrose did not become, nor intend to become, the debtor of the judgment debtor when he made the purchase. If he did not become a debtor of the plaintiff's insolvent by his failure to pay the purchase price, we are at a loss to see how the plaintiff can support the action.

By the findings quoted, the court declares that these cross demands are not mutual debts and credits or mutual debts or credits. As to the nature of the plaintiff's cause of action, his counsel stated, during the progress of the trial, to the following effect: Counsel for plaintiff: "You are mistaken in that. We do not claim it is a debt. It is money that he owes, in the sense of having purchased property, and owes the purchase price. We have to allege that money is owing from him, but it is not in the sense of a debt. He got something for a given sum of money. He did not pay that money. That is no debt. There was no credit given." Counsel for Ambrose: "You admit, then, that Ambrose does not owe anything to the California Steamship Company?" Counsel for plaintiff: "He owes us the purchase price for certain land." We are at a loss to understand the fine distinction here attempted to be drawn by plaintiff's counsel as between a debt and an amount due from defendant as the balance of the purchase price of a tract of land; yet there is nothing in a name, and, whatever name may be given to this claim by plaintiff, upon his own statement his action is one arising upon contract, and we see no reason in law why defendant's claim, which, as disclosed by the evidence, was for borrowed money, could not be offset against it. In his brief plaintiff's counsel says but little upon this question, but intimates that defendant is estopped by his conduct to rely upon a counterclaim. We see nothing in defendant's conduct in any way creating an estoppel against him. The fact that he proved his claim against the insolvent's estate for the entire indebtedness, and that he accepted a dividend based upon the entire amount of that indebtedness, does not create an estoppel. Indeed, appellant by his answer denied that he owed this money, denied that he even purchased the property, and denied that he agreed to pay \$10,000 for it. But the court decided against him, and it knew best. He was mistaken as to the fact in this regard, and, that fact being established contrary to his views, he then had the right to defend himself behind his second

line of intrenchments, and claim an offset against the balance of the purchase price. By his answer and his evidence, he had the right, under the law, to defend himself behind as many different lines of intrenchments as he saw fit. As to the legal status of a case in which the constable was suing this defendant for a balance of the purchase price, we are not concerned. Here the plaintiff stands in the shoes of the judgment debtor. His position is no better and no worse. And as to the judgment debtor seeking to recover \$9,000 as balance due from defendant upon the purchase price of a tract of land, when at the same time that debtor owes the defendant \$28,000 for borrowed money, the law will not sanction such a result. The findings are not sufficiently full to justify an order that judgment be entered for defendant in the trial court, but for the foregoing reasons the judgment and order are reversed, and the cause remanded.

We concur: HARRISON, J.; VAN DYKE, J.

(124 Cal. 270)

McKAY v. NEW YORK LIFE INS. CO.  
(S. F. 949.)<sup>1</sup>

(Supreme Court of California. April 13, 1899.)

LIFE INSURANCE—FRAUD OF AGENT—COMPLAINT—SUFFICIENCY—RECOVERY OF PREMIUM.

1. A complaint alleged that the local agent of defendant insurance company represented to plaintiff that on the payment of a specified annual premium the company would issue to him a life policy which would pay \$5,000 in case he survived for 10 years, and that in reliance thereon plaintiff made a written application, which was prepared by the agent, and read to plaintiff, with the assurance that it was properly drawn, and "all right," which induced plaintiff to sign it; that the agent then knew his representations to be false and fraudulent; that plaintiff paid the first premium, and in due time received a policy which called for \$2,520 on the expiration of the 10 years, whereupon he repudiated the contract, and sues to recover the first premium paid. The application was involved in its terms, and could not be readily understood by a person like plaintiff, who was not expert in such matters. *Held*, that the complaint is not subject to a general demurrer on the ground that it is insufficient to show fraud on the part of the agent.

2. An averment that a person knew his promises to be false and fraudulent necessarily implies that they were in fact false and fraudulent, and that he had no intention to perform them.

3. A policy provided that statements or promises by the agent should not affect the rights of the company unless reduced to writing, and presented in the application. The agent falsely and fraudulently represented to the applicant for insurance that the payment of a specified annual premium would entitle him to a \$5,000 policy, payable in 10 years. The policy received called for \$2,520 at the end of the 10 years, whereupon the insured repudiated the contract. *Held*, that the insured could recover from the company the first premium paid.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

<sup>1</sup> Rehearing denied May 13, 1899.

Action by Alexander McKay against the New York Life Insurance Company. From a judgment entered on sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Wm. J. Herrin, for appellant. Page, McCutchen & Eells, for respondent.

BRITT, C. In this cause the defendant demurred to plaintiff's amended complaint for alleged want of facts to constitute a cause of action. The demurrer was sustained, and judgment passed in defendant's favor. It is, in substance, alleged in said complaint, among other things, that one Mouser, an agent of the defendant insurance company, represented to plaintiff that, in consideration of the payment by the latter of a specified annual premium, the company would issue to him a policy of life insurance in such form as to entitle him (among other benefits) to receive from defendant the sum of \$5,000 in case he survived a period of 10 years; that plaintiff believed such representations to be true, and in reliance thereon, and at the instance of said agent, made a written application to defendant for a policy; that the agent prepared such application, and read it to plaintiff, and assured him that it was properly drawn, and "all right"; that plaintiff, induced by said statements and conduct of said agent, signed such application without reading it; that the agent then knew his said representations to be false and fraudulent; that plaintiff paid the first annual premium, and in due time received a policy from defendant, which, upon examination, he discovered would entitle him upon the expiration of the 10-year period to receive the sum of \$2,520 only; that thereupon he returned the policy to defendant, "and repudiated and rescinded the contract of insurance therein set forth." He prays judgment for the amount of the first premium paid as aforesaid.

Among the stipulations contained in said application for a policy (a copy of which is annexed to the complaint as an exhibit) was the following: "Inasmuch as only the officers at the home office of the company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written answers referred to, no statements, promises, or information made or given by or to the person soliciting or taking this application for a policy \* \* \* shall be binding on the company, or in any manner affect its rights, unless such statements, promises, or information be reduced to writing, and be presented to the officers of the company, at the home office, in this application." Plaintiff does not claim that the policy issued to him was not such a policy as was required by the terms of said written application.

Defendant contends, first, that the averments of the complaint are insufficient to make a case of fraud on the part of Mouser, the agent. We are disposed to concede that,



as against a demurrer for uncertainty, the complaint could not stand; but the demurrer is general,—merely that the complaint does not state facts sufficient to constitute a cause of action,—and this objection, it has often been held, cannot prevail when the essential facts substantially appear, although some of them are stated defectively. See *Santa Barbara v. Eldred*, 108 Cal. 294, 41 Pac. 410. The particular of the complaint concerning which we have had most doubt is whether it shows that plaintiff did not, without his own fault, understand the terms and effect of the application signed by him. The paper, however, was itself such that its full import would not be understood readily by one not expert in matters of insurance. It is shown by the application that plaintiff's business is unconnected with such matters, and it seems probable that, if he had employed his entire time in perusing the document from the date of his signature thereto until the present, he could scarcely have ascertained from its terms alone whether it varied materially from the oral representations of Mouser. Considering the character of the document in connection with the averments of the complaint regarding Mouser's assurances that the application was properly drawn, and was "all right," etc.,—from which plaintiff would naturally suppose that it was so drawn as to procure the policy Mouser had promised,—we conclude that the complaint does show sufficiently that plaintiff signed the paper misconceiving its meaning, and without material fault on his own part. In this aspect, therefore, the case is within the rule of *Maxson v. Llewelyn* (Cal.) 54 Pac. 733. Similarly, the averment that Mouser knew his promises to be false and fraudulent carries necessarily the implication that they were in fact false and fraudulent, and also that he had no intention that they should be performed. These inferences, questioned by the general demurrer only, must be imputed to the complaint for verity in like manner as if they had been directly charged. See, besides cases cited above, *Hays v. Glosster*, 88 Cal. 560, 565, 26 Pac. 367; *Langley v. Rodriguez* (Cal.) 55 Pac. 406.

Secondly, it is contended that the fraud of Mouser, if sufficiently alleged, does yet not attach to the defendant. This is asserted on the strength of the provision of the application that statements and promises of the solicitor shall not affect the rights of the company unless reduced to writing, and presented in the application. We do not understand that this provision operates to confer upon the company the right to retain money received in consequence of fraud practiced by its agent, after it has knowledge of the fraud. How could it retain money under such circumstances without becoming party to the fraud? Upon the case stated there was never a free consent to the apparent contract. The agent practiced fraud on both insurer and insured, and justice requires that the contract be held voidable at the instance

of either party, if injured thereby. And such we conceive to be the law deducible from the decisions of this court as well as others. *Maxson v. Llewelyn* (Cal.) 54 Pac. 733; *Jurgens v. Insurance Co.*, 114 Cal. 161, 45 Pac. 1054, and 46 Pac. 386; *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837; *Sawyer v. Insurance Co.*, 42 Fed. 33-35; *Selby v. Insurance Co.*, 67 Fed. 490; *Loehner v. Insurance Co.*, 17 Mo. 256; *Fisher v. Insurance Co.*, 160 Mass. 386, 35 N. E. 849; *Id.*, 162 Mass. 236, 38 N. E. 503. The judgment should be reversed, with directions to the court below to overrule the demurrer.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to the court below to overrule the demurrer.

124 Cal. 297

KLOKKE v. ESCAILLER et al. (L. A. 589.)  
(Supreme Court of California. April 14, 1899.)

MORTGAGES — FORECLOSURE — ATTORNEY'S FEES —  
FINDINGS OF COURT—REVERSIBLE ERROR.

1. Under a mortgage stipulating that, on foreclosure, mortgagee may include counsel fees, together with all payments made by mortgagee for certain purposes, all of which payments shall be deemed to be secured by the mortgage, mortgagee cannot have such counsel fees included in the mortgage lien, since it is not specified that the mortgage shall secure them.

2. A failure to find on an issue presented by defendant's pleading is not reversible error, where it is not shown, by bill of exceptions or otherwise, that evidence was submitted on the issue.

Department 2. Appeal from superior court, Los Angeles county.

Action by Ernst F. C. Klokke against Catharine Escailier and others. From a judgment for plaintiff, defendant Escailier appeals. Modified.

Appel & Whitney, for appellant. H. O. Collins, for respondent.

PER CURIAM. Foreclosure of a mortgage on real estate. The complaint is verified. Plaintiff had judgment, from which defendant Catharine S. Escailier appeals on the judgment roll alone.

Appellant objects to the judgment upon two grounds: (1) That it was error to allow attorney's fees; and (2) that the court erred in failing to find upon the issues raised by her answer.

1. The mortgage was given to secure the payment of a promissory note. Upon the subject of attorney's fees it contained the following provision: Upon default "the mortgagee may foreclose this mortgage, and may include in said foreclosure a reasonable counsel fee, to be fixed by the court, together with all payments made by the mortgagee for insurance upon the buildings on said premises,

and for any adverse claims to the mortgaged property, for searching title to the mortgaged premises, to the execution hereof, and for taxes on said premises, other than the taxes on this mortgage, or the money hereby secured, all of which payments the mortgagee is hereby authorized to make, and the same, with interest thereon at the same rate as provided in said promissory note, shall be deemed to be secured by this mortgage, and payable to the mortgagee or assigns in and out of the proceeds of the sale under said foreclosure." Unless the mortgage be given to secure the payment of attorney's fees, such fees may not be included as a part of the mortgage lien upon foreclosure. If the mortgagor contracts for the allowance of such attorney's fees, but does not secure the payment of them in the mortgage, these fees are in the nature of a special damage, which may be pleaded and recovered against the mortgagor, but for them the mortgagee may have only a personal judgment. *Prescott v. Grady*, 91 Cal. 518, 27 Pac. 755. The mortgage here under consideration declares that in the foreclosure may be included a reasonable counsel fee, together with all payments made by the mortgagee for specified purposes, all of which payments shall be deemed to be secured by the mortgage. A mortgage security is given, therefore, for the payment of the promissory note and for the repayment of such designated sums as may have been expended by the mortgagee; but, while much care is shown to bring these expenditures strictly within the mortgage, it is nowhere declared that the mortgage lien shall extend to and protect the attorney's fees. In this respect the case is identical in principle with that of *Irvine v. Perry*, 119 Cal. 352, 51 Pac. 544, 949, and with the cases there cited. It follows, therefore, that while plaintiff is entitled, upon proper showing, to recover attorney's fees in his action, he is not entitled to have those fees included in the amount of the mortgage lien. He must rely alone upon a personal judgment. The averment in the complaint "that the sum of two hundred dollars is a reasonable sum to be allowed plaintiff as his attorney and counsel fees for the foreclosure of this mortgage" is a sufficient averment upon this point.

2. The only answer to the complaint made by defendant, the mortgagor and appellant, related to an agreement alleged as follows: "That since the commencement of said action the said plaintiff and the said defendant agreed, one with the other, that the said defendant should pay the total amount of interest claimed by the said plaintiff to be due upon the notes and mortgages, \* \* \* all costs and expenses incurred by said plaintiff in bringing said action, and the sum of one hundred dollars for plaintiff's attorney in compensation for his services in said action, as a full and complete satisfaction of the cause of action set forth in plaintiff's com-

plaint"; payment of \$100 on account of said settlement is averred; and that "by reason of said agreement the said plaintiff has waived his cause of action alleged in plaintiff's complaint." The answer is duly verified. It appears from the complaint that the promissory note secured by the mortgage was dated June 1, 1896, and was for the sum of \$2,750, payable two years after date, with 12 per cent. interest, payable quarterly. The complaint was filed June 25, 1897, to which time but \$50 interest had been paid. The mortgage gave the mortgagee the option of declaring the principal of the note to be due upon any default in payment of interest, and it is alleged that he gave defendant notice of having elected to regard the note as due. There is a finding that since the commencement of the action defendant (appellant) has paid plaintiff \$100, of which \$22.30 were on account of costs of this suit, and \$77.70 were on account of attorney's fees "on behalf of plaintiff in this suit." It is also found that the principal sum of the note, together with interest (except \$50 interest paid before suit was brought), is unpaid. The finding as to payments made after suit was commenced shows that the amount corresponds with the amount alleged to have been paid under the agreement pleaded, but there is nothing in the findings to show that this was the identical money so paid.

Appellant makes the point that the court erred in not finding upon the issues presented by the answer, to which the respondent replies that the answer presented no issues calling for findings. It is not necessary to pass upon the sufficiency of the answer to raise an issue of fact. In *Wise v. Burton*, 73 Cal. 175, 14 Pac. 684, it was said: "This court will not reverse for want of a finding on an issue with respect to which there is no evidence." Commenting upon this rule in *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. 1098, it was said: "In the case at bar, which is brought here upon the judgment roll alone, we will not presume that there was evidence upon a point in respect to which there is no finding. This view of the case makes it unnecessary to consider the question whether or not the alleged special issues were material." See *Giletti v. Saracco*, 110 Cal. 428, 42 Pac. 918. Appellant, to present his point, should have shown, by bill of exceptions or otherwise, that evidence was submitted upon the issues made by his answer. The case now before us, we think, plainly falls within the rule above stated. The findings support the judgment.

The judgment is therefore ordered modified in the respect above indicated; that is to say, a personal judgment shall be given to plaintiff for the amount found due to him for counsel and attorney's fees in this foreclosure suit, but such amount shall not be included in the amount of the mortgage lien for the payment of which the property was ordered sold. In all other respects the judgment is affirmed.



124 Cal. 294

SAMUELS et ux. v. CALIFORNIA ST. CABLE RY. CO. (S. F. 1,116).<sup>1</sup>(Supreme Court of California. April 14, 1899.)  
STREET RAILROADS—INJURIES TO PASSENGERS—EVIDENCE—PLEADING—DAMAGES.

1. Where a passenger was thrown from a street car while rounding a curve, and injured, his testimony that the car was going at an unusually rapid rate of speed is sufficient to sustain a verdict, where other passengers were thrown at the same time.

2. Under an allegation that the accident was caused by the high rate of speed, he may prove that the fall was occasioned by a sudden jerk, accompanied by the high rate of speed.

3. Evidence that uterine trouble was caused by an accident due to defendant's negligence is admissible under a general averment of bodily injury and resulting damage.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Stanley A. Samuels and wife against the California Street Cable Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Henly & Costello, for appellant. Reddy, Campbell & Metson, for respondents.

PER CURIAM. This is an action brought to recover damages for bodily injuries sustained by Raquel Samuels in being thrown from a car of defendant. The car was a cable car. Mrs. Samuels was riding upon the "dummy,"—an outside seat at the front end of the car. In rounding a curve, passing from O'Farrell street into Jones street, Mrs. Samuels fell or was hurled from the car, striking the ground, and sustaining the injuries for which damages are sought. The complaint alleges that the car was "run with great, unusual, and terrific force and speed" around the corner, and that in consequence of this unusual speed she was thrown from her seat.

1. Appellant contends that the evidence fails to establish that the accident occurred by reason of its negligent management of the car, and that it does show that respondent was injured through her own carelessness. Upon this the evidence is unsatisfactory. Nevertheless, it appears that Mrs. Samuels was accustomed to ride upon the cars of this company, and that upon this occasion not she alone, but another woman sitting by her side, was thrown from her seat, and a child also was hurled to the ground. This showing, taken with the testimony of Mrs. Samuels that the car was at the time run at an unusually rapid rate of speed, and that it went around the corner with a jerk, is sufficient in support of the verdict.

2. The complaint charging that the accident was caused by the negligent operation of the car at a high rate of speed, defendant asked an instruction that the jury should disregard any or all evidence to the effect that the fall was occasioned by a sudden jerk or lunge of the car. The court declined to give the offered instruction. There was in this no error. If, as Mrs. Samuels testified, the swift motion

of the car was accompanied by sudden jerks, such testimony was pertinent under her pleading, and was proper for the consideration of the jury. It would be impossible in the case of an accident of this kind to say whether it was occasioned alone by the rapid motion of the car in rounding the curve, or whether it was occasioned by that motion and the accompanying jerks. The swaying, jerking, or jumping of a slow-moving car might be of little danger to its passengers, while they might be elements of considerable danger if the car were moving at a high rate of speed. Within the averment of the complaint, testimony as to the jerky motion of the car was admissible, and, being admissible, the court was clearly right in refusing to exclude this evidence from the consideration of the jury.

3. The complaint averred that Mrs. Samuels, by reason of the accident, "was rendered unconscious for a long period of time, and received great bodily injury, and was made sick, sore, lame, and disabled for a long period of time, to wit, from thence hitherto, during all of which time she thereby suffered great pain, and was thereby then and there hindered and prevented from attending to her business and domestic affairs, and has ever since remained and continued sick, sore, lame, and disabled, and has suffered, and still continues to suffer, great pain of body and anguish of mind, and is informed and believes that said injuries are of a permanent nature." Under this averment, evidence was admitted of a uterine trouble brought upon Mrs. Samuels by the accident. Such evidence was admissible under the general averment of bodily injury and resulting damage. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266; *Montgomery v. Railroad Co.*, 103 Mich. 46, 61 N. W. 543; *Denver Ry. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286. The judgment and order appealed from are therefore affirmed.

<sup>1</sup> Rehearing denied May 13, 1899.

123 Cal. 512

**Ex parte AZHDERIAN.** (Cr. 526.) (Supreme Court of California. Feb. 20, 1899.) In chambers. Myron Azhderian applies for bail pending his appeal from a conviction of felony. Granted.

**GAROUTTE, J.** Myron Azhderian having applied for bail pending his appeal to this court, and it appearing from the uncontradicted affidavits of the city and county physician, and other medical gentlemen, that he is undergoing a severe illness, and will probably die within a short time if his imprisonment in the county jail continues, it is therefore ordered that he be admitted to bail in the sum of \$17,000 pending the final determination of his appeal to this court from a conviction of felony, to wit, extortion. Said bond to be approved by John Haynes, commissioner of this court.

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**CHETWOOD v. SUPERIOR COURT OF ALAMEDA COUNTY.** (S. F. 766.) (Supreme Court of California. April 14, 1899.) In bank. Petition for writ of review by John Chetwood, Jr., against the superior court of Alameda county. Petition denied. E. G. Knapp, for petitioner.

**PER CURIAM.** This is an application for a writ of review. The record presented discloses the hardship of petitioner's position, and the apparent good faith of his actions. Nevertheless, as the superior court did not exceed its jurisdiction in the matter, his petition may not be entertained. The application for a writ of review is therefore denied.

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**MOTT et al. v. CLARKE.** (S. F. 784.) (Supreme Court of California. March 7, 1899.) Commissioners' decision. Department 1. Ap-



peal from superior court, city and county of San Francisco. Action by C. W. Mott and others against Alfred Clarke. From an order of commitment for contempt, defendant appeals. Dismissed. Alfred Clarke, in pro. per. Warren Olney, for respondents.

PRINGLE, C. This is an attempted appeal made from an order of the superior court of the city and county of San Francisco made on December 11, 1895, in the following words: "Ordered, that insolvent be confined in the county jail until he complies with the order of court." This order is apparently a commitment for contempt, and it is so designated by the appellant in his certificate to the transcript. The case is substantially the same as S. F. 783 (56 Pac. 545). I advise that the appeal be dismissed for want of jurisdiction.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal is dismissed for want of jurisdiction.

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124 Cal. 42

PEOPLE v. DAVIS et al. (Cr. No. 446.) (Supreme Court of California. March 16, 1899.) Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county. A. E. Davis and others were convicted of forgery, and they appeal. Reversed. Byron L. Oliver, for appellants. Atty. Gen. Fitzgerald, for the People.

GRAY, C. The defendant appeals from a judgment convicting him of the crime of forgery. Compton, a co-defendant of Davis in the information in this case, was tried and convicted in the superior court in Los Angeles county, and from such conviction he appealed; and this court reversed the judgment, holding four of the instructions of the court to the jury to be erroneous. See *People v. Compton* (Cal.) 56 Pac. 44. These same instructions were repeated on the trial of the defendant Davis. On the authority of that case (*People v. Compton*, supra), and for the reasons therein stated, I advise that the judgment herein be reversed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

























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